

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

FIRST APPEAL NO. 1223 OF 2012

- 1] Mamta wd/o Santosh Chitakalwar,
Aged about 30 years, Occ.-Household,
- 2] Aditya Santosh Chitakalwar,
Aged about 07 years, Occ-Education.
- 3] Ku. Disha Santosh Chitakalwar,
Aged about 05 years, Occ-Education,
- 4] Satyabhama wd/o Sharawan Chitakalwar,
Aged about 62 years, Occ- Household,
All R/o. Sukrawar Peth, Tq. and District Washim. Appellants.

-Versus-

- 1] Laxman Narayan Raut,
Aged about Major, Occ.- Business,
R/o. Dhotra, Tq. Mangrulpir, District Washim.
- 2] Branch Manager, The Oriental Insurance Co. Ltd.,
Branch Office Washim. Respondents.

Shri P.R. Agrawal, Advocate for the Appellants.
None present for resp. no.1.
Shri Ashish Paunikar, Advocate for resp. no.2.

CORAM : S.M. MODAK, J.
Reserved on : 27/10/2020
Pronounced on : 06/11/2020

J u d g m e n t

In this appeal the question arises is whether on the basis of the

facts of the case, can it be said that the driver of the offending vehicle was having valid driving license ? The connected issue involved is 'on whom burden to prove fact of not holding license lies? And whether this Court can direct the Insurance Company to pay first and then to recover from the owner?

2. On the point of non requirement of endorsement on LMV license, Learned advocate Shri Agrawal relied upon the judgement in case of *Mukund Dewangan vs Oriental Insurance Company*. Whereas on the point of burden of proof, learned advocate Shri Paunikar relied upon the judgement in case of *Pappu and others vs Vinod Kumar Lamba and another*. The Motor Accident claims Tribunal, Washim, as per the judgment dated 08-10-2010, was pleased to answer that issue 'of not holding valid license' in the affirmative and was pleased to exonerate the Insurance Company for the breach of policy terms on the part of the insured/respondent no.1.

3. By the impugned judgment, the claims Tribunal on one hand exonerated the Insurance Company and on the other hand held the owner responsible and directed him to pay compensation of Rs.12,37,600/- along with the other benefits. The original claimants are challenging the said judgment of exonerating the Insurance Company. They have also asked for enhancement of the compensation.

4. I have heard learned Advocate Shri P.R. Agrawal for the claimants/appellants and learned Advocate Shri Paunikar for respondent no.2-Insurance company. Though appearance was put on behalf of the

owner/respondent no.1, his Counsel has not remained present for arguing the matter. Hence, I am supposed to decide this appeal on the following grounds :-

	<u>Points</u>	<u>Findings</u>
(a)	Whether the driver of the offending vehicle Tractor was possessing valid driving license at the time of accident?	Yes.
(b)	On whom burden to prove 'absence of driving license' lies ?	First on the owner and then on Insurance Company.
(c)	Whether it was right on the part of the Claims Tribunal to exonerate the Insurance Company?	Not totally.
(d)	Whether the claimants are entitled for enhanced amount of compensation?	Yes.
(e)	What order ?	As per final order.

REASONINGS

5. **As to point nos. (i) to (v) :-** There is no dispute about the manner of the accident. The Claims Tribunal has elaborately discussed the evidence on this point. Deceased Santosh Chitakalwar was a pillion rider on a motorcycle. It was driven by his friend. The accident took place on 23-11-2006 at about 18.30 hours. They were coming towards Washim from Mangrulpir. When they came near Ambapur Phata, the offending vehicle tractor dashed them. The tractor driver has negligently and recklessly driven the tractor. Santosh died on the spot. On the report of one Rahul Panditrao, Mangrulpir Police Station registered the offence under Sections 279, 337, 338 and 304-A of the Indian Penal Code against

the tractor driver No.MH 37/A 5471 (name not known). The deceased was working as a Senior Clerk in the Maharashtra Jeevan Vikas Pradhikaran. The claimant no.1 is the wife, claimant nos. 2 and 3 are the minor son and daughter and claimant no.4 is the mother of the deceased. The respondents i.e. owner and the Insurance Company have appeared and filed written statement. The owner has pleaded about existence of the insurance policy and fixing the responsibility on the Insurance Company. Whereas Insurance Company has denied the manner of the accident, negligent driving by the Tractor driver and also taken a plea about non existence of valid driving license by the tractor driver.

6. Claimant no.1 entered into the witness box and examined one Ashok Devisingh Rathod staff from the Maharashtra Jeevan Vikas Pradhikaran. Through him the salary certificate was proved. The owner had chosen to remain absent and neither given evidence nor cross examined the witnesses as mentioned above. Insurance Company has restricted itself in cross examining the witnesses and have not adduced any evidence. On this background, the Claims Tribunal was pleaded to quantify the amount of compensation at Rs. 12,37,600/- along with other benefits. The liability was fastened only on the owner. The Claims Tribunal has answered the issue of negligence of the Tractor driver in the affirmative. The issue of contributory negligence about driver of the motorcycle was answered in the negative. There is no challenge to these findings.

7. The Claims Tribunal has considered the driving license of tractor driver. But the Tribunal goes on to hold it is not sufficient to drive

offending vehicle/tractor. It further held about lapse on the part of owner in proving valid driving license.

Learned Advocate Shri Agrawal has challenged these findings. According to him, once a person who will obtain license for driving light motor vehicle, he is also entitled to drive any other class of light vehicle and no fresh endorsement is required if he is driving transport vehicle of light motor vehicle category. In support of his contention he relied upon two judgments :-

- (a) *Mukund Dewangan vs Oriental Insurance Company*
(2017) 14 SCC 663
- (b) *Santlal vs Rajesh* (2017(8) SCC 590)

It is true that the interpretation given in *Mukund Dewangan's* case was not there when the impugned judgment was delivered on 08-10-2010.

8. As against this learned Advocate Shri Paunikar supported the judgment and contended that the driving license of Tractor driver (Exhibit-35) and certificate of registration of the Tractor (Exhibit-34) are not proved. According to him, it is the responsibility of the owner of the offending vehicle to prove that the Driver was holding valid driving license. Once the owner has discharged that burden, then only the onus will be shifted on the insurance Company. In support of his contention he relied upon the observations in case of *Pappu and others vs Vinod Kumar Lamba and another* reported in (2018) 3 SCC 208.

CONCLUSION

9. The observations of Hon'ble Supreme Court in case of *Mukund Dewangan* are binding on all of us. So I agree with learned Advocate Shri Agrawal on that point. So I am inclined to hold that the person having light motor vehicle driving licence can also drive transport vehicle of that category. However, this observation is not useful to the claimants unless documents on record are proved. We have to apply this analogy to the facts before us and then to decide the matter. When this exercise is done, I am inclined to hold that the owner has failed to prove 'that the driver of the tractor was having a valid driving licence'. The claimants have produced the driving licence at Exh-35. It was not referred during the evidence of the claimants. It was just produced and marked as exhibit. So the observations in case of Pappu (supra) are applicable. So I am not inclined to interfere in the decision of the Claim Tribunal in exonerating the insurance company. I will decide hereinafter whether pay and recover order can be passed. So also I will give reasons for coming to the conclusion as mentioned above.

10. Learned Advocate Shri Agrawal tried to argue that the facts in case of *Pappu* are different from the facts of the present case. According to him the identity of the driver Jogindersingh in case of *Pappu* was disputed. Whereas in the present case the identity of the driver is not disputed.

11. I have read the evidence and the pleadings. It is true that the FIR at Exh.30 was registered against the tractor driver. His name is not

known. The owner before the claim Tribunal has filed written statement and submitted to pass on the responsibility on the insurance company as valid insurance policy was in force. Whereas the Insurance Company in the written statement has denied the manner of the accident, the negligence of the tractor driver and also denied the allegation about holding valid driving licence by the tractor driver.

12. On these pleading the claims Tribunal has framed the issue no.3 about 'holding valid driving licence'. As said above. except the claimant no.1 and one witness on the point of salary, no other witnesses were examined. The claims Tribunal has given the following findings :-

“The applicants have filed on record copy of driving licence Exh.35 of Baban Narayan Raut, who was driving the offending tractor on the date of incident. It discloses that abovesaid Driver was holding a driving licence for driving light motor vehicle transport (car). The N A No.1-owner of said tractor has accepted his ownership, but has not adduced any evidence to show that at the relevant time concerned driver was holding valid driving licence of the required category.”

Whereas in case of *Pappu* (supra) there was a accident in between two trucks. One truck driver succumbed to the injuries. The claimants have not given the name of the driver of the offending truck. Whereas the insurance company have also emphasized on this fact and expressed their inability to verify the driving licence in absence of necessary details. On this evidence, it was held by the Claims Tribunal in that case that producing driving licence of one Jogindersingh is not sufficient. There was a emphasis on absence of specific pleading that said Jogindersingh

was driving the offending truck.

13. Whereas in this case none of the parties have stated the name of the tractor driver. Only a certificate of registration and driving licence of tractor driver were produced. Learned advocate Shri Agrawal submitted that in many cases it is difficult to ascertain the name of the driver of the offending vehicle and according to him it is the responsibility of the owner of the offending vehicle and subsequently of the insurance company to give these details. According to him the claimants cannot be blamed for not giving those details.

14. He also submitted that Hon'ble Supreme Court in case of National Insurance Company vs Swaran Singh, reported in (2004) 3 SCC 297 has held that -

“mere absence of driving licence are not in themselves defences available to the insurer against the insured or the third parties. The insurance companies with a view to avoid their liability must not only establish available defences but also establish breach on the part of owner of the vehicle and the burden of proof where for would be on them (para 1109 (iii and iv)).”

According to him these observations still holds good and they are not overruled in case of *Pappu* by Hon'ble Supreme Court. Whereas learned Advocate Shri Paunikar submitted that the facts in case of *Pappu* and the facts before us are more or less similar and the judgment in case of *Pappu* was delivered later in time and it will prevail.

15. It is true that as per the contract of insurance, the insurer indemnify the insured for the loss sustained on account of vehicular accident. In a given case the insured may be interested in passing on the responsibility to the insurer and the insurer may be interested in complaining of breach of policy terms by the insured. I do agree that this is not the case of “giving of at least some evidence of breach of policy terms by the insurance company and its wrong appreciation. This is a case wherein there is failure to give evidence by the owner. So before us there are two views expressed by Hon'ble Supreme Court one is 'burden to prove breach (that too fundamental breach)’ lies on insurance company (Swaran Singh case). And other view is “initial burden to prove existence of valid license” would lie on the owner and then to pass on company (Pappu's case). I do agree with the practical difficulties expressed by learned Advocate Shri Agrawal in giving details of the driver of the offending vehicles but we have to abide by the observations of Hon'ble Supreme Court and particularly in case of Pappu. Hon'ble Supreme Court in case of *Pappu* has opined about fastening the liability on the insurance company only when the insured/owner has discharged his burden. We are bound by these observations. Hence for the above discussion, I am inclined to hold that 'it is not proved that the driver of the offending vehicle was having valid driving licence at the time of accident'. Hence, for the discussion made herein before, the decision of the claims tribunal about exonerating insurance company is liable to be affirmed.

AMOUNT OF COMPENSATION

16. The Claims Tribunal has granted compensation by considering

the following factors-

(a)	monthly salary -	Rs. 8,975.00/-
(b)	The contribution towards family (after deducting personal expenses)	Rs.71,800.00 p.a.
(c)	age of the deceased	30 yrs
(d)	Multiplier –	17
	Compensation –	Rs.12,20,600.00
(e)	Consortium - love and affection.	Rs. 5000 and Rs. 10,000/-
(f)	Funeral expenses -	Rs. 2,000/-
(g)	Total compensation -	Rs.12,37,600.00

The claimants are having the following grievances-

(a)	Deduction towards personal expenses.	it should be 1/4th instead of 1/3rd
(b)	Future prospect.	50% not considered.
(c)	Amount of consortium ought to have been.	Rs. 40,000/- per claimant.
(d)	The amount of loss of estate and funeral expenses.	Rs. 15,000/- each.

It is true that as per the judgment in case **National insurance Company Limited vs Pranay Sethi** reported in **2017 (16) SCC 680** 50% ought to have been considered towards the future prospect if the deceased is having a permanent job. The witness Ashok Rathod has been examined to prove the occupation of the deceased in Maharashtra Jeevan Vikas Pradhikaran. The salary certificate is at Exh 42. Hence we have to believe that the deceased was the permanent employee.

17. As per the observations of the Supreme Court in case of **Sarla Verma vs Delhi Transport Corporation**, reported in **2009 (6) SCALE 129**. Hon'ble Supreme Court has laid the guidelines for calculating the contribution towards the personal expenses. If the deceased is survived by the parents and the siblings 50% would be treated as personal and living expenses and not 1/3rd as observed by the Claims Tribunal in para 14. So also as observed in case of **Magma General Insurance Co. Ltd vs Nanuram** reported in **(2018)18 SCC 130** loss towards spousal consortium, parental consortium and filial has to be considered. An amount of Rs.40,000/- for each claimant has been laid down. So claimants are entitled to Rs.1,60,000/-. The claims Tribunal has granted insufficient amount on that head. They are also entitled to get Rs. 15,000/- each on account of loss of estate and funeral expenses.

18. The claimants are right in their submission in considering the salary of Rs. 8,800.00 pm. The certificate is at Exh.42. The gross salary is Rs. 8,975.00 and net salary is Rs. 8,370.00/-. The Claims Tribunal has considered the gross salary of Rs. 8,975.00/-. There are deductions. Some are voluntary and some are statutory. Rs.175.00 is deducted towards professional tax. it is a statutory deduction. So that amount only needs to be deducted from the gross salary. It comes to Rs. 8,800.00 pm So the claimants are entitled to get the compensation on following heads:-

Salary for the purpose of assessment.	Rs.8,800 x 12 months =Rs.1,05,600.00
Calculation 50 % additions towards the future addition.	Rs. 52,800.00
Total salary	Rs.1,58,400.00
1/4th deduction towards personal deduction.	Rs. 39,600.00
Salary for multiplier	Rs. 1,18,800.00
Multiplier	17
Loss of consortium Rs. 40,000/- per claimant.	Rs. 1,60,000.00
loss of estate and funeral expenses	Rs. 30,000.00
Total compensation	Rs.22,09,600.00

PAY AND RECOVER DIRECTION

19. In case of *Pappu* Hon'ble Supreme Court has relied upon observations of Hon'ble Supreme Court in case of ***National Insurance Company Ltd Vs Swaran Singh*** (supra) in direction (x) para 110 of *Swaran Singh's* judgment Hon'ble Supreme Court has bestowed on the Claims Tribunal power to direct the insurance company to pay to the third party and then to recover from the insured/owner. I think in this case the Claims Tribunal ought to have issued this direction. However, the tribunal has restricted themselves in exonerating the insurance company. It will be detrimental to the interest of the claimants. Hence, case for issuing that direction is made out. Hence, I proceed to pass the following order -

ORDER

- (a) Appeal is partly allowed.
- (b) The judgment given by the Motor Accident Claims Tribunal, Washim in MACT No.29/07 dated 08-10-2010 is modified as follows :-
 - (i) The applicants are entitled for compensation to the tune of Rs.22,09,600.00 (Twenty Two Lakhs Nine Thousand and Six Hundred only.).
 - (ii) The respondent no.2 insurance company is directed to pay this amount to the applicants with interest @ 7% from the date of filing of the application till realization.
 - (iii) The direction about distribution of the amount amongst the applicants given by the Claims Tribunal is confirmed.
 - (iv) The applicant nos. 2 and 3 must have attained the majority or on the verge of attaining the age of majority hence, the direction to invest their amount till attaining the majority is set aside.
 - (v) If the appellant nos. 2 and 3 have not attained the majority, the amount towards their share be paid to appellant no.1.

- (vi) The respondent nos. 1 and 2 to bear their own costs and to pay the costs to the appellants.
 - (vii) The respondent no.2 is entitled to recover the amount from respondent no.1 owner.
 - (viii) The respondent no.2 is at liberty to deduct an amount of Rs. 50,000/- ascertained on account of 'no fault liability' and then to pay the remaining amount to the claimants.
- (c) Award be drawn accordingly.

JUDGE

Deshmukh