IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO.524 OF 2013
with
CIVIL APPLICATION NO.3746 OF 2017

The Oriental Insurance Co. Ltd. .. Appellant
Vs.
Dinesh Anantrao Hingu & Anr. .. Respondents

ALONG WITH
FIRST APPEAL NO.78 OF 2015
with
CIVIL APPLICATION (ST.) NO.28337 OF 2017

The Oriental Insurance Co. Ltd. .. Appellant
Vs.
Hasmukh Anantraj Hingu & Anr. .. Respondents

ALONG WITH
FIRST APPEAL NO.526 OF 2012
with
CIVIL APPLICATION NO.3597 OF 2017

The Oriental Insurance Co. Ltd. .. Appellant
Vs.
Pushpa Dinesh Hingu & Anr. .. Respondents

ALONG WITH
FIRST APPEAL NO.528 OF 2012
with
CIVIL APPLICATION NO.3598 OF 2017

The Oriental Insurance Co. Ltd. .. Appellant
Vs.
Lekha Harshad Hingu & Anr. .. Respondents

ALONG WITH
FIRST APPEAL NO.529 OF 2012
with
CIVIL APPLICATION NO.3599 OF 2017

The Oriental Insurance Co. Ltd. .. Appellant
Vs.
Bhavan Hasmukh @ Raju Hingu & Anr. .. Respondents

ALONG WITH
FIRST APPEAL NO.530 OF 2012
with
CIVIL APPLICATION NO.3600 OF 2017

The Oriental Insurance Co. Ltd. .. Appellant
Vs.
Harshad Anantrai Hingu & Anr. .. Respondents

ALONG WITH
FIRST APPEAL NO.531 OF 2012
along with
CIVIL APPLICATION NO.3601 OF 2017

The Oriental Insurance Co. Ltd. .. Appellant
Vs.
Baby Riya Dinesh Hingu & Anr. .. Respondents

Mr.Devendranath S. Joshi for the appellant.
Mr.Avinash Gokhale for the respondent no.1 in all first appeal and for the applicant in all civil applications.

CORAM : R.D.DHANUKA, J.
DATE : 20th December 2019

P.C.:

. Mr.Joshi, learned counsel for the appellant in all these appeals states that the respondent no.2 who was the owner of the offending vehicle has been served by publication. Statement is accepted.

2. None appears for the respondent no.2 when the matter was called out. Learned counsel for the appellant further states that matter had proceeded against the respondent no.2 ex parte even before the trial Court. Statement is accepted.

3. In all these appeals, a short question that arises for consideration of this Court is that if the driver of the offending vehicle did not have valid license on the date of accident and if the same is proved before the Tribunal, the insurer is liable to pay compensation amount at the first instance to the claimant and thereafter to recover the said amount from the owner of the offending vehicle under the provisions of the Motor Vehicles Act, 1988.

4. All the appeals are arising out of the same accident. I shall deal with the facts in First Appeal No.524 of 2013 and this order would apply to all other matters.

5. The appellant herein was one of the party opponent to the Claim Application No.2231 of 2005 before the MACT which was filed by the respondent no.1. It was the case of the respondent no.1 that on 25th February 2005 at about 10.30 a.m., the motor van bearing No.MAP-8445 was proceeding from Mumbai-Agra road towards Shirdi. When the van was near village Koti, Motor Truck bearing registration No.MH-04-S-5114 coming from the opposite direction in high speed dashed the said motor van. The respondent no.1 sustained injuries because of the impact of the dash.

6. The respondent no.1 was treated at Suyash Hospital, Nashik

for the injuries sustained by him for head injury and fracture of femur. The respondent no.2 herein was insured with the appellant on the date of accident. The respondent no.1 applied for compensation in the sum of Rs.5 lakhs against the respondent no.2 and the appellant.

7. The claim was resisted by the appellant. The respondent no.2 did not file any written statement before the Tribunal. Matter thus proceeded ex parte against the respondent no.2. The respondent no.2 did not appear before this Court also though has been served by publication. Tribunal framed four issues for consideration. The respondent no.1 examined himself. The appellant examined DW1 Mr.Ravindra to prove entries in Motor Vehicle Register maintained by office of Regional Transport Officer, Kalyan.

8. A perusal of the judgment rendered by the Tribunal indicates that the Tribunal, after considering the evidence of witness examined by the respondent no.1 and the appellant, rendered a finding that the license was valid from 3rd June 1998 to 15th February 2012. The witness examined by the appellant deposed that the license was also issued to drive three wheeler transport vehicle in the year 1999. The Tribunal rendered a finding that the driver of the offending vehicle was not having valid and effective driving license.

9. The Tribunal after adverting to the judgment of the Supreme Court in the case of ***National Insurance Company Vs. Swaran Singh, (2004) 3 SCC 297*** has held that the Insurance Company in order to avoid liability towards insured has to prove that the insurer was guilty and had failure to exercise reasonable care in the matter of fulfilling conditions of the policy while driving the vehicle by a duly licensed driver. It is further held that mere proof of absence of license, fake or invalid license or any disqualification of the driver are not in themselves defences available to the Insurance Company. In this case, the insurer has not adduced any evidence to show that the fact of driver not holding license to drive a four wheeler was within the knowledge of the owner of the vehicle and thus in absence of any evidence, it cannot be assumed that the owner of the offending vehicle has not taken due care and allowed the driver to drive the offending truck inspite of knowing the fact that he did not hold license to drive four wheeler. The Tribunal accordingly held that the owner of the offending vehicle as well as the appellant are liable to pay compensation.

10. Mr.Joshi, learned counsel for the appellant invited my attention to the judgment of the Supreme Court in the case of ***Pappu & Ors. Vs.Vinod Kumar Lamba and Anr., (2018) 3 SCC 208*** and in particular paragraphs 12 to 20 thereof and would submit that after

adverting to the judgment of the Supreme Court in the case of ***National Insurance Company Vs. Swaran Singh (supra)*** which was relied upon by the Tribunal in the impugned judgment and award has held that the Insurance Company is entitled to take a defence that the offending vehicle was driven by an unauthorised 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 authorised by him to drive the vehicle and was having a valid driving license at the relevant time. It is further held that 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 authorised person having a valid driving license. 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 license produced in support was of a person who, in fact, was authorised 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.

11. The Tribunal in this case has rendered a finding that the driver of the offending vehicle did not hold valid and effective driving license. The Hon'ble Supreme Court in the case of ***Pappu & Ors. Vs.Vinod Kumar Lamba and Anr.(supra)*** has distinguished the said judgment in the case of ***National Insurance Company Vs. Swaran Singh (supra)*** and has taken a different view.

12. In view of the finding rendered by the Tribunal that the driver of the offending vehicle did not have valid license on the date of accident and since the owner of the offending vehicle had not filed any written statement, the onus would not have been shifted upon the appellant. The principles of law laid down by the Supreme Court in the case of ***Pappu & Ors. Vs. Vinod Kumar Lamba and Anr.(supra)*** squarely applies to this case. I am respectfully bound by the said judgment.

13. In view of the fact that the view taken by the Tribunal relying upon the judgment of the Supreme Court in the case of ***National Insurance Company Vs. Swaran Singh (supra)*** which judgment is distinguished by the Supreme Court and taking different view in the case of ***Pappu & Ors. Vs.Vinod Kumar Lamba and Anr.(supra).*** I am bound by later judgment of the Supreme Court in the case of ***Pappu & Ors. Vs.Vinod Kumar Lamba and Anr. (supra).*** The entire finding of

the Tribunal in paragraph 17 based on the judgment of the Supreme Court in the case of ***National Insurance Company Vs. Swaran Singh (supra)*** thus deserves to be set aside. There are no other issues raised by the learned counsel for the appellant for consideration of this Court.

14. I therefore pass the following order :-

(i) All the appeals are dismissed with aforesaid clarification with costs quantified at Rs.25,000/- which shall be paid by the appellant to the claimant in each of the case within six weeks from today.

(ii) It is made clear that the appellant would be liable to pay the amount of compensation as awarded by the Tribunal at the first instance to the respondent no.1 and thereafter the appellant would be entitled to file an execution application for recovering the amount from the respondent no.2 (owner of the offending vehicle) under Section 49(2) of the Motor Vehicles Act, 1988.

(iii) It is also made clear that the appellant would be entitled to recover the amount of costs also as directed to be paid by this order from the respondent no.2 (owner of the offending vehicle) which is to be paid to the original claimant.

(iv) It is made clear that the respondent no.1 (original claimant) would be entitled to recover the decreetal amount as modified by this order out of the amount deposited by the appellant before the MACT along with interest and costs.

(v) Office is directed to transmit the statutory deposit of Rs.25,000/- to the MACT, Mumbai expeditiously.

(vi) If there is any shortfall in recovering the amount by the respondent no.1, the appellant shall deposit the balance amount with the Tribunal within two weeks from the date of computation of shortfall by the Tribunal. If the Tribunal finds any additional amount deposited by the appellant, the Tribunal shall refund the said additional amount within four weeks from the date of such computation to the appellant.

(vii) In view of dismissal of the appeals, none of the pending civil applications survive and are disposed of.

(viii) Parties as well as the MACT, Mumbai to act on the authenticated copy of this order.

R.D.DHANUKA, J.