IN THE HIGH COURT OF JUDICATURE AT BOMBAY.
BENCH AT AURANGABAD.

FIRST APPEAL NO.954 OF 2007

New India Assurance Company Limited,
Having it's Head and Registered Office
At New India Assurance Building,
87, M.G. Marg, Fort, Mumbai 400 001,
Branch Office at Beed, Division Office
at Aurangabad .. **Appellant**
(Orig. Respt No.2)

Versus

1. Baburao Satwaji Kendre
Age : 65 years, Occu : Agril,
R/o. Kauthali, Tal. Parli Vaijinath
Dist. Beed

2. Panchphulabai w/o Baburao Kendre
Age : 63 years, Occu : Household,
R/o. Kawthali, Tal. Parli Vaijinath,
Dist. Beed

3. Manchak Nagorao Garad
Age : Major, Occu : Business,
R/o. Kawthali, Tal. Parli Vaijinath,
Dist. Beed

.. **Respondents**
(Respt. No.1 & 2 – Orig. Claimant No.1 & 2
Respt No.3 – Orig. Respondent No.1)

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Advocate for Appellant : Shri Mohit R. Deshmukh
Advocate for Respondent Nos.1 & 2 : Shri G.V. Ghuge
Advocate for Respondent No.3 : Shri S.S. Dhage (Absent)

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CORAM : P.R. BORA, J.
Dated: February 21, 2019

ORAL JUDGMENT :-

1. The present appeal is filed by the Insurance Company against the Judgment and the Award passed in Motor Accident Claim Petition No.119 of 2005 decided on 17.01.2007 by the Motor Accident Claims Tribunal at Ambajogai. The present respondent nos.1 and 2 had filed the aforesaid claim petition claiming compensation on account of the death of one Ramdhan Baburao Kendre alleging the same to have been caused in a vehicular accident happened on 03.02.2005 having involvement of a tractor bearing registration no.MH-23-B-3645 owned by the present respondent no.3 and insured with the appellant – Insurance Company. The petition was resisted by the appellant – Insurance Company on various grounds. A specific defence was raised by the Insurance Company as about the breach of policy condition by the owner of the offending vehicle by allowing a person to drive the said vehicle, who was not holding a valid driving licence. Based on the defence so raised by the appellant – Insurance Company, a specific issue

was also framed by the Tribunal. The Tribunal, however, has recorded a negative finding on the said issue and has ultimately held that, the Insurance Company has failed to substantiate the defence raised by it and as such, held the Insurance Company jointly and severally liable to pay the amount of compensation to the legal heirs of the deceased along with the owner of the offending vehicle. Aggrieved by, the Insurance Company has preferred the present appeal.

2. Shri Mohit Deshmukh, learned Counsel appearing for the appellant – Insurance Company has assailed the impugned Judgment mainly on the ground that, the Tribunal has recorded an erroneous finding that, the Insurance Company has failed in substantiating its defence that, the driver of the offending tractor was not holding a valid driving licence. The learned Counsel submitted that, in the written-statement, the Insurance Company has raised a specific defence that, the driver of the offending tractor was not holding a valid driving licence and by allowing such person to drive the said vehicle, the insured has committed the breach of policy condition. The

learned Counsel submitted that, the owner had appeared in the claim petition and has also filed his written-statement. The learned Counsel pointed out that, the owner was quite aware of the plea so raised by the Insurance Company in its written statement. However, except a bare statement in para-6 of his written statement that the driver was holding licence, the owner of the offending vehicle did not provide the necessary particulars as about the driving licence of his driver nor placed on record the copy of the said driving licence. The learned Counsel submitted that, in such circumstances, in fact no liability could have been fastened upon the Insurance Company.

3. The learned Counsel further submitted that, AA form filed on record by the claimants though contains the name of the driver of the offending tractor, does not contain the further particulars as about the driving licence of the said driver. Referring to the provisions of the Motor Vehicles Act, more particularly Section 158 of the Motor Vehicles Act, the learned Counsel submitted that, had the particulars provided to the I.O., the same could have been certainly incorporated in form AA.

The fact that such particulars are not there in the said form, leads to an inference that, such particulars were not provided to the police. The learned Counsel further referred to the provisions under Section 134 (c) of the Motor Vehicles Act, which contemplates that, after the accident the owner of the vehicle has to provide the necessary particulars as about the alleged accident as well as the driving licence of the driver, fitness certificate of the vehicle etc. to the Insurance Company. In the circumstances, according to the learned Counsel, the Tribunal should not have held the appellant – Insurance Company jointly and severally liable to pay the amount of compensation to the claimants.

4. The learned Counsel placed his reliance on the Judgment of the Hon'ble Apex Court in the case of **Pappu and Others Vs. Vinod Kumar Lamba and Anr, AIR 2018 (SC) 592**. The learned Counsel submitted that, the Hon'ble Apex Court in the aforesaid judgment has held that, unless the initial burden is discharged by the owner of the offending vehicle by bringing on record the cogent and sufficient evidence that, the driver of the

offending vehicle was holding a valid driving licence, the burden will not shift upon the Insurance Company to prove its defence that, the said driver was not holding valid driving licence on the date of accident. The learned Counsel, therefore, prayed for setting aside the impugned Judgment and Award and to allow the appeal.

5. Shri Ghuge, learned Counsel appearing for respondent nos.1 and 2 i.e. orig. claimants supported the impugned Judgment and Award. The learned Counsel submitted that, the Insurance Company has failed in substantiating its defence by leading any positive evidence in that regard and in such circumstances, no fault can be found in the impugned Judgment and Award. The learned Counsel, in the alternative, submitted that even otherwise the Insurance Company has to be held liable to pay the amount of compensation to the claimants at the first instance and then to recover it from the owner of the offending vehicle. The learned Counsel, therefore, submitted for passing appropriate orders.

6. Respondent no.3 is duly served. Advocate Shri. Dhage has also caused appearance for the said respondent. However, today even on second call, no one caused appearance for respondent no.3. The record shows that, even on earlier occasions, no one has appeared for the said respondent.

7. I have considered the submissions advanced by Shri Deshmukh, learned Counsel appearing for the appellant – Insurance Company and Shri Ghuge, learned Counsel appearing for the original claimants. I have perused the impugned judgment and the evidence on record. Perusal of the written statement filed by the appellant – Insurance Company reveals that, a specific defence was raised by it as about not holding of valid driving licence by the driver of the offending tractor. In the written statement filed by the owner of the offending vehicle though there is an avernment that the driver of the offending tractor was holding licence, neither the said statement has been proved by the owner by stepping into witness box, nor the copy of the said driving licence has been placed on record. I also perused AA form, which is at Exh.26, in the record of the trial

Court. The said form does not contain the particulars of the driving licence of the driver though the name of the driver is mentioned in said form. Thus, the Insurance Company has *prima facie* brought on record that, the driver of the offending tractor was not holding the valid driving licence at the relevant time. The issue though was framed by the Tribunal, the finding recorded by the Tribunal on the said issue apparently appears unsustainable. The Tribunal has held that, the Insurance Company has not substantiated the said defence by adducing any evidence in that regard. The Hon'ble Apex Court in the case of **Pappu & Others Vs. Vinod Kumar Lamba and Anr** (cited supra) has clearly laid down that, the initial burden in this regard has to be discharged by the owner of the offending vehicle and unless the same is discharged by it, no burden shifts upon the Insurance Company to disprove the said fact. I deem it appropriate to reproduce herein below para-11 of the said judgment, which reads thus :

> "11. The question is: whether the fact that the offending vehicle bearing No.DIL-5955 was duly insured by respondent No.2 Insurance Company would per se make the Insurance Company liable? This Court in the case of National Insurance Co. Ltd. (supra), has noticed the defences available to the Insurance Company under Section 149(2)(a)(ii) of the Motor Vehicles Act, 1988.

The Insurance Company is entitled to take a defence that the offending vehicle was driven by an unauthorized person or the person driving the vehicle did not have a valid driving licence. The onus would shift on the Insurance Company only after the owner of the offending vehicle pleads and proves the basic facts within his knowledge that, the driver of the offending vehicle was authorized by him to drive the vehicle and was having a valid driving licence at the relevant time. In the present case, the respondent No.1 owner of the offending vehicle merely raised a vague plea in the Written Statement that the offending vehicle DIL-5955 was being driven by a person having valid driving licence. He did not disclose the name of the driver and his other details. Besides, the respondent No.1 did not enter the witness box or examine any witness in support of this plea. The respondent No.2 Insurance Company in the Written Statement has plainly refuted that plea and also asserted that the offending vehicle was not driven by an authorized person and having valid driving licence. The respondent No.1 owner of the offending vehicle did not produce any evidence except a driving licence of one Joginder Singh, without any specific stand taken in the pleadings or in the evidence that the same Joginder Singh was, in fact, authorized to drive the vehicle in question at the relevant time. Only then would onus shift, requiring the respondent No.2 Insurance Company to rebut such evidence and to produce other evidence to substantiate its defence. Merely producing a valid insurance certificate in respect of the offending Truck was not enough for the respondent No.1 to make the Insurance Company liable to discharge his liability arising from rash and negligent driving by the driver of his vehicle. The Insurance Company can be fastened with the liability on the basis of a valid insurance policy only after the basic facts are pleaded and established by the owner of the offending vehicle – that the vehicle was not only duly insured but also that it was driven by an authorized person having a valid driving licence. Without disclosing the name of the driver in the written Statement or producing any evidence to substantiate the fact that the copy of the driving licence produced in support was of a person who, in fact, was authorized to drive the offending vehicle at the relevant time, the owner of the vehicle cannot be said to have extricated himself from his liability. The Insurance Company would become liable only after such foundational facts are pleaded and proved by the owner of the offending vehicle."

. In view of the observations made by the Hon'ble Apex Court as above, the finding recorded by the Tribunal cannot be sustained and deserves to be set aside.

8. After having considered the entire material on record, it appears to me that, the burden was upon the owner of the offending vehicle in view of the specific defence raised by the appellant Insurance Company in its written statement to bring on record some positive evidence showing that, the driver was holding the valid driving licence. Since the said burden has not been discharged by the owner, the Insurance Company was not liable to adduce any further evidence to substantiate its defence.

9. It is further brought to my notice that, an attempt was made by the appellant - Insurance Company to summon the driver of the offending tractor by filing an application at Exh.38 and the summons was also directed to be issued by the Tribunal. Further, there is no record showing that, as to whether the said

summons was served upon the driver, however, the fact remains that, his evidence has not been recorded before the Tribunal. Considering the evidence on record, the Tribunal could not have held the Insurance Company jointly and severally liable to pay the amount of compensation to the claimants in the said petition. In the circumstances, the Tribunal must have passed further order directing the appellant – Insurance Company to satisfy the award at the first instance and to recover the said amount from the owner of the offending vehicle in the said proceeding. However, the Tribunal has not passed such an order. The appellant – Insurance Company has deposited 50% of the awarded amount in the Tribunal. For the reasons recorded above, the finding recorded by the Tribunal holding the appellant - Insurance Company jointly and severally liable cannot be sustained and deserves to be set aside. Hence, the following order.

ORDER

(i) The appellant - Insurance Company is directed to satisfy the award at the first instance and to recover the amount, which may be paid by it to the claimants along with the interest accrued thereon at the rate of 9% per annum from the owner of the offending vehicle i.e. respondent no.3.

(ii) The appellant – Insurance Company shall deposit the remaining amount of compensation along with the interest accrued thereon before the Tribunal, so that the same can be remitted in favour of the claimants in terms of the Award passed by the Tribunal.

(iii) The appeal stands allowed in the aforesaid terms.

(iv) Pending Civil Application, if any, stands disposed of.

(**P.R. BORA, J.**)

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