

Shailaja

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
FIRST APPEAL NO.41 OF 2021**

A/W

CIVIL APPLICATION NO.2010 OF 2019

A/W

INTERIM APPLICATION NO.886 OF 2020

Reliance General Insurance Co. Ltd.	]	
570, Naigaum Cross Road,	]	
Next to Royal Indl Estate,	]	
Wadala (E), Mumbai – 400 031.	]	
Mumbai – 400 063.	]	Appellant
Vs.		
1. Smt. Kirati Jigar Jhaveri	]	
Age: 38 years,	]	
R/o 380, Majestic Mansion,	]	
3 rd Floor, SV. VP. Road,	]	
Mumbai – 400 004.	]	(Org. Applicant)
2. M/s. Unique Constructions	]	
At Post: Talwade Valiv Village,	]	
Tal. Vasai, Dist. Thane – 401203.	]	(Org. Applicant)

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Ms. D. Shalini Shankar, for Appellant in F.A. No.41 of 2021 and Applicant in C.A. No.2010 of 2019 and for Respondents in I.A. No.886 of 2020.

Mr. T.J. Mendon, for Respondent in F.A. No.41 of 2021 and C.A. No.2010 of 2019 and for Applicant in I.A. No.886 of 2020.

**Shailaja S.
Halkude**

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CORAM : PRITHVIRAJ K. CHAVAN, J.**RESERVED ON : 29th JANUARY, 2021.****PRONOUNCED ON : 12TH FEBRUARY, 2021.****JUDGMENT:**

1. Challenge in this appeal is to a Judgment and Award passed by the Motor Accident Claims Tribunal, Mumbai in M.A.C.P No.964 of 2011 on 30th July, 2018, by which the respondent-claimant (for short 'claimant') has been awarded compensation of Rs.83,000/- on account of permanent partial disability sustained by her in a motor vehicle accident which took place on 3rd August, 2010 on P.R. Road opposite Nityanand Hotel, Prarthana Samaj Junction, Girgaon, Mumbai.

2. Facts in brief are as follows;

On 3rd August, 2010, claimant was walking on PR road when the offending tanker bearing registration No. MH-04-DS-86 while taking 'U' turn gave dash to the applicant resulting into injuries as described below;

- (i) distal nervo vascular disorder and small hematoma anterior to vastus medial;
- (ii) small heamotoma on the right knee;
- (iii)destruction of power of her right knee joint to some extent;

She was rushed to Harkishandas Hospital. She was admitted in the hospital from 3rd August, 2010 to 11th August, 2010. The claimant had incurred medical expenses of Rs.90,000/-.

3. Driver of the offending tanker has been booked by D.B. Marg Police Station vide Crime No.150 of 2010.

4. The claimant has contended that on account of accidental injuries, she is unable to perform her day-to-day work. The accidental injuries have resulted in causing unbearable pains. Expectation of her life has been shortened. She was advised to take complete rest and also further treatment. The claimant has, therefore, claimed compensation of Rs.3,00,000/- from the insurer and owner of the offending tanker.

5. The owner of the offending tanker has been absent despite service, hence proceeded ex-parte.

6. The appellant-insurer in the written statement denied all the averments made by the claimant in the claim petition. The main challenge in the written statement is that the Driver of the offending tanker possessed a fake driving licence and, therefore, the appellant cannot be held liable to indemnify the owner of the offending tanker as there is a breach of policy condition. Apart from that, it is the contention of the appellant that claim is bad for non joinder of Driver of the offending tanker as a party and secondly, it was a case of contributory negligence.

7. After recording the evidence of the applicant A.W.1-Kirati (claimant herself) at **Exhibit 12**, A.W.2 Jadhav (Employee of Sir Harkishandas Hospital) at **Exhibit 24**, A.W.3-Anant (Accountant of said Hospital) at **Exhibit 29** and A.W.4 – Dr. Khanna at **Exhibit 34**, D.W.1-Ahire (Junicor Clerk of ARTO Andheri) at **Exhibit 38** and D.W. 2 – Pallavi (Legal Manager of Insurer) at **Exhibit 42** and after perusing the documentary evidence, learned Member, M.A.C.T has partly allowed the Petition and directed opposite party-M/s. Unique Constructions and Reliance General Insurance Co. Ltd to jointly and severally pay compensation of Rs.83,000/- with interest @ 7.5% per annum from the date of registration of the Petition till complete realization of the said amount.

8. I heard Ms. D. Shalini Shankar, learned Counsel for the appellant and Mr. T.J. Mendon, learned Counsel for the respondent No.1.

9. The learned Counsel for the appellant would argue that the learned Member of the Tribunal has failed to consider that the driving licence of the Driver of the offending tanker was in the name of someone else and, therefore, it is the case of fake driving licence and, therefore, Insurance Company cannot be held liable to indemnify the owner of the offending tanker. The learned Member of the Tribunal, at the most, could have directed the appellant to pay compensation and recover the same from the owner of the offending tanker. It is further contended that the disability certificate has not been issued by the treating Doctor but by another one who had no occasion to see nature of the injuries

sustained by the claimant.

10. In support of her submission, Ms. Shalini Shankar has placed reliance on some of the authorities, which shall be referred to hereinafter.

11. On the other hand, Mr. Mendon, has supported the impugned judgment and award. He stressed that the investigating report is produced today in this Court for the first time which was not produced before the Tribunal and, therefore, it cannot be considered.

12. Mr. Mendon has placed reliance on a judgment of Calcutta High Court in case of **National Insurance Company Limited Vs. Sohna Singh and others, 2020 ACJ 1946** on the aspect of composite negligence and principles of assessment.

13. On the aspect of fake driving licence, Mr. Mendon has placed reliance on a judgment of the Hon'ble Supreme Court in case of **Pepsu Road Transport Corporation Vs. National Insurance Company, 2013 ACJ Supreme Court, 2440.**

14. Argument of the learned Counsel for the appellant is mainly two fold viz; Driver of the offending tanker possessed a fake driving licence which amounts to breach of policy conditions and, therefore, the appellant is not liable to indemnify the insurer and secondly, the disability certificate of the original applicant came to be issued by a Doctor who had not treated her.

15. Apart from these grounds, a few grounds which have not been argued, however, taken in the memo of appeal are of contributory negligence and non joinder of Driver of the offending tanker who was a necessary party.

16. The law is now well settled that in case of motor vehicle accident, Driver of the offending vehicle is not a necessary party and, therefore, the ground raised by the learned Counsel does not have any force.

17. So far as aspect of contributory negligence is concerned, no evidence has been adduced on behalf of the appellant nor there is anything on record from which it can be even remotely inferred that it was a case of contributory negligence, meaning thereby, the claimant had also to some extent, responsible for the accident. A perusal of the accident report form issued by the Road Transport Officer indicates that the accident was not due to any mechanical defect in the offending tanker.

18. Report of the claimant lodged with the Police indicates that when she was walking on the road, offending tanker came from opposite direction and suddenly took a 'U' turn and dashed her from behind. It seems that the claimant was unaware of the sudden 'U' turn of the offending tanker which came from behind and, therefore, there was no occasion to even see the tanker being negligently driven by the driver which hit her from behind. Her right leg entangled in the wheel of the offending tanker and she was dragged to some distance. Thus, it is clear that there was no contributory negligence. The Driver ought to have taken due care and precaution while taking

a 'U' turn as while doing so, one has to also take into account the width of the road and proper Judgment so as to not obstruct or cause injury to the passerby on the other side of the road. There was no effective cross-examination of the claimant.

19. So far as the aspect of non examination of the treating Doctor is concerned, the claimant has examined A.W. No.4-Dr. Khanna. According to him, the claimant had suffered 38% permanent partial disability due to injuries. Certificate is proved at **Exhibit 35**. The Doctor in his cross-examination, admits that the claimant had approached him after a period of 7 years of the accident and that he had never treated her.

20. Learned Member of the Tribunal has rightly evaluated the evidence of A.W. 4-Dr. Khanna after going through the medical certificates and the injuries stated hereinabove suffered by the claimant in the motor vehicle accident and concluded that the claimant had suffered 10% permanent partial disability which restricted her right leg. It has been observed, correctly so, by the Tribunal that the claimant had nowhere stated that she could not perform her day-to-day household work and further she had not produced any document to show that she took treatment for the accidental injuries after her discharge from Harkishan Hospital after a week. The learned Member of the Tribunal had, therefore, rightly awarded an amount of Rs.8,000/- towards 'loss of income' for a period of two months. I do not find any infirmity in the findings arrived at by the learned Member in quantifying the amount of compensation payable to the claimant which can be said to be a just compensation in the given set of facts and circumstances. Since, the

learned Counsel for the appellant has not seriously challenged the quantum of compensation, it is needless to go into the details of the same.

21. Coming to the issue of fake driving licence of the Driver of the offending tanker, it is the contention of the appellant that this amounts to breach of policy condition and, therefore, the appellant is not liable to indemnify the insurer. In that regard, the appellant had examined D.W.1-Ahire Junior Clerk working in the office of ARTO, Andheri. He has produced extract of driving licence bearing No. MH-02-2006-C-27759 which is at **Exhibit 41**. It appears to have been issued to one Rabi-Ul-Rehman Hakimali Shekh, whereas, name of the Driver of the offending tanker as per F.I.R is Shivnath Shah. At the first place, it was incumbent upon the appellant to show that Driver of the offending tanker was in possession of the driving licence bearing No. MH-02-2006-C-27759 issued from R.T.O, Andheri. Copy of the said driving licence has not been produced by the appellant.

22. D.W.2-Pallavi had deposed that the appellant had appointed an Investigator. A perusal of **Exhibit 41** indicates that an information about the said licence was given to one Suresh Raut. There is no evidence on record to indicate that said Suresh was appointed as an Investigator. Therefore, it is difficult to come to a conclusion that said Suresh Raut is the Investigator appointed by the insurer. There is no report of the investigator allegedly appointed by the appellant. No offence has been registered by the Police against the Driver of the offending tanker under section 3/181 of the Motor Vehicles Act. Merely because extract of the R.T.O indicates the driving licence is in the name of Rabi-Ul-Rehman Hakimali Shekh is not sufficient to hold

that the driving licence in the name of the driver of the offending tanker is fake.

23. The law is well settled that it was incumbent upon the appellant-insurer to show that the owner of the offending tanker had engaged services of Driver of the offending tanker willfully despite knowing that his driving licence is fake. D.W.2-Pallavi admits in her cross-examination that the appellant had not issued any notice to the Driver of the offending tanker for producing the driving licence. This clearly means that the appellant had not made any attempt to verify the genuineness of the driving licence of the offending tanker.

24. A useful reliance has been placed by Mr. Mendon on a well known judgment of the Hon'ble Supreme Court in the case of **Pepsu Road Transport Corporation Vs. National Insurance Company Ltd (supra)**. The Hon'ble Supreme Court was dealing with a situation where the Driver in that case, allegedly possessed a fake driving licence.

25. The Hon'ble Supreme Court referred in this case it's judgment in case of ***United India Insurance Company Limited vs. Lehru and others, (2003) 3 Supreme Court Cases 338***. It would be apposite to reproduce paragraphs 5 and 18 of this judgment;

“5. In United India Insurance Company Limited vs. Lehru and others, a two-Judge Bench of this Court has taken the view that the insurance company cannot be permitted to avoid its liability only on the ground that the person driving the

vehicle at the time of accident was not duly licensed. It was further held that the wilful breach of the conditions of the policy should be established. Still further it was held that it was not expected of the employer to verify the genuineness of a driving licence from the issuing authority at the time of employment. The employer needs to only test the capacity of the driver and if after such test, he was been appointed, there cannot be any liability on the employer. The situation would be different when the employer was told that the driving licence of its employee is fake or false and yet the employer not taking appropriate action to get the same duly verified from the issuing authority. We may extract the relevant paragraphs from the judgment:

*18. Now let us consider Section 149 (2). Reliance has been placed on Section 149 (2) (a) (ii). As seen in order to avoid liability under this provision it must be shown that there is a “breach”. As held in **Skandia and Sohan Lal Passi** cases the breach must be on part of the insured. We are in full agreement with that. To hold otherwise would lead to absurd results. Just to take an example, suppose a vehicle is stolen. Whilst it is being driven by the thief there is an accident. The thief is caught and it is ascertained*

that he had no licence. Can the Insurance Company disown liability? The answer has to be an emphatic “No”. To hold otherwise would be to negate the very purpose of compulsory insurance. The injured or relatives of the person killed in the accident may find that the decree obtained by them is only a paper decree as the owner is a man of straw. The owner himself would be an innocent sufferer. It is for this reason that the Legislature, in its wisdom, has made insurance, at least third party insurance, compulsory. The aim and purpose being that an insurance company would be available to pay. The business of the company is insurance. In all businesses there is an element of risk. All persons carrying on business must take risks associated with that business. Thus, it is equitable that the business which is run for making profits also bears the risk associated with it. At the same time innocent parties must not be made to suffer or loss. These provisions meet these requirements. We are thus in agreement with what is laid down in aforementioned cases viz. that in order to avoid liability it is not sufficient to show that the person driving at the time of accident was not duly licensed. The Insurance Company must establish that the breach was on the part of the insured. When an owner is hiring a driver he will therefore have to check whether the

driver has a driving licence. If the driver produces a driving licence which on the face of it looks genuine, the owner is not expected to find out whether the licence has in fact been issued by a competent authority or not. The owner would then take the test of the driver. If he finds that the driver is competent to drive the vehicle, he will hire the driver. We find it rather strange that Insurance Companies expect owners to make enquiries with RTO's, which are spread all over the country, whether the driving licence shown to them is valid or not. Thus where the owner has satisfied himself that the driver has a licence and is driving competently there would be no breach of Section 149 (2) (a) (ii). The Insurance Company would not then be absolved of liability. If it ultimately turns out that the licence was fake, the Insurance Company would continue to remain liable unless they prove that the owner/insured was aware or had noticed that the licence was fake and still permitted that person to drive. More importantly, even in such a case the Insurance Company would remain liable to the innocent third party, but it may be able to recover from the insured. This is the law which has been laid down in Skandia 's Sohan Lal Passi 's and Kamla 's case. We are in full agreement with the views expressed therein and see no reason to take a different view.

26. Ratio laid down by the Hon'ble Supreme Court in the case of **Pepsu Road Transport Corporation Vs. National Insurance Company** (supra), is squarely applicable to the case in hand.

27. Upshot of the aforesaid discussion is that no interference is warranted in the impugned judgment and award passed by the learned Member, M.A.C.T, Mumbai. Consequently, the appeal stands dismissed with costs.

28. In view of dismissal of the appeal, pending applications, if any, shall stand disposed of.

[PRITHVIRAJ K. CHAVAN, J.]