IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.

FIRST APPEAL NO. 153 OF 2009

National Insurance Company Limited
through its Branch Manager,
D O IV, 40 Durga Sadan,
Balraj Marg, Dhantoli,
Nagpur

...**APPELLANT**

VERSUS

1. Mrs. Sarjabai wd/o Ganpat Deshmukh,
   Age about 60 years, Occ. Nil

2. Rushi Ganpat Deshmukh,
   Age about 45 years.

3. Keshav Ganpat Deshmukh,
   Age about 43 years.

4. Khushal Ganpat Deshmukh,
   Age about 40 years.

5. Shyamrao Ganpat Deshmukh,
   Age about 39 years.

6. Netaji Ganpat Deshmukh,
   Age about 33 years

7. Vasant Ganpat Deshmukh,
   Age about 30 years.

   Respondent Nos.2 to 7 are
   agriculturist by profession.
   All residents of Visora Tehsil,
   Desaiganj, District Gadchiroli.

8. Ganesh Prakash Rajvaidya,
   Age about 32 years and
   resident of Sirispeth, Gattipura,
   Nagpur

9. Nagarjun Domaji Bhalerao,
Age about 50 years,
Occ. Business and
resident of Somwaripeth,
Near Budhwar Bazar Atta Chakki,
Nagpur.

...RESPONDENTS

Shri A.M. Kukday, Advocate for the appellant.
Shri V.N. Morande, Advocate for the respondent Nos.1 to 7.

CORAM : PUSHPA V. GANEDIWALA, J.
DATED : 08/10/2021.

ORAL JUDGMENT :

Heard.

2. The appellant - National Insurance Company Limited, the insurer of the offending vehicle – metador (Mini truck) bearing registration No. MH-32-B-2139, takes exception to the Judgment and Award passed by the Chairman, Motor Accident Claims Tribunal (hereinafter referred to as 'M.A.C.T.'), Gadchiroli dated 10/11/2008 in Motor Accident Claim Petition No.10/2004, whereby the learned Chairman of the Tribunal awarded compensation of Rs.3,00,000/- inclusive of N.F.L. amount of Rs.50,000/- from the date of application till its realization, to the claimants – legal representatives of deceased Ganpat Kuksu Deshmukh. The grievance of the appellant - Insurance

Company in this appeal is that the claimants have failed to prove that the driver – respondent No.9 of the offending vehicle was holding a valid and effective driving license at the relevant time and secondly that without any positive evidence on the income of the deceased, the learned Chairman of the Tribunal has erroneously considered his income from agriculture at Rs.81,500/- per annum.

3. The facts in brief necessary for deciding the present appeal may be stated as under:

A] The accident took place on Wadsa-Kurkheda road near village Visora on 02/08/2003. It is stated that on 02/08/2003, at about 5.45 a.m., while the deceased Ganpat Kuksu Deshmukh was attending the nature's call, one metador (Mini truck) bearing registration No.MH-32-B-2139 came from Wadsa side in a high speed and the driver of the said metador (Mini truck) all of a sudden turned with his vehicle towards deceased Ganpat and gave dash to him. The deceased Ganpat came under the front wheel of the vehicle and sustained serious injuries and died on the spot. The age of the deceased at that time was 60 years.

B] The legal representatives of the deceased filed claim petition claiming compensation of Rs.3,00,000/- inclusive of N.F.L. amount of

Rs.50,000/- from the date of application till its realization, saying that the deceased was earning Rs.60,000/- per year from his agricultural land admeasuring 12 acres and also earning Rs.20,000/- per year by cultivating one field on lease.

4. The appellant – Insurance Company filed its written statement resisting the claim and also took all statutory defences which are available to it under law.

5. The Chairman, M.A.C.T. framed necessary issues below Exh. 35 and recorded evidence as adduced by the parties.

6. One of the claimants by name Netaji Ganpat Deshmukh examined himself below Exh.46 in support of their claim. This witness brought on record all police papers concerning motor vehicular accident so also the copy of Insurance policy below Exh.57. The respondents preferred not to examine any witness in support of their defence.

7. The learned Chairman, M.A.C.T. on appreciation of evidence recorded the finding that the deceased Ganpat Deshmukh died in an accident involving motor vehicle No.MH-32-B-2139 and he was earning Rs.81,500/- per annum and, therefore, the claimants/respondent Nos.1

to 7 are entitled to receive compensation of Rs.3,00,000/- inclusive of N.F.L. amount of Rs.50,000/- from the date of application till its realization with interest @ 7.5% per annum. The Insurance Company and the owner i.e. respondent No.8 by name Ganesh Prakash Rajvaidya were held jointly and severally responsible to pay the amount of compensation to the claimants.

8. This Judgment of the learned Chairman M.A.C.T. is impugned in this appeal.

9. I have heard Shri Kukday, learned counsel appearing on behalf of the appellant and Shri Morande, learned counsel appearing on behalf of respondent Nos.1 to 7. I have also perused the record with the assistance of learned both the counsel.

10. On the basis of submissions made on behalf of both the parties, the following points arise for the consideration of this Court :

(i) Whether the directions in the nature of 'pay and recover' can be granted, in the absence of proof of valid and effective driving license of the driver of the offending vehicle?

(ii) In the absence of filing of any cross-objection or cross-appeal, whether the respondent Nos.1 to 7/claimants are entitled to receive just and reasonable compensation?

11. As far as, point with regard to the principle of 'pay and recover' is concerned, it is the contention of the learned counsel Shri A.M. Kukday appearing on behalf of the appellant – Insurance Company that the record is absolutely silent with regard to driving license of the driver of the offending vehicle at the relevant time and, therefore, learned counsel urged that there is a clear breach of terms and conditions of the policy and urged to issue directions in the nature of 'pay and recover'.

12. None appeared for the owner of the vehicle despite due service. Learned counsel Shri Morande since appearing for claimants has nothing to say about this issue as the dispute is between the insured and the insurer.

13. I have considered the submissions made by learned counsel Shri Kukday and I do not find the same to be acceptable, considering the Judgment of the Hon'ble Apex court in the case of *National Insurance Company Ltd. Vs. Swaran Singh and others AIR 2004 SC 1531* wherein the Hon'ble Apex Court in its comprehensive judgment has considered the aspect of defences open to the Insurance Company and the breach of

policy conditions, so also the principle of 'pay and recover'. The Hon'ble Apex Court in conclusion recorded summary of findings to the various issues as raised in the petition in paragraph No.105. As per finding No.(iii), the Hon'ble Apex Court has held that the breach of policy condition e.g. disqualification of driver or invalid driving licence of the driver, as contained in sub-section (2)(a)(ii) of Section 149 have to be proved to have been committed by the insured for avoiding liability by the insurer and mere absence, fake or invalid driving licence or disqualification of the driver for driving at the relevant time, are not in themselves defences available to the insurer against either the insured or the third parties. It is further held that to avoid its liability towards insured, the insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by duly licensed driver or one who was not disqualified to drive at the relevant time.

14. In the instant case, the Insurance Company, although filed its written statement, however, failed to examine any witness to substantiate its defence that the driver of the offending vehicle was not holding an effective driving license at the relevant time. As held in the aforesaid Judgment of the Hon'ble Apex Court, mere absence of driving

license at the relevant time, is not in itself a defence available to the Insurance Company unless, the Insurance Company proves that the negligence on the part of the owner to take reasonable care in the matter of fulfilling the conditions of the policy regarding use of vehicle by duly licensed driver.

15. In view of the aforesaid exposition of law by the Hon'ble Apex court, this Court is not inclined to give directions to the appellant/insurance company to recover the amount of compensation from the owner of the offending vehicle, as urged by the learned counsel for the appellant. The judgment in the case of *Shamanna and anr. Vs. Divisional Manager, Oriental Insurance Co. Ltd. and ors.* AIR 2018 SC 3726 would also be of no assistance to the learned Counsel. In the said judgment the Hon'ble Apex Court relied on the ratio in the case of Swaran Singh and held that onus is always upon the insurance company to prove that the driver had no valid driving licence and that there was breach of policy condition. In the instant case, at the cost of repetition, the appellant - insurance company has failed to prove that the diver was not holding a valid and effective driving licence and there was a fundamental breach of the policy conditions by the owner of the vehicle. Therefore, the issue No.1 is answered accordingly.

16. With regard to second issue, the Larger Bench of the Hon'ble Apex Court in the case of *Surekha and others Vs. Santosh and others 2020 ACJ 2156*, observed that the motor accident claims courts should not take hyper-technical approach and ensure that just compensation is awarded to the affected person or the claimants. The Hon'ble Apex Court was pleased to observe the aforesaid in the context that the High Court in this case, declined to grant enhancement in compensation merely on the ground that the appellant had failed to file cross-appeal.

17. In the instant case, even though the Chairman of the M.A.C.T. although held that the claimants are entitled to receive Rs.4,34,664/- however, as the claimants claimed only Rs.3,00,000/- towards compensation, the same was awarded by the Tribunal. Shri Kukday, learned counsel for the appellant submits that the Tribunal has grossly erred in considering the annual income of the deceased of Rs.81,500/- without any documentary evidence on record.

18. On the contrary, Shri Morande, learned counsel for the claimants submits that the claimants are entitled to receive enhanced amount of compensation in the light of judgment of the Constitution Bench of the Hon'ble Apex Court in the case of *National Insurance Company Limited Vs. Pranay Sethi & Ors. (SLP Civil No. 25590/2014,*

decided on 31/10/2017) and *Magma General Insurance Co. Ltd. Vs. Nanu Ram alias Chuhru Ram and ors.,* reported in *2018 (11) Scale 247*.

19. I have considered the rival submissions on this aspect.

20. The learned Chairman of the Tribunal, while calculating the amount of compensation has taken annual agricultural income of the deceased at Rs.80,500/-. The learned counsel for appellant harped on the point that the learned Chairman of the Tribunal has erroneously concluded the annual income as Rs.80,500/- of the deceased, in the absence of documentary evidence. Evidently, the aforesaid income was from the agricultural operations. In my considered opinion, this meagre income of Rs.80,500/- is difficult to be proved through any documentary evidence. The deceased was survived by wife and six children. The age of the deceased at the relevant time was 60 years. It is inconceivable that the deceased was not earning any income from his agricultural property. I do not find any infirmity in the findings recorded by the learned Chairman of the Tribunal. The claimants would be entitled to receive the enhanced amount of compensation in the following manner :

	Rs.80,500/-	Annual Income
(-)	Rs.16,100/-	One fifth deduction towards personal expenses of deceased.
	Rs.64,400/-	Total
	Rs.6,440/-	10% towards future prospects

(x)	9	Multiplier applied as deceased was 60 years of age.
	Rs.6,37,560/-	Should be just compensation
(+)	Rs.15,000/-	Funeral Expenses
(+)	Rs.15,000/-	Loss of estate
(+)	Rs.2,00,000/-	Loss of consortium (Rs.40,000 x 5) (Magma General Insurance Co. Ltd. Vs. Nanu Ram alias Chuhru Ram and ors. reported in 2018 (11) Scale 247)
(+)	Rs.8,67,560/-	Total compensation considered (Rs.6,37,560/- + Rs.2,30,000/- = Rs.8,67,560/- with 7.5% annual interest)
	Rs.3,00,000/-	**Total compensation is granted by the learned Tribunal, Gadchiroli**

21. For the aforesaid reasons, the respondent Nos.1 to 7 are entitled to receive total compensation of Rs.8,67,560/- with interest @ 7.5% from the date of application. The appellant – Insurance Company to deposit the balance decretal amount in terms of the aforesaid calculations within a period of three months. Thereafter the claimants / respondent Nos.1 to 7 would be entitled to withdraw the same with accrued interest thereon.

22. The withdrawal of the aforesaid amount shall be subject to payment of deficit court fees on the enhanced amount of compensation. The first appeal stands dismissed.

JUDGE

**DB*