

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

FIRST APPEAL NO. 294 OF 2005

The New India Assurance Co. Ltd. ..Appellant

v/s.

Shaila Janardhan Zendekar & Anr. ..Respondents

**WITH
FIRST APPEAL NO. 352 OF 2005**

The New India Assurance Co. Ltd. ..Appellant

v/s.

Janardhan Balaram Zendekar & Anr. ..Respondents

**WITH
FIRST APPEAL NO. 496 OF 2005**

The New India Assurance Co. Ltd. ..Appellant

v/s.

Anandi Balkrishna Zendekar & Ors. ..Respondents

Mr. S.M.Dange for the Appellant.

Mr.T.J.Mendon for the Respondent No.1 in FA/294/2005 and FA/352/2005 and for the Respondent Nos.1 to 5 in FA/496/2005.

Mr. Ashutosh Gavnekar i/b. Mr. C.G.Gavnekar for the Respondent No.2 in FA/294/2005 and FA/352/2005.

CORAM : SMT. ANUJA PRABHUDESSAI, J.
DATED : 11th SEPTEMBER, 2019.

ORAL JUDGMENT .

1. These are the appeals under Section 173 of the Motor Vehicles Act, arising out of motor accident claims filed under Section 166 of the M.V.Act.

(i) Appeal No. 496 of 2005 is directed against the judgment and award dated 23.12.2004 in MACP No.651 of 1997,

(ii) Appeal No. 294 of 2005 is directed against the judgment and award dated 14.10.2004 in MACP No.385 of 1998, and

(iii) Appeal No. 352 of 2005 is directed against the judgment and award dated 20.10.2004 in MACP No.386 of 1998, passed by the Claims Tribunal, Raigad.

2. The relevant facts necessary to decide these appeals are as under :

On 21.4.1997 one Balkrishna Zendekar was proceeding from Revdanda to Alibag on motor-cycle bearing no MH-06-B-2054. The appellants Janardhan Zendekar and Shaila were the pillion riders. A

maruti van bearing No. MH-06-4349 dashed against the said motor cycle at Navedar Beli. Shri Balakrishna Zendekar, the rider of the motor-cycle expired as a result of the injuries sustained in the said accident, whereas both the pillion riders sustained grievous injuries resulting in permanent disablement.

3. MACP No.651 of 1997 was filed by the widow and children of the deceased Balkrishna Zendekar-rider of the motor-cycle. Whereas, MACP No. 358 of 1998 and 386 of 1998 were filed by the pillion riders -Janardhan and Shaila. The claimants in these three claim petitions claimed that the accident was caused solely due to rash and negligent driving by the driver of the Maruti Van. The claimants therefore filed petitions under Section 166 of the Motor Vehicles Act claiming compensation from the driver/owner as well as the insurer of the said maruti van.

4. The claimants in Claim Petition No.651 of 1997 had claimed that the deceased Balkrishna was 43 years of age and was drawing monthly salary of Rs.11884/-. They claimed that they were solely

dependent on the earning of the deceased Balkrishna Zendekar. They therefore claimed total compensation of Rs.16 lakhs from the owner as well as the appellant-insurance company.

5. Shaila Zendekar, the claimant in Claim Petition No. 385 of 1998, had sustained grievous injuries resulting in permanent disablement to the extent of 64%. She had claimed compensation of Rs.3 lakhs. Whereas Janardhan Zendekar, the claimant in Claim petition No. 386 of 1998 had suffered permanent disablement to the extent of 54%. He claimed compensation of Rs.3.5 lakhs.

6. The appellant insurance company had alleged that the driver of the maruti van was not holding a valid and effective licence to drive a tourist vehicle. It was alleged that the vehicle was driven in breach of terms and conditions of the policy and hence it was not liable to indemnify the insured. The appellant insurance company further claimed that the rider of the motorcycle was negligent in not wearing a helmet and in carrying two pillion riders. The rider of the motor cycle was therefore guilty of contributory negligence.

7. The Tribunal, after considering the evidence has recorded a finding that the accident was caused solely due to rash and negligent driving by the driver of the Maruti van. The Tribunal has further observed that the insurance company had failed to prove that the insured had committed breach of terms and conditions of the policy and hence it could not be exonerated of its liability of indemnifying the insured.

8. While deciding the question of quantum of compensation, in claim petition No. 651 of 1997, the Tribunal has considered the monthly income of the deceased as Rs.9,644/-. After deducting 2/3rd towards personal expenses and applying multiplier of 15, the Tribunal computed loss of dependency at Rs.11,57,220/-. The Tribunal also awarded Rs.27500/- on other conventional heads and awarded total compensation of Rs.11,84,720/- .

9. In MACP No. 385 of 1998, the Tribunal, considered the notional income of the Claimant Shaila at Rs.2000/- per month. Considering

the age of the claimant. nature of the injuries and the extent of permanent disablement, the Tribunal assessed loss of income as Rs.2,30,400/- . The Tribunal also awarded compensation of Rs.6000/- as actual loss of income during the period of treatment, Rs.28,960/- towards medical expenses, Rs. 50,000/- towards pain and suffering, Rs.25,000/- towards loss of amenities of life, and Rs.5000/- towards special diet. The Tribunal thus awarded total compensation of Rs.3,45,360/- to the claimant Shaila.

10. In MACP No. 386 of 1998, the Tribunal held that the claimant Janardhan was employed in Zilla Parishad as a launchman and was drawing monthly salary of Rs.3800/-. The Tribunal held that the claimant continued to be in service and had no promotional prospects and hence there was no loss of actual or future income. The Tribunal awarded compensation of Rs.50,000/- towards pain and suffering and Rs.22000/- towards medical expense. The Tribunal also awarded additional compensation of Rs.50,000/- by holding that his value in the open market stands diminished to the extent of 54%. The Tribunal has also awarded compensation of

Rs.3000/- towards transport charges and special diet. The Tribunal thus awarded total compensation of Rs.1,75,000/-.

11. The learned Counsel for the appellant contends that the Maruti van was registered as a tourist vehicle and that under the terms and conditions of the policy, the driver/owner was required to obtain a separate license to drive a tourist vehicle. He contends that the respondent Javed Gorame, the driver and owner of the said Maruti Van failed to obtain such driving license and drove the vehicle in breach of terms and conditions of the policy. He submits that the appellant insurance company is therefore not liable to indemnify the insured.

12. The learned Counsel for the appellant further contends that the rider of the motor cycle – Balkrishna Zendekar had driven the motorcycle without wearing a helmet and had carried two pillion riders, which is in contravention of the provisions under Section 128(1) and 129 of the Motor Vehicles Act. He therefore contends that the driver of the motorcycle had contributed to the accident.

The case being of composite/contributory negligence, the Tribunal was not justified in directing the appellant-insurance company to pay the entire compensation.

13. The learned Counsel for the appellant does not challenge the quantum of compensation awarded to the claimants in Claim Petition No. 651 of 1997. He has only questioned the quantum of compensation awarded in the other two claim petitions being Claim Petition No. 385 of 1998 as exorbitant and excessive. He submits that the claimant in Claim Petition No. 386 of 1998 was an employee of Zilla Parishad. He continued to be in employment even after the accident. He had otherwise no promotional prospects. He had not suffered either actual or future loss of earning and as such the Tribunal was not justified in awarding additional amount of Rs.50,000/- by holding that his value in the open market had diminished to the extent of 54%.

14. The learned Counsel for the claimants submits that the driver of the Maruti van was holding a valid driving license to drive a light

motor vehicle. Relying upon the decision in ***Mukund Dewangan v. Oriental Insurance Co. Ltd. 2017 ACJ 2011***, he submits that a person holding a driving license to drive a light motor vehicle is competent and eligible to drive a tourist vehicle. He contends that the appellant insurance company having failed to prove breach of terms and conditions of the policy, cannot be absolved of its liability of indemnifying the insurer.

15. The learned Counsel for the claimants further contends that the evidence on record does not indicate in any manner that the rider of the motor cycle had contributed to the accident. Hence the mere fact that the rider of the motorcycle had carried two pillion riders would not per se constitute rash and negligent act. Drawing my attention to paragraph 12 of the impugned judgment in Claim Petition No.385 of 1998, he submits that the infact the appellant Insurance Company had submitted before the Tribunal that they were not seriously challenging the fact that the accident was caused due to the rash and negligent driving by the driver of the maruti van. Having given up the plea before the Tribunal, the appellant insurance

company cannot now raise the issue of contributory negligence.

16. The learned Counsel for the claimant concedes that the claimant in Claims Petition No. 386 of 1998 continues to be in employment and that there is no loss of actual earning on account of the accident. He further admits that the claimant was not entitled for additional amount of Rs.50,000/- on the ground that his value in the open market had diminished because of the permanent disablement. He, however, contends that the evidence on record clearly indicates that the claimant was hospitalized 2 ½ months and that he was unable to resume duties for a further period of 5 months. He submits that the Tribunal had not awarded any compensation towards loss of earning during the period of treatment. He also submits that considering the nature of the injuries sustained by him, an amount of Rs.50,000/- awarded towards pain and suffering cannot be considered as just compensation. He submits that the additional amount of Rs.50000/- which is awarded by the Tribunal on the head of 'diminishing value in the open market' can be adjusted towards loss of earning during the period of treatment as

well as under the head of 'pain and suffering'.

17. I have perused the records and considered the submissions advanced by the learned Counsel for the respective parties.

18. It is not in dispute that the deceased Balkrishna was the rider of the motor-cycle no. MH 06 B 2054. There was a collision between the motorcycle and the Maruti Van bearing No. MH 06 4349 driven by Javed Gorame. Balkrishna Zendekar. The rider of the motor-cycle expired as a result of the injuries sustained in the accident, whereas both the pillion riders i.e. Janardhan Zendekar and Shaila Zendekar sustained injuries resulting in permanent disablement. It is in evidence that the rider of the motor cycle had not worn helmet, and had carried two pillion riders. This is in contravention of Section 128(1) and 129 of the Motor Vehicles Act, and is an offence punishable under the M.V.Act.

19. The question is whether the rider of the motorcycle can be held guilty of composite or contributory negligence for contravention of

Section 128(1) and 129 of the Motor Vehicles Act. In this regard it would be advantageous to refer to the judgment of the Apex Court in ***Sudhir kumar Rana vs. Surinder Singh 2008 ACJ 1834***. The Apex Court while considering the question whether driving a vehicle without holding a valid and effective license amounted to contributory negligence has observed thus :

" 6. A contributory negligence may be defined as negligence in not avoiding the consequences arising from the negligence of some other person, when means and opportunity are afforded to do so. The question of negligence would arise only when both parties are found to be negligent.

7. The question is negligence for what? If the complainant must be guilty of an act or omission which materially contributed to the accident and resulted in injury and damage, the concept of contributory negligence would apply. (see. New India Assurance Co. vs. Avinash)...

*8. ****

9. If a person drives a vehicle without a license, he commits an offence. The same, by itself, in our opinion, may not lead to a finding of negligence as regards the accident. ..."

20. Similar view has been taken by Allahabad High Court in ***New India Assurance Co., vs. V. Sharda Devi in 2013 ACJ 652*** and by the Hyderabad High Court in ***Chakali Swarupa & Ors. vs. Mohd. Gaus &***

Anr. 2016 ACJ 383. It is thus well settled that the breach of provisions or violation of safety measures provided under the Act and Rules would not ipso facto constitute contributory negligence unless the driver has contributed to the accident by his act or omission.

21. In the instant case, the evidence of both the pillion riders clearly indicates that the accident was caused due to rash and negligent driving by the driver of the maruti van. It is also in evidence that the first information report was lodged against the driver of the maruti van for driving the vehicle in a rash and negligent manner, and he was prosecuted for committing offences punishable under sec.279, 337, 338 and 304A of IPC.

21. The appellant insurance company had not adduced any evidence to prove that the rider of the motor-cycle had in any manner contributed to the accident or that violation of these two provisions had in any manner contributed to the accident. The Tribunal, upon considering the evidence on record has recorded a specific finding that the accident was caused solely due to rash and

negligent driving by the driver of the maruti van and that there is no iota of evidence to prove the negligence on the part of the rider of the motor-cycle. The aforesaid findings are based on evidence on record. The findings on the issue of rashness and negligence are neither perverse nor illegal and do not warrant interference.

22. A perusal of para 12 of the impugned judgment in MACP 385 of 1998 indicates that the insurance company had not challenged the fact that the accident was caused due to rash and negligent driving by the driver of the maruti van. Having given up the plea of contributory negligence, the appellant insurance company cannot now raise the issue of contributory negligence in this appeal. Under the circumstances, the appellant insurance company cannot seek reduction of compensation on the ground of contributory negligence.

23. While deciding the question of breach of terms and conditions of the policy, it would be advantageous to refer to the decision of the Apex Court in *National Insurance Company vs. Swaran Singh (2004) 3 SCC* the Apex Court has observed that :

“89. Section 3 of the Act casts an obligation on a driver to hold an effective driving license for the type of vehicle which he intends to drive. Section 10 of the Act enables the Central Government to prescribe forms of driving licenses for various categories of vehicles mentioned in sub-section (2) of the said section. The various types of vehicles described for which a driver may obtain a license for one or more of them are : (a) motorcycle without gear, (b) motorcycle with gear (c) invalid carriage, (d) light motor vehicle, (e) transport vehicle, (f) road roller, and (g) motor vehicle of other specified description. The definition clause in Section 2 of the Act defines various categories of vehicles which are covered in broad types mentioned in sub-section (2) of Section 10. They are “goods carriage”, “Heavy goods vehicle”, “heavy passenger motor vehicle”, invalid carriage, “light motor vehicle”, maxi-cab”, “Medium goods vehicle”, “medium passenger motor vehicle”, “motor cab”, “motor cycle”, “Omnibus”, “private service vehicle”, “semi trailer”, “tourist vehicle”, “tractor”, “trailer” and “transport vehicle”. In claims for compensation for accidents, various kinds of breaches with regard to the condition of driving licenses arise for consideration before the Tribunal as a person possessing a driving license for “motorcycle without gear” [sic may be driving a vehicle] for which he has no license. Cases may also arise where a holder of driving license for “light motor vehicle is found to be driving a “maxi-cab”, “motor cab” or “omnibus” for which he has no license. In each case, on evidence led before the Tribunal, a decision has to be taken whether the fact of the driver possessing license for one type of a vehicle but found driving another type of vehicle, was the main or contributory cause of accident. If on facts, it is found that the accident was caused solely because of some other unforeseen or intervening causes like mechanical failures and similar other causes having no nexus with the driver not possessing requisite type of

license, the insurer will not be allowed to avoid its liability merely for technical breach of conditions concerning driving license.

90. We have construed and determined the scope of sub-clause (ii) of sub-Section (2) of Section 149 of the Act. Minor breaches of license conditions, such as want of medical fitness certificate, requirement about age of the driver and the like not found to have been the direct cause of the accident, would be treated as minor breaches of inconsequential deviation in the matter of use of vehicles. Such minor and inconsequential deviations with regard to licensing conditions would not constitute sufficient ground to deny the benefit of coverage of insurance to the third parties.

91. On all plea of breach of licensing conditions taken by the Insurer, it would be open to the Tribunal to adjudicate the claim and decide inter se liability of insurer and insured; although where such adjudication is likely to entail undue delay in decision of the claim of the victim, the Tribunal in its discretion may relegate the insurer to seek its remedy of reimbursement from the insured in the civil court”

24. In the instant case, it is not in dispute that the maruti van was a light motor vehicle. The driver of the maruti van was holding a valid and effective driving licence to drive a light motor vehicle. The learned counsel representing the appellant insurance company has not been able to show any condition in the policy which required the driver to hold a separate license to drive a tourist vehicle.

25. The evidence on record further indicates that though the said motor vehicle was registered as a tourist vehicle, as on the date of the accident it was not used as a tourist vehicle, but was used by the respondent for his personal use. It is not the case of the appellant insurance company that not holding a separate license to drive a tourist vehicle was a main or contributory cause of the accident. There being no nexus between the accident and the driver not possessing requisite type of license, the insurance policy cannot be absolved of its liability on such technical grounds.

26. The appellant insurance company has not challenged the quantum of compensation awarded to the claimants in Claim Petition Nos.651 of 1997 and 385 of 1998. The only challenge is to the payment of additional compensation of Rs.50,000/- to the claimant Janardhan Zendekar on the ground that his value in the open market has diminished on account of the permanent disablement.

27. It may be mentioned that the rules under which the

compensation is awarded under personal injury are spelt out by the

Apex Court in ***Raj Kumar vs. Ajay Kumar & Anr. (2011) 1 SCC 343***

wherein it has been held as under:

“6. The heads under which compensation is awarded in personal injury cases are the following:

Pecuniary damages (Special damages)

(i) Expenses relating to treatment, hospitalization, medicines, transportation, nourishing food, and miscellaneous expenditure.

(ii) Loss of earnings (and other gains) which the injured would have made had he not been injured, comprising:

(a) Loss of earning during the period of treatment.

(b) Loss of future earnings on account of permanent disability,

(iii) Future medical expenses.

Non-pecuniary damages (General damages)

(iv) Damages for pain, suffering and trauma as a consequence of the injuries.

(v) Loss of amenities (and/or loss of prospects of marriage)

(vi) Loss of expectation of life (shortening of normal longevity)

In routine personal injury cases, compensation will be awarded only under heads (i)(ii)(a) and (iv). It is only a serious cases of injury, where there is specific medical evidence corroborating the evidence of the claimant, that compensation will be granted under nay of the heads (ii) (b), (iii), (v) and (vi) relating to loss of future earnings on account of permanent disability, future medical expenses, loss of amenities (and/or loss of prospects of marriage) and loss of expectation of life.

7. Assessment of pecuniary damages under Item (i) and under (ii)(a) do not pose much difficulty as they involve reimbursement of actuals and are easily ascertainable from the evidence. Award under the head of future medical expenses –Item (iii) depends upon specific medical evidence regarding need for further treatment and cost thereof. Assessment of non-pecuniary damages –Items (iv)(v) and (vi) involves determination of lump sum amounts with reference to the circumstances such as age, nature of injury/ deprivation/ disability suffered by the claimant and the effect thereof on the future life of the claimant. Decisions of this Court and the High Courts contain necessary guidelines for awards under these heads, if necessary. What usually poses some difficulty is the assessment of the loss of future earnings on account of permanent disability –Item (ii)(a). We are concerned with that assessment in this case.”

28. In the instant case, the claimant-Janardhan was in employment of Zilla Parishad as a launchman. It is in evidence that he continued to be in employment even after the accident. The Tribunal has also considered the fact that there was no promotional prospect and that the claimant did not suffer actual or future loss of income on account of the injuries sustained in the accident. This being the case, the Tribunal was not justified in awarding compensation of Rs.50000/- on the ground that his value in the open market had diminished due to the permanent disablement.

29. The evidence on record indicates that the claimant -Janardhan had suffered injuries resulting in permanent disablement of 54%. The evidence on record indicates that he was hospitalized for a period of two and half months and that he was unable to resume his duties for a further period of five months. The claimant was therefore unable to resume duties for a total period of 7 ½ months. The Tribunal has not awarded any compensation to the claimant on the account of loss of earning during the period of treatment. Considering the fact that the claimant was earning Rs.3800/- per month, he would be entitled for compensation of Rs.28,500/-, which can be rounded up to Rs.30,000/- towards loss of earning during the period of treatment. This amount can be adjusted from the additional amount of Rs.50,000/- which has been awarded by the Tribunal towards diminishing value in the open market on account of permanent disablement. The balance amount of Rs.20,000/- can be adjusted towards loss of expectation of life. Hence, I am not inclined to reduce the compensation awarded by the Tribunal to the claimant in Claim Petition No.386 of 1998.

30. Under the circumstances, and in view of the discussion supra, the appeals have no merits and are accordingly dismissed.

. The record and proceedings be returned to the Tribunal.

. Statutory deposit, if not already transferred, be transferred to the Tribunal.

Prasanna
P.
Salgaonkar
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signed by
Prasanna P.
Salgaonkar
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(ANUJA PRABHUDESSAI, J.)