IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

FIRST APPEAL NO.2365 OF 2020

National Insurance Co.Ltd.,
Through Branch Manager,
Branch Officer, Hanuman Chowk,
Main Road, Latur
National Insurance Company Ltd.,
Through its Authorized Official,
Hazari Chamber, Station Road,
Aurangabad .. Appellant

Versus

1. Vaishaliw/o Bhaiyyasaheb Dengale,
Age 29 years, Occu. H.H.

2. Adarsh s/o Bhaiyyasaheb Dengale,
Age 12 years, Occu. Education

3. Aryan s/o Bhaiyyasaheb Dangale,
9 years, Occu. Education

Claimant Nos.2 & 3 are minors,
Through their guardian mother
Vaishali Dangale,i.e. Respondent no.1

4. Bharat s/o Kondiba Dangale,
Age 65 years, Occ : Nil

5. Laxmi w/o Bharat Dangale,
Age 60 years, Occ: Nil

All R/o Bhatangalli, Taluka
and District Latur

6. Jarnailsing s/o Gurdassingh Saini,
Age major, Occu. Business,
R/o Shop No.1 and 2, Mayank Complex,
Ground floor, Amravati road, Dattwadi,
Nagpur 440 023

7. Sarmail Singh s/o Sajjan Singh,
Age major, Occu. Driver of Luxury Bus,
R/o Near Gurdwara, Plot No.671,
Baba Deep Singh Nagar Nari road,
Nagpur 400 026 .. Respondents

Mr A.S. Usmanpurkar, Advocate for appellant
Mr S.S. Manale, Advocate for respondents no.1 to 5
Mr S.A. Kothari, Advocate h/f Mr Sagar Ladda, Advocate for respondent no.6 & 7

CORAM : SHRIKANT D. KULKARNI, J.

RESERVED ON : 21.2.2022
PRONOUNCED ON : 6.4.2022

ORDER

1. This appeal takes an exception to the impugned judgment and award dated 11.10.2019 passed in M.A.C. P. No.232 of 2016 by the Member, M.A.C.T., Latur.

2. The brief facts giving rise to this appeal are as under :

(i) On 3.8.2016, Bhaiyyasaheb (since deceased) along with his friend Angad Zodpe were proceeding on motorcycle bearing No.MH-24-W-5998 on Latur-Nanded road. They reached in front of Agriculture college when luxury bus bearing No.MH-40-AT-0735 came from opposite direction, driven in a rash and negligent manner from Nanded-Latur side and gave dash to the motorcycle of the deceased by coming to wrong side. Bhaiyyasaheb died on the spot. Respondent no.7 was driving the luxury bus owned by respondent no.6 at the time of accident.

(ii) The luxury bus was duly insured with the appellant at the time of accident.

(iii) The claimants have filed claim petition against the appellant/insurance company, driver and owner of the luxury bus under Section 160 of the Motor Vehicles Act, 1966 before the M.A.C.T at Latur and sought compensation of Rs.10 lakhs.

(iv) The owner and driver of the vehicle filed their common written statement at Exh.25 and denied the cause for the accident. However, they admitted that respondent no.7/Sarmail Singh s/o Sajjan Singh was driving the luxury bus at the time of accident, owned by respondent no.6/Jarnailsing s/o Gurdassingh Saini and insured with the appellant at the time of accident. However, owner and driver of the vehicle did not prefer to adduce any evidence in support of their contentions.

(v) The appellant/insurance company filed written statement vide Exh.13 and raised the defence that the driver of the luxury bus had no valid and effective licence at the time of accident. It is a case of breach of terms and conditions of the policy and, therefore, appellant/insurance company is not liable to pay the compensation. It is further contended that deceased was driving the motorcycle in a rash and negligent manner and accident was caused due to his own fault, luxury bus driver was not at fault.

(vi) The learned Member of the tribunal, after considering the rival pleadings of the parties, evidence on record and argument advanced on behalf of both the sides was pleased to allow the claim and directed to the appellant/insurance company and owner of the vehicle to pay compensation of Rs.23,38,000/- (including NFL amount) jointly and severally to the claimants with interest @ 7.5% per annum from the date of claim petition till its realisation.

(vii) Feeling aggrieved by the judgment and award passed by the Member, M.A.C.T., Latur, the appellant/insurance company has preferred this appeal and raised same grounds.

3. Heard Mr A.S. Usmanpurkar, learned Counsel for the appellant, Mr S.S. Manale, learned Counsel for respondents no.1 to 5/original claimants and Mr S.A. Kothari holding for Mr Sagar Ladda, learned Counsel for respondents no.6 and 7 (owner and driver) of luxury bus.

4. Mr Usmanpurkar, learned Counsel for the appellant invited my attention to the copy of driving licence produced before the tribunal and extract of driving licence issued by R.T.O., Nagpur vide Exh."A" by way of Civil Application No.3240 of 2021. He submitted that the driving licence of the luxury bus was valid upto 10.10.2010. The driver has not renewed the driving licence till 16.9.2016. The date of accident is 3.8.2016. He, therefore, vehemently submitted that on the date of accident, luxury bus driver was not holding valid and effective driving licence. The copy of driving licence produced before the tribunal does not reflect true picture. The appellant/insurance company has obtained extract of driving licence of the luxury bus driver and came to know about this position.

5. Mr Usmanpurkar, learned Counsel for the appellant submitted that owner and driver of the luxury bus have simply filed written statement. They have not adduced any evidence to prove the basic facts which were within their knowledge. Mr Usmanpurkar has placed his reliance in case of **Pappu and ors., Vs. Vinod Kumar Lamba and anr.,** reported in **2018 (1) L.A.R. 140.** He submitted that the owner and driver of the vehicle have failed to prove the basic facts within their knowledge. They have failed to prove that driver of luxury bus was authorised by the owner of the vehicle to drive the vehicle and was having a valid and effective driving licence at the relevant time. He submitted that insurance company would become liable only when basic facts are pleaded and proved by the owner of the vehicle in view of Section 149 (2) (a) (ii) of the Motor Vehicles Act, 1988. Mr Usmanpurkar, by taking help of above citation of the Apex Court vehemently submitted that the appellant/insurance company is not liable to pay the compensation. It is for the owner of the luxury bus to shoulder the responsibility. The insurance company cannot be fastened with the liability

in view of legal position made clear by the Apex Court in case of **Pappu and ors., Vs. Vinod Kumar Lamba and anr. Pappu and ors., Vs. Vinod Kumar Lamba and anr** (supra).

6. Mr S.S. Manale, learned Counsel for respondents no.1 to 5/original claimants supported the impugned judgment and award passed by the tribunal. He submitted that the appellant/insurance company though contested the claim and raised the defence under Section 149 of the Motor Vehicles Act, 1988, not adduced any iota of evidence to prove its defence. The tribunal has considered the pleadings of both the sides and evidence on record and accordingly, allowed the claim. He submitted that the impugned judgment passed by the tribunal does not suffer from any legal error. The view taken by the tribunal is proper and correct. The tribunal has awarded adequate compensation having regard to the facts of the case and evidence on record. He submitted that the appellant/insurance company has attempted to produce one extract of the driving licence of the luxury bus driver and on that basis, defence is sought to be proved at appellate stage. It is not permissible in the eye of law without evidence.

7. Mr Manale, learned Counsel for respondents no.1 to 5/original claimants submitted that on the date of accident, luxury bus was duly insured with the appellant. As per police papers, driving licence of the luxury bus driver was valid and effective on the date of accident. The findings recorded by the tribunal are based upon evidence.

8. Mr Manale submitted that Angad Zodpe (since deceased) was a pillion rider proceeding on the motorcycle driven by Bhaiyysaheb. Both of them died in the accident occurred on 3.8.2016 about 3.00 p.m. on Latur-Nanded

road in front of Agriculture College at Latur. The legal heirs of Angad Zodpe have also filed claim petition vide M.A.C.T. No.205 of 2016 against the same driver, owner and insurance company. The Member, M.A.C.T., Latur was also pleased to allow that claim and directed to pay compensation to the claimants in M.A.C.P. No.205 of 2016. The tribunal awarded Compensation of Rs.9,34,000/- by fastening the liability jointly and severally on the owner, driver and the insurance company of the vehicle. He pointed out that the appellant/insurance company has not preferred any appeal against the judgment and award passed in M.A.C.P.No.205 of 2016 by the Member, M.A.C.T., Latur. But, the appellant/insurance company has preferred the appeal against the judgment and award passed in M.A.C.P. No.232 of 2016. He submitted that the appellant/ insurance company has not come before the Court with clean hands. There are no *bona fides* on the part of appellant/insurance company while filing this appeal. It is a pick and choose policy adopted by the insurance company. The M.A.C.P. No.232 of 2016 is preferred by the claimants in this appeal and M.A.C.P. No.205 of 2016 was preferred by the legal heirs of Angad Zodpe. The parties to the claim petitions before the tribunal are one and the same, but the appellant/insurance company has only chosen to prefer this appeal against impugned judgment and award passed in M.A.C.P. No.232 of 2016. It is not permissible. It is hit by Section 11 of Code of Civil Procedure. Mr Manale placed his reliance in case of **Narayana Prabhu Venkateswara Prabhu Vs. Narayana Prabhu Krishna Prabhu,** reported in **1977 AIR (SC) 1268.**

9. Mr Manale, learned Counsel for the claimants submitted that the owner of the vehicle has not proved basic facts within his knowledge regarding driver of the luxury bus was authorised by him to drive the luxury bus and had a valid and effective driving licence at the time of accident, the order of pay and

recover may be passed so as to make substantial justice. He has placed his reliance on the citation in case of **Shamanna and anr., Vs. Divisional Manager, Oriental Insurance Company Limited and ors.,** reported in **2018 AIR (SCW) 3726.**

10. Mr S.A. Kothari, learned Counsel for respondents no.6 and 7 submitted that owner of the vehicle had made *bona fide* enquiry about driving licence of the driver and satisfied himself that he was holding valid driving lilcence and accordingly, engaged his services. Respondent no.7 was duly authorised to drive luxury bus and holding valid driving licence at the time of accident. The licence of the luxury bus was renewed on 20.11.2013 and was valid upto 10.10.2016 thereby covering the date of accident. He, therefore, submitted that the appellant/insurance company is liable to pay the compensation and cannot run away from the liability.

11. Having regard to the submissions of learned Counsel for respective sides, I have gone through the impugned judgment passed by the Member, M.A.C.T., Latur and evidence on record coupled with pleadings of respective parties.

12. There is no dispute about the quantum of compensation awarded by the tribunal. The dispute is centered around with the liability to pay the compensation, whether it is joint and several liability or sole liability of the owner of the vehicle to pay the compensation in view of defence raised by the insurance company.

13. It appears from the record that there were two claim petitions filed before the M.A.C.T., Latur. One claim petition is filed by the present claimants wherein the insurance company has preferred the appeal. Whereas, against the

impugned judgment and award passed in M.A.C.P. No.205 of 2016, the same insurance company has not preferred the appeal and accepted the award and thereby liability to pay the compensation awarded by the tribunal in M.A.C.P. No.232 of 2016. M.A.C.P. No.232 of 2016 and M.A.C.P. No.205 of 2016 are arising out of same accident. The owner, driver and the insurer are the same parties in both the claim petitions. The insurance company has chosen to prefer an appeal and challenged the judgment and award passed in M.A.C.P. No.232 of 2016. The conduct of the appellant/insurance company is somehow appears to be not *bona fide.* No reasons are forthcoming from the appellant/insurance company about such use of arbitrary decision. This Court has made query to the learned Counsel for the appellant in this regard when learned Counsel for the appellant made it clear that the insurance company has not preferred any appeal against the judgment and award passed in M.A.C.P. No.205 of 2016 by the M.A.C.T., Latur and satisfied the award by making payment of compensation. In this background, there seems to be lack of *bona fides* on the part of insurance company while prosecuting this appeal. Why different treatment is given to the decision rendered by the same tribunal arising out of one and the same accident and that too parties are also same except claimants.

14. Be that as it may, the doctrine of *res judicata* may not attract though argued by Mr S.S. Manale, learned Counsel for the original claimants by placing reliance on citation in case of **Narayana Prabhu Venkateswara Prabhu Vs. Narayana Prabhu Krishna Prabhu** (supra) in view of the facts of the case in hand and facts of the cited case are distinguishable.

15. The appellant sought to produce certified copy of extract of driving licence issued in favour of the luxury bus driver - Sarmail Singh s/o Sajjan Singh/respondent no.7 by R.T.O. Nagpur by moving Civil Application no. 3240 of

2021. This Court was pleased to allow the production without prejudice to the rights and interest of the opposite party and subject to the evedentiary value according to the provisions of Evidence Act. Mr Usmanpurkar, learned Counsel for the appellant by placing reliance on the extract of driving licence of the luxury bus driver put forth his defence that luxury bus driver was not holding valid and effective driving licence on the date of accident. He pointed out that the owner of the vehicle ought to have produced his evidence before the tribunal to prove the basic facts within his knowledge regarding the driver of the offending vehicle who authorised by him to drive the vehicle was having valid and effective driving licence at the relevant time.

16. I found merit in the submissions of Mr Usmanpurkar, learned Counsel for the appellant/insurance company. It is pertinent to note that driver and owner of the vehicle/luxury bus have filed their common written statement before the tribunal vide Exh.25. They contended that respondent no.7 was driver and luxury bus was duly insured with the appellant at the time of accident. The bus driver was authorised to drive the luxury bus and was having valid and effective driving licence on the date of accident. It is worthy to note that neither owner of the vehicle nor driver produced their evidence in support of their contentions. Mere filing written statement/pleadings does not dispensed with the proof. It was necessary on the part of the owner of the vehicle to produce his evidence to prove the basic facts within his knowledge that the driver of the offending vehicle/luxury bus was authorised by him to drive the luxury bus and he was having a valid and effective driving licence at the time of accident, particularly when the insurance company has come out with a defence that driver of the offending vehicle was not having valid driving licence at the time of accident by taking aid of Section 149 of the Motor Vehicles Act, 1988.

17. Mr Usmanpurkar, learned Counsel for appellant/insurance company has placed his reliance on the citation in case of **Pappu and ors., Vs. Vinod Kumar Lamba and anr.** (supra) wherein (Honourable three Judges Bench) the Honourable Supreme Court in paragraph 11 has observed as under :

> "11. The question is: whether the fact that the offending vehicle bearing No.DIL-5955 was duly insured by respondent No.2 Insurance Company would per se make the Insurance Company liable? This Court in the case of **National Insurance Co. Ltd**. (supra), has noticed the defences available to the Insurance Company under Section 149 (2) (a) (ii) of the Motor Vehicles Act, 1988. 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 licence at the relevant time. In the present case, the respondent No.1 owner of the offending vehicle merely raised a vague plea in the Written Statement that the offending vehicle DIL-5955 was being driven by a person having valid driving licence. He did not disclose the name of the driver and his other details. Besides, the respondent No.1 did not enter the witness box or examine any witness in support of this plea. The respondent No.2 Insurance Company in the Written Statement has plainly refuted that plea and also asserted that the offending vehicle was not driven by an authorised person and having valid driving licence. The respondent No.1 owner of the offending vehicle did not produce any evidence except a driving licence of one Joginder Singh, without any specific stand taken in the pleadings or in the evidence that the same Joginder Singh was, in fact, authorised to drive the vehicle in

> question at the relevant time. Only then would onus shift, requiring the respondent No.2 Insurance Company to rebut such evidence and to produce other evidence to substantiate its defence. Merely producing a valid insurance certificate in respect of the offending Truck was not enough for the respondent No.1 to make the Insurance Company liable to discharge his liability arising from rash and negligent driving by the driver of his vehicle. 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 licence. 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 licence 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".

18. In view of the above legal position, it was incumbent on the part of owner of the luxury bus to produce his evidence so that onus would shift on the insurance company. Even though the insurance company has produced extract of the driving licence of the luxury bus driver at late in the appeal, that cannot be a ground to discard that important documentary evidence. The owner of the luxury bus seems to have not produced his evidence in support of his pleadings and thereby failed to prove the basic facts within his knowledge that luxury bus driver was authorised by him to drive the vehicle and he was having a valid and effective driving licence at the relevant time. According to the decision in case of **Pappu and ors., Vs. Vinod Kumar Lamba and anr.** (supra), mere producing

a valid insurance certificate in respect of the offending vehicle was not enough to make the insurance company liable to discharge his liability arising from rash and negligent driving by the driver of the vehicle. 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 licence. Without producing any evidence to substantiate the fact that the copy of the driving licence produced in support was of a person who, in fact, was authorised to drive the offending vehicle at the relevant time, the owner 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.

19. Having regard to the above legal position made clear by the Hnourable Supreme Court in case of **Pappu and ors., Vs. Vinod Kumar Lamba and anr.** (supra), the owner of the vehicle, present respondent no.6 has failed to prove the basic facts within his knowledge that respondent no.7 was authorised by him to drive the luxury bus and he was holding a valid and effective driving licence at the relevant time. Thus, the owner/respondent no.6 has failed in proving such facts and certainly, the onus would not shift on the insurance company. The insurance company cannot be held liable to pay the compensation when the owner of the vehicle has failed to prove basic facts within his knowledge regarding valid and effective licence of the driver of offending vehicle at the relevant point of time.

20. Now, coming to liability to pay the compensation in such cases of breach of policy. In case of **Pappu and ors., Vs. Vinod Kumar Lamba and anr.** (supra), the Honourable Supreme Court to subserve the ends of justice

directed the insurance company to pay the amount of compensation to the claimants in the first instance, with liberty to recover the same from the owner of the vehicle in accordance with law. The same view is taken by the Honourable Supreme Court in case of **Shamanna and anr., Vs. Divisional Manager, Oriental Insurance Company Limited and ors.** (supra).

21. Having regard to the above reasons and discussion, it is very much clear that the appellant/insurance company cannot be fastened with the liability jointly and severally with the owner of the luxury bus to pay the compensation to the claimants. However, the appellant/insurance company shall pay the claim amount awarded by the tribunal to the claimants in the first instance and may recover the same from the owner of the vehicle/luxury bus and to that extent, the judgment and award passed by the tribunal needs to be modified. In the result, appeal succeeds partly as under :

ORDER

(i) The appeal stands partly allowed.

(ii) Respondent no.6/owner of the luxury bus (Jarnailsing s/o Gurdassingh Saini) and respondent no.7/driver of the luxury bus (Sarmail Singh s/o Sajjan Singh) shall be liable to pay the compensation of Rs.23,38,000/- (Rs. Twenty three lakhs thirty eight thousand only) (including N.F.L. amount) with interest @ 7% per annum from the date of claim petition till its realisation in full.

(iii) However, the appellant/insurance company shall first satisfy the award passed by the tribunal by making payment of compensation to the claimants and shall recover the same from the abovesaid owner and driver of the luxury bus in accordance with law.

(iv) The award be modified accordingly.

(v) The amount of compensation, if deposited in this Court by the appellant/insurance company, it shall be paid to the claimants as per the apportionment made under the award by the tribunal.

(III) The First Appeal is accordingly disposed of.

(IV) No order as to costs.

(SHRIKANT D. KULKARNI, J.)

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