

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

FIRST APPEAL NO. 789 OF 2019
WITH
CIVIL APPLICATION NO. 3573 OF 2019
WITH
CIVIL APPLICATION NO. 12014 OF 2019

Bajaj Allianz General Insurance Co. Ltd. ...Appellant

versus

Jijabai Anil Koli and others ...Respondents

.....
Mr. S.G. Chapalgaonkar, advocate for the appellant
Mr. M.M. Bhokarikar, advocate for respondent Nos.1 to 3
.....

WITH
CROSS APPEAL NO. 2 OF 2021

Jijabai Anil Koli and others ...Appellants

versus

Bajaj Allianz General Insurance Co. Ltd.
And others ...Respondents

.....
Mr. M. M. Bhokarikar, advocate for the appellants
Mr. S. G. Chapalgaonkar, advocate for respondent No.1
.....

CORAM : V. K. JADHAV, J.

**Date of Reserving
the Order :24.02.2021**

**Date of pronouncing
the Order :09.03.2021**

PER COURT :-

1. By order dated 04.10.2019 this court (Coram: Smt. Vibha Kankanwadi, J.) after recording that the service to all respondents is

complete, directed to place the first appeal for final disposal at admission stage. Even in terms of the order dated 20.11.2019 notices have been issued to the respondent owner of the offending vehicle and the rider of the vehicle for final disposal, however, despite service of said notice of final disposal, none appears for respondent No.6.

2. On 6.5.2011 at about 7.30 p.m. deceased Anil Koli was the pillion rider of motor cycle bearing registration No. MH-19/BB-3260 and one Manohar Koli (respondent No.6 herein) was riding the said motor cycle. The said motor cycle met with an accident on National Highway No.6, as the rider of the motor cycle had lost his control over the vehicle and the motor cycle skidded on the road. On account of the said accident, deceased Anil Koli had sustained fatal injuries.

3. Respondent Nos. 1 to 5 original claimants had filed M.A.C.P. No. 337 of 2011 under Section 166 of the Motor Vehicles Act, 1988 (for short "M.V. Act") for award of compensation. The learned Member of M.A.C.T. by impugned judgment and award dated 10.9.2018 partly allowed the claim petition with proportionate costs and thereby directed the respondents in the claim petition to pay compensation of Rs.7,18,000/- jointly and severally.

4. Being aggrieved by the same, the insurer Bajaj Allianz

General Insurance Company Ltd. has preferred first appeal No. 789 of 2019 and original claimants have filed cross appeal No. 2 of 2021 challenging the award to the extent of quantum.

5. Mr. Chapalgaonkar, learned counsel for the appellant insurer in first appeal No. 789 of 2019 submits that the appellant insurer has raised specific defence in the written statement that the respondent No.1 in the claim petition i.e. rider of the motor cycle was not holding valid and effective driving licence at the time of accident. Further there is voluminous evidence to prove that he was not holding valid and effective driving licence at all. Learned counsel submits that the appellant insurer ought to have been exonerated in terms of the provisions of section 149(2) of the M.V. Act. Learned counsel submits that the respondent No.1 in the claim petition i.e. rider of the motor cycle was prosecuted for the offence under Section 181 of the M.V. Act and the appellant insurer has examined the investigating officer R.W.1 at Exh.44 to prove the contents of the charge sheet. Learned counsel submits that the appellant insurer had issued communicated Exh.50 alongwith the track report, which indicates that it was duly signed by the respondent owner of the vehicle. Under the said communication, respondent No.1 owner, was requested to produce copy of driving licence, if any. However, no driving licence or its particulars were made available to the insurance company. Learned counsel submits that the Tribunal should have drawn an adverse inference against the respondents by accepting the defence

raised by the appellant insurer.

6. Mr. Chapalgaonkar, learned counsel for the appellant insurer submits that the insurance policy is placed on record, which is marked at Exh.49 and the contents of the said policy are proved by P.W.2 Chinmay Joshi. Further the appellant insurer has also examined post master to prove that the communication was dispatched to the respondent owner. Learned counsel submits that despite the respondent owner has caused his appearance before the Tribunal and engaged advocate, the respondent owner has not produced copy of driving licence nor stepped in the witness box to controvert the defence of insurer. Learned counsel submits that even the appellant insurer had filed an application Exh.18 in terms of the Order XI Rule 14 of C.P.C. and the Tribunal has passed order directing the respondent owner to file driving licence up to 8.1.2014. However, till disposal of claim petition, no driving licence was filed on record.

7. Mr. Chapalgaonkar, learned counsel for the appellant submits that in terms of provisions of section 134 (c) of the M.V. Act, it is mandatory on the part of the owner or the driver of the vehicle, as the case may be, to produce the copy of driving licence or its particulars to insurer immediately upon the accident of the insured vehicle. However, the respondents have failed to comply their obligation as per the mandate of law. It is equally mandatory on the part of the

driver of the vehicle, which met with an accident, to produce the driving licence or its particulars to the Police Officer on demand. The respondent owner has not produced such driving licence. The respondent Nos. 6 and 7 (original respondent Nos. 1 and 2) could not produce such driving licence or any particulars to the police. Therefore, the charge sheet came to be filed against rider of the motor cycle for the offence punishable under section 181 of the M.V. Act.

8. Mr. Chapalgaonkar, learned counsel for the appellant submits that in terms of ratio laid down by the Supreme Court in the case of ***Pappu and others vs. Vinod Kumar Lamba, reported in (2018) 3 SCC 208***, the initial burden to produce the driving licence or its particulars is upon the owner of the vehicle and 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 authorized by him to drive the vehicle and was having a valid driving licence at the relevant time. Learned counsel submits that in the instant case, the respondent original respondent Nos. 1 and 2 have failed to discharge the initial burden and thus, onus cannot be shifted on the appellant insurer to prove the defence about breach of the conditions.

9. Mr. Bhokarikar, learned counsel for the respondents original claimants submits that the Tribunal in para 21 of the judgment has

observed that, from entire evidence led by respondent No.3 insurer, is not sufficient to conclude that respondent No.1 was not having valid and effective driving licence on the day of accident. The learned Member of the Tribunal has observed that offending vehicle was duly insured with respondent No.3 insurer covering the date of accident and as such, respondents are jointly and severally liable to pay the compensation to the claimants.

10. Mr. Bhokarika, learned counsel for the respondents claimants in his cross appeal submits that deceased Anil Koli met with an accidental death at young age. He was working as supervisor on one brick-kiln on monthly salary of Rs.8000/-. Deceased Anil was earning additional income of Rs.2000/- to Rs.2500/- p.m. other than the salary. Learned counsel Mr. Bhokarika, submits that considering the young age of the deceased, the Tribunal ought to have considered his future prospects, however, the Tribunal has not considered the same. Learned counsel submits that thus the impugned judgment and award passed by the Tribunal requires modification to the extent of quantum of compensation.

11. I have carefully perused the evidence led by both the parties. On perusal of written statement filed by respondent No.2 owner in the claim petition, it appears that in para 6 of the written statement, respondent No.2 owner has specifically pleaded that respondent No.1 had driven the offending vehicle at the time of accident having

valid driving licence. Admittedly, respondent No.2 owner of the vehicle has not adduced any evidence in support of his plea taken in the written statement. Despite the communication Exh.50 sent to respondent No.2 owner by the appellant insurer and even by the investigating officer, respondent No.2 owner has not produced the driving licence or the particulars of the driving licence of respondent No.1 before the Tribunal.

12. In the case of ***Pappu and others vs. Vinod Kumar Lamba and another (supra)*** relied upon by learned counsel for the appellant insurer, the Supreme Court by referring the case of ***National Insurance Co. Ltd. vs. Swaran Singh, reported in (2004) 3 SCC 297*** has observed that the Insurance company entitled to take a defence that offending vehicle was driven by unauthorized person or the person having no valid driving licence, however, onus would shift on insurance company only after owner of offending vehicle pleads and proves basic facts within his knowledge that driver of offending vehicle was authorised by him to drive the vehicle and was having a valid driving licence at relevant time. It appears that respondent No.2 owner of the offending vehicle, which met with accident, has raised vague plea in the written statement. It is thus held by the Supreme Court that the Insurance company becomes liable only after such foundational facts are pleaded and proved by the owner of the offending vehicle.

13. In the facts of the present case and considering the pleadings and the evidence led by the parties, the ratio laid down by the Supreme Court in the aforesaid case is squarely applicable to the facts and circumstances of the present case. The Supreme court in the said case has considered the question as to “whether in the fact situation of the case the insurance company can be and ought to be directed to pay the claim amount, with liberty to recover the same from the owner of the vehicle”? The Supreme court has referred the ratio laid down in the case of ***National Insurance Company vs. Swaran Singh (supra)***, particularly by referring paras 107 and 110 has directed the insurer to satisfy the award in terms of the insurance policy issued by it and then granted liberty to recover the same from the owner of the vehicle in accordance with law.

14. In the instant case, the appellant insurer has also examined the officer of the insurance company to prove the contents of insurance policy Exh.49. It appears that this is two wheeler package policy. In view of the same, considering the facts and circumstances of the present case and ratio laid down in the aforesaid cases, as referred above by the Supreme Court, it would be just and appropriate if the appellant insurer is directed to pay the claim amount to the respondents-claimants in the first instance with liberty to recover the same from the owner of the vehicle in accordance with law.

15. So far as the quantum of compensation is concern, it appears that deceased Anil Koli met with accidental death at a very young age. It appears that he was bread earner of the family, leaving behind his widow, two minor children and aged parents. Deceased Anil was working as supervisor on a brick-kiln on certain monthly salary. It appears that the Tribunal has not considered the future prospects. In para 12 of the judgment even though the Tribunal has discussed the evidence of the claimants about income of deceased, which is to the tune of Rs.10,500/- p.m. however, considered the monthly income of Rs.4000/- as notional income while deciding the quantum of compensation. Deceased was working as supervisor on a brick-kiln and it is common knowledge that the brick-kiln owner hardly issues any salary certificate or transfer the salary in the bank account of brick-kiln workers. Further the Tribunal has not considered the future prospects of deceased, however, the respondents-claimants could have examined the brick-kiln owner to substantiate their claim about monthly income of deceased. In view of the same, this court left with no other choice but to consider the notional income of deceased Rs.4000/- p.m. however, I am inclined to consider the addition of 40% towards the future prospects considering the young age of the deceased.

16. In view of above, if the monthly income of deceased is considered at Rs.4000/- which equivalent to Rs.48,000/- per annum and by addition of 40% of future prospects, the total income comes to

Rs.67,200/-. If 1/4th amount is deducted towards personal expenses of the deceased, the net income for calculation of compensation comes to Rs.50,400/-. Though there is some controversy with regard to actual age of deceased, however considering the age of deceased alongwith the age of his widow and minor children, the multiplier 17 would be just and appropriate in this case. Thus, the amount of Rs.50,400/- if multiplied by 17, the amount of compensation comes to Rs.8,56,800/-. The Tribunal has awarded Rs.70,000/- towards the non pecuniary damages. Thus, the respondents claimants are entitled for total compensation of Rs.9,26,800/- (Rs. 8,56,800 + 70,000/-).

17. At this stage, the learned counsel for the appellant insurer placed his reliance on the judgment of the Supreme court in the case of ***Oriental Insurance Co. Ltd. vs. Nanjappan and others, reported in (2004) 13 SCC 224*** and submits that for recovery of amount from the insured owner, the insurer shall not be required to file a suit. It may initiate a proceeding before the executing court concerned as if the dispute between the insurer and the owner was the subject matter of determination before the Tribunal and the issue is decided against the owner and in favour of the insurer. Learned counsel submits that in terms of ratio laid down in the aforesaid case, before releasing the amount to the claimants, owner of the vehicle shall be issued a notice and he shall be required to furnish security for the entire amount which the insurer will pay to the claimants. The

offending vehicle shall be attached as part of the security. The executing court shall pass appropriate order in accordance with law.

18. In the instant case, though after giving notice of final disposal, the respondent owner remained absent. It thus appears that the respondent owner has sufficient knowledge about pendency of this matter before this Court and therefore, no such directions are required to be given to the executing court to complete the formalities, as observed in para 8 of the aforesaid order, before releasing of amount to the claimants. Hence, I proceed to pass the following order:-

O R D E R

I. The first appeal as well as the cross appeal are partly allowed with proportionate costs and the judgment and award dated 10.9.2018 is hereby modified to the following effect:-

a) The claim petition is hereby partly allowed and original respondent Nos. 1 and 2 do pay jointly and severally a sum of Rs.9,26,800.00 (Rupees Nine lacs twenty six thousand eight hundred) inclusive amount awarded under Section 140 of the Motor vehicles Act 1988 with interest @ 8% p.a. from the date of registration of claim till the realization of the amount. However, original respondent No.3 insurer shall pay the quantum of compensation to the claimants as per the determination above and with the following conditions:-

i) For the purpose of recovering the same from the

respondents insured, the respondent No.3 insurer shall not be required to file a suit and it may initiate a proceeding before the executing court concerned as if the dispute between the insurer and the owner was the subject matter of determination before the Tribunal and the issue is decided against the owner and in favour of the insurer.

- ii) The award be drawn up in accordance with modification, as above.
 - iii) The amount of compensation deposited by the appellant insurer before this Court in terms of the judgment and award passed by the Tribunal before modification, as aforesaid, shall be paid to the respondents-claimants forthwith in terms of the apportionment as directed by the Tribunal.
 - iv) The appellant insurer shall pay remaining amount to the respondents-claimants in terms of the modified award as above within three months from the date of this order.
 - v) The deficit court fees, if any, be paid as per Rules.
- II. The First appeal, cross appeal and all pending civil applications, are accordingly disposed of.

(V. K. JADHAV, J.)

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