IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

FIRST APPEAL NO.1165 OF 2012
WITH
CIVIL APPLICATION NO.13295 OF 2018
IN
FIRST APPEAL NO.1165 OF 2012
WITH
CIVIL APPLICATION NO.3225 OF 2019
IN
FIRST APPEAL NO.1165 OF 2012

The New India Assurance Co.Ltd.,
through its Divisional Manager,
D.O. No. I, Adalat Road,
Aurangabad,
Shri Sanjiv Ramrao Gaisamudre,
Age 50 years, Occu: Service,
R/o Aurangabad ... **APPELLANT** (Orig. Rspdnt No.3)

VERSUS

1. Smt. Sunita w/o Gorakh Wakale,
Age 35 years, Occu: Household,
R/o Bhadji, Tq. Khultabad,
District Aurangabad.

2. Radha d/o Gorakh Wakale,
Age 14 years, Occu : Education,
R/o Bhadji, Tq. Khultabad,
District Aurangabad.

3. Meena d/o Gorakh Wakale,
Age 11 years, Occu : Education
R/o Bhadji, Tq. Khultabad,
District Aurangabad.

4. Yogita d/o Gorakh Wakale,
Age 8 years, Occu : Education
R/o Bhadji, Tq. Khultabad,
District Aurangabad.

5. Vishnu s/o Gorakh Wakale,
Age 7 years, Occu : Education
R/o Bhadji, Tq. Khultabad,
District Aurangabad
No. 2 to 5 are minors and under
Guardianship of their mother
Respondent No. 1.

6. Karbhari s/o Shripati Wakale
Age 75 years, Occu: Agriculture,
R/o Bhadji, Tq. Khultabad,
District Aurangabad.

7. Laxmibai w/o Karbhari Wakale
Age 70 years, Occu : Household,
R/o Bhadji, Tq. Khultabad,
District Aurangabad. ... **Respondents** Org.Claimants

8. Jayant s/o Ramchandra Wakale,
Age 50 years, Occu: Driver,
R/o Bhadji, Tq. Khultabad,
District Aurangabad. ... **Respondent** (Orig. R-1)

9. Smt. Bhagirathabai w/o Jagannath Holkar,
Age 55 years, Occu: Household,
District Aurangabad.

9-A Manohar s/o Jagannath Holkar,
Age 36 Years, Occu: Business,
R/o Mamnapur, Tq. Khultabad,
District Aurangabad

9-B Dilip s/o Jagannath Holkar,
Age 35 years, Occu: Business,
R/o Mamnapur, Tq. Khultabad,
District Aurangabad ... **Respondent** Org.R-2 to 2-B

...

Mr. M.M. Ambhore, for the Appellant.

Mr. D.V. Naik, for respondent Nos.1 to 7.

Mr. V.S. Borkar, for Respondent No.8.

Mr. M.N. Deshmukh for Respondent No.R/9 to 9B.

...

CORAM : SUNIL K. KOTWAL, J.

Reserved on : 20th March, 2019

Pronounced on : 01st April, 2019

JUDGMENT:

1. This appeal is filed by New India Assurance Company Limited which was original respondent No. 3 in

the Motor Accident Claim Petition No.335/2007, against the judgment and award dated 17.07.2010 passed by the Motor Accident Claim Tribunal, Aurangabad. Respondent Nos. 1 to 7 are original claimants. Respondent No. 8 is original Respondent No. 1 i.e. driver of the offending tractor. Respondent No. 9A and 9-B are the legal heirs of original respondent No. 2 i.e. owner of the offending tractor. Hereinafter, the parties are referred in accordance with their status in the original proceeding before the Tribunal, as claimant, driver, owner of the offending vehicle and insurance company of the offending vehicle.

2. The facts leading to institution of this appeal are that on 23.01.2007 at about 9 a.m. on Mamnapur to Sonkheda road, when deceased Gorakh was riding his bicycle by road that time the offending tractor bearing No.MH-20-AB-3226 came from opposite direction and due to rash and negligent driving by driver of the tractor, it gave dash to the bicycle, resulting into the death of deceased Gorakh. Therefore, the claimants filed claim petition against the driver, owner of the offending tractor and insurance company of the offending tractor.

3. By filing written statement, driver denied

that he was driving the tractor and he was even knowing the driving.

4. Only respondent No. 3 filed written statement (Exh.22) and denied each and every contention of the petitioner. In the alternate contention of insurance company is that driver of the tractor did not hold valid and effective driving license and the tractor was used for the purpose other than agriculture operation. Even the owner of the tractor was sitting on the tractor at the time of accident. As there was breach of condition of policy of the insurance, the insurance company is not liable to indemnify the owner of the tractor. Insurance company has also taken defence that the accident occurred due to rash and negligent act of the deceased. The owner did not contest the claim by filing written statement.

5. After considering the oral and documentary evidence placed on record by claimant, the Tribunal awarded compensation of Rs.4,01,000/- with interest @ 9% per annum on the compensation amount. That award is challenged in the present appeal by only insurance company.

6. Heard learned advocates Mr. M.M. Ambhore for Insurance Company, Mr. Naik for claimants, Mr. Borkar

for driver of the tractor and Mr. Deshmukh for the owner of the tractor.

7. Learned counsel for the appellant submits that in the written statement the driver of the tractor has denied even the driving on the tractor at the time of accident. He has also admitted that he did not know driving of the tractor. He has also drawn my attention towards cross-examination of claimant Sunita PW-1, wherein she has admitted that driver did not hold driving license. According to Mr. Ambhore, as driver of the tractor did not hold driving license, there was breach of condition of the policy of the insurance and therefore, the Insurance Company deserves to be exonerated from the liability to pay any compensation. He placed reliance on **Jawahar Singh V. Bala Jain and Ors.**, reported in (**AIR 2011 Supreme Court 2436**), wherein, Apex Court held that when driver of the offending vehicle did not hold driving license and when the offending vehicle was being driven by minor person, the liability to pay compensation shifts on owner of the offending vehicle.

8. Learned counsel for claimants submits that vague admission given by illiterate woman PW-1, does not carry any importance. He submits that the FIR

shows that no offence was registered against the driver for driving the tractor without driving license. He has pointed out that on behalf of insurance company, no witness is examined to prove that driver of the offending tractor did not hold driving license.

9. Learned counsel for respondent No. 8 driver submits that as the driver is acquitted in criminal case registered against him, the claimant cannot prove that the accident occurred due to rash and negligent driving by driver of the offending vehicle.

10. Learned counsel for legal representatives of the owner of the offending tractor submits that the rash and negligent driving by driver is not proved. Therefore, no vicarious liability lies on owner of the offending tractor.

11. At this stage of argument of this appeal, it reveals that the Insurance Company has probably waived the defence of contributory negligence of the deceased. Otherwise also no witness is examined by the appellant insurance company to prove that the accident occurred due to rash and negligent act of the deceased.

12. On the other hand, after going through the oral evidence of Sunita Wakle PW-1, it emerges that she consistently deposed before the Court that the accident

occurred due to rash and negligent driving by driver of the offending vehicle. She has categorically named the original respondent No.1 Jayant Ramchndra Wakle as driver of the offending vehicle. No doubt from the cross-examination, it emerges that she was not eye witness of the accident and she had no personal knowledge about the occurrence of the accident. However, it cannot be ignored that the certified copy of the FIR (Exh.38) which is also corroborated by Panchanama By (Exh.39) clearly indicates that the accident occurred only due to rash and negligent driving by the driver of the tractor. Even the name of the driver as Jayant Wakle is specifically mentioned in the FIR. It is to be noted that in addition to police papers, the claimants have also examined Sudam Wakle (PW2) as eye witness of the accident. This witness has duly prove that the accident occurred only due to rash and negligent driving by driver of the offending vehicle. Even in the cross-examination of this witness, the occurrence of the accident due to rash and negligent driving by driver of the tractor, is not challenged by learned counsel for insurance company. Therefore, conclusion of the Tribunal cannot be faulted that the accident occurred only due to rash and negligent driving by the driver of the offending tractor. In the circumstances, the written statement filed by driver denying any involvement in the accident does not carry any importance.

13. Otherwise also driver of the offending vehicle who is respondent No.1 in original proceeding, did not enter in witness box to prove his contention that he was not driving the offending vehicle or he did not hold driving license.

14. No doubt Sunita PW-1 has admitted in her cross-examination that driver did not hold driving license and therefore, it was not produced by her. It cannot be ignored that Sunita PW-1 is illiterate village woman and therefore, if while answering the question as to why she did not produced driving license of the driver of the tractor, she has given such admission, overmuch importance cannot be given to such admission. Even no importance can be given to the written statement filed by driver of the tractor that he did not know driving. That admission given by driver in written statement cannot be stretched to hold that driver of the tractor did not hold driving license. Heavy burden lies on insurance company to prove that at the time of occurrence of the accident,

the driver did not hold valid and effective driving license. However, admittedly in this case, insurance company did not examine any witness from RTO office to prove that driver of the offending tractor did not hold valid driving license on the date of accident. Even Investigating Officer is not examined by insurance company to prove this defence. Therefore, I have no hesitation to hold that the insurance company failed to prove that the driver of the offending tractor did not hold valid and effective driving license at the time of accident.

15. No doubt from the cross-examination of Sudam wakle PW-2 and from examination-in-chief of Sunita PW-1 it has come on record that at the time of occurrence of the accident, the owner of the tractor Jagannath Holkar was sitting by the side of driver. However, the Insurance Company, has not placed on record the original policy of the insurance to prove that such act of the owner of the tractor amounts to breach of condition of policy of the insurance. The cover note Exh.44 dos not show any such condition in the policy of the insurance. Therefore, because the owner Jagannath had sat on the tractor that does not amount to breach of condition of policy of the insurance.

16. In the circumstances, I have no hesitation to hold that the appellant insurance company failed to prove that the owner of the offending tractor committed breach of condition of policy of the insurance. As there was no breach of condition of policy of the insurance, the appellant insurance company cannot be exonerated from its liability to pay the compensation to the claimants or to indemnify the owner of the offending tractor. In the distinguishing circumstances, the ratio of Jawahar Singh V. Bala Jain (Supra) is of no avail to the appellant.

17. Before parting with the judgment, I must make it clear that acquittal of the driver in criminal case does not affect the finding given by the Tribunal regarding rash and negligent driving by driver of the offending tractor.

18. The quantum of compensation awarded by the Tribunal is not disputed at the stage of argument by the insurance company or owner of the tractor. Otherwise also after going through the judgment passed by the Tribunal, I am fully satisfied that the compensation awarded by Tribunal is not exorbitant.

19. In view of the discussion, I hold that the appellant insurance company miserably failed to prove

that owner of the offending tractor committed breach of condition of policy of the insurance. Therefore, appellant insurance company cannot be exonerated from its liability to pay the compensation. This appeal being devoid of merits deserves to be dismissed. Accordingly, First Appeal No.1165/2012 is dismissed. Civil Application No.13295/2018 and Civil Application No.3225/2019 are disposed of.

20. Parties to bear their respective costs of the appeal.

21. The compensation deposited by the insurance company in the Court be remitted to the Motor Accident Claim Tribunal, Aurangabad. Claimants are at liberty to withdraw the compensation amount in accordance with award.

22. The appeal is disposed of in above said terms.

(SUNIL K. KOTWAL, J.)

habeeb