IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

FIRST APPEAL NO.175 OF 2012

M/s IFFCO-TOKIO General Insurance Co. Ltd.,
having its office at 4th & 5th Floor,
IFFCO Tower, Plot No.3, Sector 29,
Gurgaon (Haryana) – 122 001, having its
Branch Office at Kalda Corner,
New Shreynagar, Aurangabad,
through its Constituted Attorney **APPELLANT (Orig. Respondent No.2)**

VERSUS

1. Smt. Minakshi w/o Sanjay Mandumle,
   Age : 20 years, Occu. Household,
   R/o Dhamangaon, Tq. Jalkot,
   District Latur

2. Ku. Annapurna d/o Sanjay Mandumle,
   Age : 2 years, Minor u/g of her
   real mother Minakshi w/o Sanjay
   Mandumle **RESPONDENTS (Ori. Claimant Nos.1 and 2)**

3. Somnath s/o Baburao Kheme,
   Age : Major, Occu. Business **RESPONDENT (Orig. Respondent No.1)**

WITH

CIVIL APPLICATION NO.3697 OF 2016
IN
FIRST APPEAL NO.175 OF 2012
(Minakshi Sanjay Mandumle and another Vs. M/s IFFCO TOKIO General Insurance Co.Ltd., through its Constituted Attorney and another)

Mr. V.N. Upadhye, Advocate for the appellant and for respondent No.1 in Civil Application
Mr. Santosh S. Jadhavar, Advocate for respondent Nos.1 and 2 in First Appeal and for the applicants in Civil Application

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CORAM : SUNIL K. KOTWAL, J.

JUDGMENT RESERVED ON : 6th JUNE, 2019
JUDGMENT PRONOUNCED ON : 20th JUNE, 2019

JUDGMENT :

M/s IFFCO-TOKIO General Insurance Company Ltd has challenged the vires of the judgment and order dated 4th January, 2011, passed by the Motor Accident Claims Tribunal ("Tribunal", for short), Udgir in Motor Accident Claims Petition ("MACP", for short) No.116 of 2009, whereby compensation of Rs.4,00,000/- was awarded to the claimants and direction was given to opponent No.2 – insurer to pay the compensation amount to the claimants with liberty to recover the same from owner of Tempo bearing registration No. MH-24-F-6114 (hereinafter referred to as "offending vehicle"). Respondent Nos.1 and 2 in the appeal are original claimants and respondent No.3 is original opponent No.1, who is the owner of the offending vehicle (hereinafter referred to as "insured").

2. In this appeal, the appellant - insurer of the offending vehicle has challenged only "pay and recover order" passed against the insurer of the offending

vehicle, though breach of condition of policy of the insurance by insured is proved by insurer of the offending vehicle. Therefore, the only point arises for consideration is “whether `pay and recover order' passed by the Tribunal against the insurer of the offending vehicle is justified under law?”

3. In view of this limited controversy to be decided in this appeal, the relevant facts leading to institution of this appeal are that on 7th August, 2009, the deceased Sanjay Hariba Mandumle died in motor vehicle accident due to rash and negligent driving by the driver of the offending vehicle, which gave dash to the Ape rickshaw by which the deceased was travelling.

4. By filing written statement, opponent Nos.1 and 2 have denied the occurrence of the accident due to rash and negligent driving by the driver of the offending vehicle. The insurer of the offending vehicle had taken additional defence that at the time of accident the driver of the offending vehicle did not hold valid and effective driving licence and therefore, the insured of the offending vehicle committed breach of condition of policy of the insurance, resulting into total exoneration of insurer of the offending vehicle from its

liability to indemnify the insured or from its liability to pay compensation to the claimants.

5. The Tribunal, after considering the evidence placed on record by both the parties, held that the accident occurred due to rash and negligent driving by the driver of the offending vehicle and at the time of accident, the driver of the offending vehicle did not hold valid and effective driving licence and thereby the insured – the owner of the offending vehicle committed breach of condition of policy of the insurance. However, the Tribunal issued direction against the insurer of the offending vehicle to first pay the compensation amount of Rs.4,00,000/- to the claimants with liberty to recover the said amount from owner of the offending vehicle.

6. Heard Shri V.N. Upadhye, learned counsel for the appellant/insurer of the offending vehicle and Shri S.S. Jadhavar, learned counsel for respondent Nos.1 and 2 – claimants. None appeared for respondent No. 3 - the owner of the offending vehicle, though served.

7. Learned counsel for the appellant/insurer of the offending vehicle submits that as the owner of the

offending vehicle committed breach of condition of policy of the insurance, the insurer of the offending vehicle is liable to be exonerated from all liabilities and therefore, the "pay and recover order" passed by the Tribunal against the insurer is bad in law. In the alternative, he submits that in case the "pay and recover order" is upheld by this Court, then stringent directions may be given to the Tribunal not to pay the compensation amount to the claimants unless sufficient security is obtained from the owner of the offending vehicle. He placed reliance on ***"Ram Babu Tiwari Vs. United Indian Insurance Co.Ltd. and others" (2008 STPL 16423 SC), "Oriental Insurance Co.Ltd. Vs. Shri Nanjappan and others" (2004 STPL 3476 SC)*** and the judgment delivered by this Court on 11th September, 2014 in ***First Appeal No.594 of 1997 (M/s New India Assurance Co.Ltd. Vs. Mr. Budha Shrawan Zodge and others)*** and other connected First Appeals.

8. Learned counsel for respondent Nos.1 and 2 – claimants supported the judgment and award passed by the Tribunal regarding direction issued against the insurer of the offending vehicle on the ground that it is the statutory responsibility of the insurer of the vehicle

to satisfy the award passed in favour of the claimants in Motor Accident Claims cases. He pressed for modification of the award passed by the Tribunal on the ground that though the Tribunal came to the conclusion that the claimants are entitled to total compensation of Rs.6,19,000/-, the Tribunal passed award for the compensation of Rs.4,00,000/- on the ground that the claim was restricted by the claimants to the extent of Rs.4,00,000/- only. Learned counsel for the claimants placed reliance on ***"Pappu and others Vs. Vinod Kumar Lamba and another" [2018 DGLS (SC) 16]*** and ***"S. Iyyapan Vs. United India Insurance Company Ltd. and another" [Mh.L.J 2013(6) Page 1].***

9. The prayer of the claimants for modification of the award was vehemently opposed by the learned counsel for the insurer on the ground that in absence of Cross-Objection, such modification to enhance the compensation amount awarded by the Tribunal, cannot be justified.

10. At the outset, I must make it clear that though the Tribunal held that the accident occurred due to rash and negligent driving by the driver of the offending vehicle and the owner of the offending vehicle committed breach of condition of policy of the insurance as driver

did not hold valid and effective driving licence on the date of accident, those findings of the Tribunal are not at all challenged by the owner of the offending vehicle by filing Cross-Objection. Even at the stage of arguments, the insurer of the offending vehicle has not disputed the occurrence of the accident due to rash and negligent driving by the driver of the offending vehicle. Therefore, these points cannot be re-considered in this appeal.

11. I have to only decide "whether, in the wake of breach of condition of policy of the insurance by the owner of the offending vehicle proved by the insurer, direction can be issued against the insurer of the offending vehicle to pay the compensation to the claimants and lateron recover it from the owner?"

12. In fact, this controversy is set at rest by three Judges Bench of Apex Court in ***"National Insurance Co.Ltd. Vs. Swarn Singh and others" [JT 2004 (1) SC 109]***, by holding that the Tribunal and the Court must, however, exercise their jurisdiction to issue such a direction upon consideration of the facts and circumstances of each case and in the event such a direction has been issued, despite arriving at a finding

of fact to the effect that the insurer has been able to establish that the insured has committed a breach of contract of insurance as envisaged under sub-clause (ii) of clause (a) of sub-section (2) of Section 149 of the Act, the insurance company shall be entitled to realize the awarded amount from the owner or driver of the vehicle, as the case may be, in execution of the same award. This law was also followed by the three Judges Bench of the Apex Court in recent case of ***"Pappu and others Vs. Vinod Kumar Lamba and another"*** (supra), though in that case driver of the offending vehicle did not hold valid and effective driving licence at the time of the accident. Therefore, the direction issued by the Tribunal against the insurer of the offending vehicle to first pay the compensation amount to the claimants and lateron recover it from the owner of the offending vehicle, is absolutely legal and justified.

13. Before parting with the discussion on this point, I must make it clear that the ratio in the case of ***"Ram Babu Tiwari Vs. United Indian Insurance Co.Ltd. and others"*** (supra) is not applicable in the case at hand as in that case, correctness of the "pay and recover order" was not considered. In that case, the

Apex Court only held that if the driver of the offending vehicle did not hold valid and effective driving licence at the time of accident, the insurer of the offending vehicle need not indemnify the owner. Even in the case of *“**Oriental Insurance Co.Ltd. Vs. Shri Nanjappan and others**”* (supra), the Apex Court has considered as to what directions can be issued while passing “pay and recover order”. In “ ***M/s New India Assurance Co.Ltd. Vs. Mr. Budha Shrawan Zodge and others*”** (supra), this Court was not considering the correctness of “pay and recover order”, but was considering liability of the insurer of the offending vehicle when the deceased was travelling by goods vehicle.

14. Accordingly, I hold that the “pay and recover order” passed by the learned Tribunal is fully justified. I answer the above point in affirmative.

15. In view of above finding, this First Appeal filed by the insurer of the offending vehicle deserves to be dismissed. However, the “pay and recover order” needs to be modified to safeguard even the interest of the insurer of the offending vehicle.

16. While modifying the award passed by the

Tribunal, this Court by invoking the powers under Order-XLI Rule 33 of the Code of Civil Procedure, can also modify the amount of compensation from Rs.4,00,000/- to Rs.6,19,000/-, because in paragraph No.14 of the impugned judgment, the Tribunal had come to the conclusion that the claimants are entitled to total compensation amount of Rs.6,19,000/- under the heads of loss of dependency, funeral expenses and loss of consortium. The absence of Cross-Objection or Cross-Appeal cannot be treated as legal impediment for making such modification for the simple reason that by modifying the award, this Court is only making arithmetical correction in the quantum of compensation, for the simple reason that only because claimants restricted their claim to the extent of Rs.4,00,000/-, in this appeal the Court is not prevented to give effect to the finding of the Tribunal regarding entitlement of the claimants about the compensation amount. Therefore, while modifying the award passed by the Tribunal, the quantum of compensation is also modified to the extent of Rs.6,19,000/-.

17. Accordingly, First Appeal No.175 of 2012 is dismissed. However, the award passed by the Motor

Accident Claims Tribunal, Udgir in Motor Accident Claims Petition No.116 of 2009 is modified as under:-

“(i) Petition is partly allowed with proportionate costs.

(ii) Opponent No.1 do pay compensation of Rs.6,19,000/- to the claimants (inclusive of “No Fault Liability”) with interest thereon at the rate of 9% per annum, from the date of petition till realisation of compensation amount.

(iii) The amount of compensation shall be equally apportioned in between claimant Nos.1 and 2 and the share of claimant No.2 shall be invested, through claimant No.1, in fixed deposit in any Nationalized Bank till claimant No.2 attains majority, with liberty to claimant No.1 to withdraw the quarterly accrued interest on fixed deposit amount for the benefit of minor claimant No.2.

(iv) The compensation amount of the share of claimant No.1 shall be paid to her through the Tribunal by account payee cheque.

(v) Deficit court fees, if any, be recovered from the claimants.

(vi) Opponent No.2 – M/s IFFCO-TOKIO General Insurance Company Ltd. is exonerated from its liability to indemnify opponent No.1. However, opponent No.2 – insurer shall pay the entire compensation amount of Rs.6,19,000/- with accrued interest thereon to the claimants within three months from the date of passing of this order. Lateron, the insurer of the vehicle will be at liberty to recover the entire compensation amount paid to the claimants from the insured (owner of the offending vehicle) by initiating appropriate proceedings before the executing Court, as if the dispute between the insurer and the owner was subject matter of determination before the Tribunal and the issue is decided against the owner and in favour of the insurer. Before disbursement of compensation amount, the Tribunal shall issue notice to the owner of the offending vehicle and the owner shall be required to furnish security for the entire amount which the insurer will pay to the claimants. The offending Tempo shall be attached, as part of the security and if necessity arises, the executing Court shall take assistance of the concerned Regional Transport Authority. The executing Court shall pass appropriate orders in accordance with law as to the manner in which the insured – owner of the vehicle shall make payment to the insurer. In case there is any default, it shall be open to the executing Court to direct realization by disposal of securities to be furnished or from any other property or properties of the owner of the vehicle – the insured.

(vii) The award be modified accordingly."

18. The amount of compensation deposited in this Court be transmitted to the concerned Tribunal. Permission is granted to the claimants to withdraw compensation amount in accordance with modified award subject to fulfillment of all the conditions and directions issued by this Court in the modified award.

19. The appeal is disposed of in the abovesaid terms.

20. The parties to bear their respective costs of the appeal.

21. Civil Application No.3697 of 2016 stands disposed of.

[SUNIL K. KOTWAL]
JUDGE

npj/fa175-2012