IN THE HIGH COURT OF JUDICATURE AT BOMBAY,

BENCH AT AURANGABAD

FIRST APPEAL NO. 2067 OF 2018

WITH

CROSS OBJECTION (ST) NO. 9129 OF 2019

1. Varsha wd/o Gopinath Shevtekar,
Age; 49 years, Occ; Household,
Resident of Opposite of Roxy Talkies,
Kanphate Hanuman Mandir,
Taluka and District; Aurangabad.

2. Vrushali d/o Gopinath Shevtekar,
Age; 29 years, Occ; Education,
Resident of As above.

3. Gaurav Gopinath Shevtekar,
Age; 26 years, Occ; Education,
Resident of As above. ...**APPELLANTS**
(Original Claimants)

VERSUS

1. Digambar Dattu Jadhav,
Age; Major, Occ; Driver,
Resident of P. No. 10, Gut No. 4/1,
Ahillyadevi Nagar, Near Walmi Gate,
Paithan Road, Kanchanwadi,
Taluka and District; Aurangabad.

2. Dattu Shenphad Jadhav,
Age; Major, Occ; Business,
Resident of P. No. 10, Gut No. 4/1,
Ahillyadevi Nagar, Near Walmi Gate,
Paithan Road, Kanchanwadi,
Taluka and District; Aurangabad.

3. TATA – AIG, Insurance Company Ltd.,
Through; its Branch Manager,

Jalna Road, Near Doodh Diary Chowk,
Aurangabad. ...**RESPONDENTS**
(Orig. Respondents)

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Shri. K.B. Jadhav, Advocate for Appellants
Shri. S.G. Chapalgaonkar, Advocate for Respondents

…...

CORAM : SUNIL K. KOTWAL, J.

Date of Reserving Judgment : 14/03/2019

Date of Pronouncing Judgment : 22/03/2019

JUDGMENT :

Original Claimants have filed this Appeal against the judgment and award passed by the Motor Accident Claims Tribunal, Aurangabad (hereinafter referred to as the 'Tribunal') in Motor Accident Claim Petition No. 352 of 2013, (hereinafter referred to as the 'MACP') whereas, the compensation of Rs. 7,42,811/- was awarded. The Tribunal has exonerated respondent No. 3, the insurer of the offending vehicle. Even the insurer has filed Cross Objection against the judgment and award, challenging the quantum of compensation awarded by the Tribunal. (hereinafter the parties are referred in accordance with their status in the original proceeding as Claimant, Driver, Owner and the Insurer.

2. Facts leading to the institution of this appeal are that on 09.11.2012, when the deceased Gopinath was riding his Honda Activa bearing No. MH-20-BV-1671 by the road, at Savarkar Square, Aurangabad, the offending vehicle No. MH-20-CE-0127, came from opposite direction in rash and negligent manner and gave dash to the Honda Activa of the deceased. Though, deceased was admitted in Apex Hospital, Aurangabad, he succumbed to the injuries on 29.11.2012. After the death of the deceased, on the next day, the First Information Report (For short 'FIR') was lodged to the Police Station, Aurangabad, by Police Head Constable, Mr. V.S. Shinde. Respondent Nos. 1 and 2 are the driver and the owner of the offending motorcycle and respondent No. 3 is the insurer of that motorcycle.

3. Respondent Nos. 1 and 2 did not file Written Statement. However, respondent No. 3 the Insurer opposed this petition, denying the

involvement of the offending motorcycle in the said accident. The Insurer also raised defence that the driver of the motorcycle did not hold valid and effective driving license at the time of the accident.

4. Heard Shri. K.B. Jadhav, learned counsel for appellants and Shri. S.G. Chapalgaonkar, learned counsel for respondents for insurer of the offending vehicle.

5. The learned counsel for claimants submits that the Tribunal has erroneously exonerated the insurer of the offending vehicle, on the ground that the driver did not hold valid and effective driving license at the time of accident. He submits that if the driver did not hold valid and effective driving license, at the time of accident, then there is a breach of contract of insurance in between the owner of the offending vehicle and the insurer. The deceased, who was third party to the said contract, should not suffer and therefore, direction needs to be given to the insurer to pay the compensation to the

claimants and recover the same from the owner of the offending vehicle. In support of his contention, he placed reliance on recent judgment of the Supreme Court delivered on 5.9.2018 in **"Shivaraj v. Rajendra and Anr." [Civil Appeal No. 8278 – 8279 of 2018]** and **"S. Iyyapan v. M/s. United India Insurance Company Ltd. and Anothers" [2013 (3) T.A.C. 392 (S.C.]**

6. In reply, learned counsel for respondents/insurer submits that the driver of the offending vehicle obtained the driving license ten months after the date of occurrence of the accident, and therefore, obviously on the date of accident the driver of the offending vehicle did not hold effective and valid driving license.

7. Next contention of the learned counsel for the insurer is that the FIR was lodged after an inordinate delay of twenty one days and therefore, involvement of the offending vehicle in the said accident is not duly proved by the claimants. He submits that under the non-pecuniary

heads, excess compensation has been awarded by the Tribunal, than the permissible, in view of the judgment of the Larger Bench of the Apex Court in "**National Insurance Company Ltd. vs Pranay Sethi and others" [2018 (3) Mh.L.J. 70].** He has also pointed out that no additional compensation can be awarded under the head of loss of future prospects, as the deceased was '61' years old on the date of accident.

8. So far as the involvement of the offending vehicle is concerned, merely on the ground of delay in lodging the FIR, the claim petition cannot be dismissed. It cannot be ignored that wherein the above said accident the deceased sustained serious injuries and when he was admitted in the hospital for treatment, certainly all the family members of the deceased would be anxious only regarding the proper treatment to the deceased and his recovery. Therefore, the total inaction on the part of the relatives of the deceased till the death of the deceased, is just and natural.

9. So, it cannot be ignored that the FIR of the occurrence of the accident was lodged on 30.11.2012, when the accident occurred on 9.11.2012. Thus, obviously, there is delay in lodging the FIR. However, on that count as observed above, the case of the claimants cannot be doubted. On the other hand, it was the duty of the concerned Investigating Officer to immediately lodge the FIR to the Police Station, when the relatives of the deceased were not in a position to lodge it. Thus, if there is any delay on the part of the police machinery, on that count, the dependents of the deceased should not suffer.

10. After going through the FIR (Exh. 23), it emerges that all particulars of the occurrence of the accident including the registration number of the offending motorcycle, the name of the driver of the offending motorcycle is mentioned in the FIR. Even, in the spot panchanama (Exh. 24), the registration numbers of both the vehicles are mentioned. Thus, on the basis of the contents of the FIR, which are corroborated by the spot panchanama, claimants have proved that on

9.11.2012 an accident occurred due to rash and negligent driving of the offending motorcycle by respondent No. 1. Thus, the preliminary objection raised by the learned counsel for the insurer regarding the non involvement of the offending vehicle in the accident, is rejected.

11. No doubt, at the stage of argument, the learned counsel for the claimants does not the enhancement of the compensation awarded by the Tribunal. The compensation is disputed only by the insurer. From the evidence of claimant Varsha (PW-1), it emerges that the deceased was retired from Government Milk Dairy in 2010. The inquest panchanama shows that at the time of death, the deceased was 61 years old. Thus, the notional income of the deceased was rightly considered by the Tribunal as Rs. 5,000/- p.m. In view of the guidelines issued by the Apex Court in **"Smt. Sarla Varma and Ors. Versus Delhi Transport Corporation and Anr" [AIR 2009 Supreme Court 3104]**, as the age of the deceased was 61 years, the multiplier of '7' is applicable in the case at

hand. The annual income of the deceased comes to Rs. 60,000/-. As there are three dependents to the deceased, then, 1/3rd amount, towards his personal expenses has to be deducted, which comes to Rs. 21,000/-. Thus, the annual loss of income due to death of the deceased comes to Rs. 40,000/-. After applying the multiplier '7', the loss of dependency comes to Rs. 2,80,000/-.

12. As the deceased was above 60 years old, no additional compensation can be awarded under the head of loss of future prospects, in view of "**National Insurance Company Ltd. vs Pranay Sethi and others**" [supra].

13. By examining two witnesses from the concerned hospital i.e. (PW 2 and 3), the claimants have also proved the medical expenses of Rs. 2,37,811/-.

14. However, after going through the judgment of the Tribunal, it emerges that the Tribunal awarded Rs. 2,25,000/- to the claimants under Non-

pecuniary heads, such as loss of consortium, loss of estate and the funeral expenses. In view of the law settled by the Apex Court in "**National Insurance Company Ltd. vs Pranay Sethi and others**" [supra], under non-pecuniary heads the claimants are entitled to the following compensation :

a)	Loss of consortium	=	Rs. 40,000/-
b)	Loss of estate	=	Rs. 15,000/-
c)	Funeral expenses	=	Rs. 15,000/-
	Total =		Rs. 70,000/-

15. Thus, the claimants are entitled to total following compensation under different heads :

a)	Loss of dependency	=	Rs.2,80,000/-
b)	Medical Expenses	=	Rs. 2,37,811/-
b)	Loss of consortium	=	Rs. 40,000/-
c)	Loss of estate	=	Rs. 15,000/-
d)	Funeral expenses	=	Rs. 15,000/-
	Total =		Rs. 5,87,811/-

(Rs. Five Lac Eighty Seven Thousand Eight Hundred and Eleven Only).

16. As accident occurred due to rash and negligent driving of respondent No. 1, respondent Nos. 1 and 2 are certainly jointly and severally liable to pay above compensation to the claimants. Therefore, now

question arises, as to whether the insurance company can be directed to pay this compensation to the claimants and later on recover it from the owner of the offending vehicle. In the case at hand, learned counsel for the claimants fairly conceded that on the date of accident the respondent No. 1/driver of the offending vehicle did not hold valid and effective driving license, but he obtained driving license subsequently. Therefore, obviously, **respondent No. 2 the owner** of the offending vehicle has committed the breach of conditions of policy of the insurance, which requires that the motorcycle can be driven only by the person holding valid and effective driving license. Therefore, respondent No. 3 Insurance Company deserves to be exonerated from its liability to indemnify owner of the offending vehicle.

17. However, in **"S. Iyyapan v. M/s. United India Insurance Company Ltd. and Another"** [supra] and **"Shivaraj v. Rajendra and Anr."** [supra] the Apex Court after considering various judgments

summed up the legal position that the Insurer and the Insured are bound by the conditions enumerated in the policy and the Insurer is not liable to the Insured if, there is violation of any policy condition. The Insurer, who is made statutorily liable to pay compensation to third party on account of certificate of insurance issued, shall be entitled to recover from the Insured, the amount paid to the third party, if, there was any breach of policy condition, on account of the vehicle being driven without valid driving license. Therefore, directions need to be issued to the respondent No. 3, Insurance Company of the offending vehicle, to pay the above said compensation amount to the claimants and thereafter, recover it from respondent No. 2, who is the owner of the offending vehicle, after filing appropriate proceeding before the Tribunal.

18. In the result, I hold that First Appeal No. 2067 of 2018 and the Cross Objection (ST) No. 9129 of 2019 deserves to be partly allowed.

19. Award passed by the Motor Accident Claims

Tribunal, Aurangabad in MACP No. 352 of 2013, is modified as under :

"a) Petition is partly allowed.

b) Respondent Nos. 1 and 2 do jointly and severally pay compensation of Rs. 5,87,811/- (Rs. Five Lac Eighty Seven Thousand Eight Hundred and Eleven Only) to the claimants with interest thereon @ 9% per annum from the date of filing of this petition till realization of the entire amount.

c) This compensation amount includes the compensation awarded under the 'No Fault Liability'.

d) Respondent No. 3, Insurance Company is exonerated from its liability to indemnify respondent No. 2. However, respondent No. 3 is directed to deposit the above said compensation before the Executing Court and thereafter recover it from respondent No. 2, the owner of the offending vehicle by filing appropriate proceeding before the Tribunal.

e) On deposit of the entire

compensation before the Tribunal, the same shall be equally apportioned amongst claimant Nos. 1 to 3.

f) Each claimant shall invest Rs. 1,00,000/- each in fix deposit, in any Nationalized Bank for the period of three years and remaining amount be paid to them by issuing Account Payee Cheques in their respective names.

g) Premature withdrawal is not permissible.

h) Award be drawn up accordingly."

20. The Tribunal is directed to obtain security from respondent No. 2 for the payment of awarded compensation, after the appearance of the owner of the offending vehicle before the Tribunal.

21. The Tribunal shall attach the offending motorcycle bearing No. MH-20-CE-0127, as security for payable compensation amount. If necessary, the Tribunal shall take the help of the concerned Regional Transport Officer.

22. Parties shall bear their respective costs of the appeal and the Cross Objection.

23. Appeal and the Cross Objection are disposed of in the above terms.

24. Civil Application No. 3861 of 2019 in X-OBJST No. 9129 of 2019, is disposed of.

25. If compensation amount is deposited in the Court, the claimants are at liberty to withdraw it, in accordance with modified award. Surplus compensation amount be refunded to insurance company. The compensation amount be remitted to Motor Accident Claims Tribunal, Aurangabad, for disbursement.

(SUNIL K. KOTWAL)
JUDGE

mahajansb/