

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

FIRST APPEAL NO. 1290 OF 2011

1. Ayushi d/o Bharat Mali
Age : 11 years, occ : student
R/o Village Ajintha, Tal. Sillod,
District Aurangabad.
Under guardianship of
Ramesh Ramgopal Mali
R/o Ajintha, Taluka Sillod,
District Aurangabad.
2. Ramesh Ramgopal Mali
Age : 59 years, occ : nil
R/o Ajintha, Taluka Sillod,
District Aurangabad.
3. Yeshoda w/o Ramesh Mali
Age : 50 years, occ : household
R/o Ajintha, Taluka Sillod,
District Aurangabad.

Appellants

Versus

1. M/s Gujrat Andhra Road
Carriers Through K.Kewalsing
Bhajansing
Age : major, occ : business
R/o C/o G.A.R.C. Godown,
Nizamabad, Andhra Pradesh
2. Ganesh Waghmare
Age : major, occ : driver
R/o C/o G.A.R.C. Godown,
Nizamabad, Andhra Pradesh
3. United India Insurance Co. Ltd.
Through its Divisional Manager,
Divisional Office, Osmanpura,
Aurangabad.
4. Sonal w/o Bharat Mali
(Deleted)

Respondents

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Mr. R.K. Khandelwal, Advocate for the appellants.
Mr. A.G. Kanade, Advocate for respondent No.3.

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CORAM : SANDIPKUMAR C. MORE, J.

Judgment Reserved on : 18th August 2022
Judgment pronounced on : 16th September 2022

Judgment:

1. The appellants, who are the original claimants, have challenged the judgment and award dated 21.07.2009 in Motor Accident Claim Petition No. 686/2001, passed by the learned Member, Motor Accident Claims Tribunal and Ad-hoc District Judge-1, Aurangabad (hereinafter referred to as “the learned Tribunal”). It is significant to note that at the time of filing this appeal, the appellants had raised so many grounds challenging the impugned award, such as, applicability of lower multiplier, consideration of lower income, dependency of appellants upon deceased, granting lower rate of interest and also the amount of compensation towards lower side. However, at the time of argument, the learned Counsel for the appellants, by filing fresh synopsis on 04.07.2022, restricted the challenge to the impugned award only to the extent of exonerating the Insurance Company from paying compensation to the claimants and waived the other challenges.

2. Further, it is significant to note that the original claim petition was filed by the wife of deceased Bharat Ramesh Mali namely Sonal alongwith minor daughter and parents of the deceased, but the learned Tribunal subsequently made wife of the deceased as respondent No.4 from original claimant No. 1 as she remarried. Further, this Court, vide order dated 18.03.2011 on instructions received by the learned Counsel for the appellants, permitted to delete the name of the said wife of deceased from the array of respondents in this appeal. As such, the wife of deceased on her remarriage, is not the party to this present appeal.

3. It is not disputed that deceased Bharat Ramesh Mali died in the accident took place on 20.07.2001 at about 5.30 p.m. when he was proceeding to Fardapur on motorcycle and was crushed under the offending truck bearing registration No. AP-25-T-2917.

4. Learned Counsel for the appellants submits that the present appeal has been filed only on the ground that the learned Tribunal should not have been exonerated the Insurance Company totally since respondent No.2 – driver was not holding valid driving licence. Learned Counsel for

the appellants however did not dispute the part of calculation of compensation. He further submits that the learned Tribunal, despite observation in para-12 and para-13 of the impugned judgment that at the time of accident offending truck was insured with respondent No.3 and that respondent No. 2 driver was having licence to drive light motor transport vehicle, exonerated the Insurance Company totally. He further submits that as per Section 149 of the Motor Vehicles Act, the insurer has to satisfy the award even if there is breach of policy condition. He then submitted that the learned Tribunal could have passed 'pay and recover' order when it was found that the driver of offending truck was not having proper licence to drive heavy goods motor vehicle. Besides his submissions, the learned Counsel for the appellants relied upon the following judgments :

- (i) New India Assurance Co. Ltd. vs Swati Dhondiram Nagargoje & others, 2017 (3) Mh.L.J.124*
- (ii) Singh Ram vs Nirmala and others 2019 (1) Mh.L.J. 20*

5. On the contrary, respondent Nos.1 and 2 being owner and driver of the offending truck, though served by paper publication, remained absent.

6. On the other hand, learned Counsel for respondent No. 3 Insurance Company submitted that the learned Tribunal has rightly exonerated the Insurance Company from the liability of paying compensation to the claimants as it was found that the driver of offending truck was not holding valid driving licence and thereby committed breach of policy condition. However, in the alternative the learned Counsel for respondent No. 3 Insurance Company submitted that if this Court comes to the conclusion that the Insurance Company is also liable to pay the compensation jointly and severally with respondent Nos.1 and 2, then pay and recover order be passed.

7. I have carefully gone through the impugned judgment and award alongwith record and proceedings of the claim petition with assistance of the learned Counsel for appellants as well as Insurance Company.

8. It is to be noted here that though the claimants initially had challenged the impugned judgment on various grounds, but thereafter they preferred to challenge the impugned judgment on the only ground as to why the Insurance Company has been exonerated by the learned Tribunal from the liability of paying compensation to the

claimants. Therefore, this is the only ground which is required to be considered in the instant appeal. According to the learned counsel for the appellants, the learned Tribunal should not have exonerated the Insurance Company from the liability of paying compensation since the driver of offending truck was though not having licence to drive heavy goods vehicle, but he was at least having licence to drive light motor vehicle, such as car and jeep, etc. He submits that this cannot be treated as fundamental breach of policy condition. He also submitted that the learned Tribunal at least should have passed pay and recover order as per the observations of this Court and the Hon'ble Apex Court in the judgments cited supra.

9. In the case of ***New India Assurance Co. Ltd. vs Swati Dhondiram Nagargoje*** (supra), this Court in para-5 has made the following observation :

“5. It appears that the driver of the Tempo was holding driving licence prior to the accident. It is not the case that, the driver of the tempo was not having any driving licence at all. The certificate extract issued by the RTO, Pune was produced before the Tribunal by the appellant-insurer and the same was exhibited by the Tribunal. It appears from the record that, the respondents/original claimants have not raised any objection to exhibit the said document. It thus appears that the appellant-insurer succeeded in

proving that the driver of the tempo was not having valid and effective driving licence at the time of accident. In view of this, the Tribunal has committed an error to saddle the appellant- insurer with liability to pay the compensation alongwith respondent no.1”.

10. Further, this Court in the same judgment has also referred the observation of Hon'ble Apex court in the case of S. Iyyapan Vs. United India Insurance Company Limited and another reported in 2013(6) Mh.L.J. (SC) 1 which is as follows :

“In a case S. Iyyapan (supra) in paragraph no.17 of the judgment, the Supreme Court has made following observations :-

"17. Reading the provisions of Sections 146 and 147 of the Motor Vehicles Act, it is evidently clear that in certain circumstances the insurer's right is safeguarded but in any event the insurer has to pay compensation when a valid certificate of insurance is issued notwithstanding the fact that the insurer may proceed against the insured for recovery of the amount. Under Section 149 of the Motor Vehicles Act, the insurer can defend the action inter alia on the grounds, namely,

(i) the vehicle was not driven by a named person,

(ii) it was being driven by a person who was not having a duly granted licence, and

(iii) person driving the vehicle was disqualified to hold and obtain a driving licence.

Hence, in our considered opinion, the insurer cannot disown its liability on the ground that although the driver was holding a licence to drive a light motor vehicle but before driving

light motor vehicle used as commercial vehicle, no endorsement to drive commercial vehicle was obtained in the driving licence. In any case, it is the statutory right of a third party to recover the amount of compensation so awarded from the insurer. It is for the insurer to proceed against the insured for recovery of the amount in the event there has been violation of any condition of the insurance policy."

11. On going through the above observation of the Hon'ble Apex Court, it is evident that it is statutory right of the third party to recover the amount of compensation from the insurer even in the event in violation of any condition of the insurance policy. By relying on the aforesaid observation of the Hon'ble Apex Court, this Court had directed the insurer to pay first the compensation to the claimants and then to proceed against the insured for recovery of the amount.

12. Further, the Hon'ble Apex Court in the case of ***Singh Ram vs Nirmala and others*** (supra) has followed the same course and confirmed the order of High Court directing the insurer to pay compensation and to recover it from the owner and driver though at the time of accident the licence of the driver was not valid. The Hon'ble Apex Court in the said judgment has made the following observation while coming to final conclusion :

“(iii) The breach of policy condition e.g. disqualification of the driver or invalid driving licence of the driver, as contained in sub-section (2)(a)(ii) of Section 149, has to be proved to have been committed by the insured for avoiding liability by the insurer. 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. To avoid its liability towards the 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 a duly licensed driver or one who was not disqualified to drive at the relevant time.

(iv) Insurance companies, however, with a view to avoid their liability must not only establish the available defence(s) raised in the said proceedings but must also establish “breach” on the part of the owner of the vehicle; the burden of proof wherefor would be on them.

(v) The court cannot lay down any criteria as to how the said burden would be discharged, inasmuch as the same would depend upon the facts and circumstances of each case.

(vi) Even where the insurer is able to prove breach on the part of the insured concerning the policy condition regarding holding of a valid licence by the driver or his qualification to drive during the relevant period, the insurer would not be allowed to avoid its liability towards the insured unless the said breach or breaches on the condition of driving licence is/are so fundamental as are found to have contributed to the cause of the accident. The Tribunals in interpreting the policy conditions would apply “the rule of main purpose” and the concept of “fundamental breach” to allow defences available to the insurer under Section 149 (2) of the Act.

(vii) The question, as to whether the owner has taken reasonable care to find out as to whether the driving

licence produced by the driver (a fake one or otherwise), does not fulfil the requirements of law or not will have to be determined in each case”.

13. In the instant matter, the learned Tribunal in para-13 of the impugned judgment has made the following observation :

“13. Respondent no.3 Insurance Company, however, examined its witness Balasaheb, who is Senior Clerk in RTO Office at Beed at present. Respondent witness (RW) Balasaheb in his evidence stated that licence to respondent Ganesh Waghmare was issued from the office of Nanded RTO. That licence was issued only for Light Motor Transport Vehicles. Jeep, Car, and such other vehicles come in the class of Light Motor Vehicles. However, trucks or containers come in the class of Heavy Goods Motor Vehicles. He further explained that, vehicle of the weight less than 7500 kgs. is light motor vehicle. Person having licence for light motor vehicles can not drive heavy motor vehicles. This witness had also brought with him a register in respect of licences issued by his office, as seen from cross- examination. Details given by RTO Nanded are at Ex.67. These details show that respondent no.2 driver Ganesh Waghmare was issued only a licence for light motor vehicles and that too for transport purpose. Obviously, Ganesh Waghmare does not seem to have a valid driving

licence for heavy motor vehicles. It is proved that accident has taken place due to a truck, which is a heavy motor vehicle. In the circumstances, evidence of RW1 Balasaheb shows that respondent Ganesh Waghmare did not have valid driving licence for driving heavy motor vehicles, like truck and in spite of it complaint and panchnama show that he drove a heavy motor vehicle. This obviously would be breach of terms and conditions of the policy. Owner has not defended himself and there is no case that he was unaware of driver not having valid licence or driver driving without his permission or knowledge. In these circumstances, though accident has taken place due to fault of truck driver and though truck was insured with respondent no.3 Insurance Company, respondent no.3 Insurance Company would have to be exonerated from liability for payment of compensation to claimants. In the circumstances, respondent no.1 owner and respondent no.2 driver would only be liable for payment of compensation to claimants”.

The above observation made by the learned Tribunal is contrary to the observation of the Hon'ble Apex Court as well as this Court in the aforesaid judgments, to the extent of exonerating the Insurance Company from the liability of payment of compensation to the claimants. It is extremely important to note that the learned Tribunal ought

to have directed the Insurance Company first to satisfy the award and then to recover the same from respondent Nos.1 and 2 who are the respective owner and driver of the offending truck. Therefore, interference to that extent is definitely called for in the impugned judgment and accordingly the operative part of the impugned judgment needs to be modified. Further, the apportionment as done by the learned Tribunal also needs to be modified since respondent No.4 Sonam, who was the wife of deceased Bharat Mali, remarried just within a short period after the accident.

14. In view of the above, the following order is passed.

ORDER

- (i) The appeal is hereby partly allowed.
- (ii) Respondent Nos.1 and 2 shall jointly and severally pay the amount of Rs. 10,00,000/- (Rupees Ten Lakh) to the present appellants within a period of one month from the date of this order, alongwith interest on the said amount at the rate of 7 % per annum from the date of filing of the claim petition till realization of the entire amount. However, respondent No.3 Insurance Company is directed to satisfy the award first as aforesaid and then to recover the amount of award from

respondent Nos.1 and 2 under the same proceeding.

(iii) The amount of compensation shall be deposited with the Motor Accident Claims Tribunal, Aurangabad within three months. On deposition of compensation amount by the Insurance Company, the amount of Rs. 6,00,000/- (Rupees Six Lakh) be paid to appellant No.1 Ms. Ayushi d/o Bharat Mali alongwith accrued interest thereon till it's realization and the amount of Rs. 2,00,000/- (Rupees Two Lakh) each be paid to appellant No.2 Ramesh Ramgopal Mali and appellant No.3 Smt. Yeshoda w/o Ramesh Mali alongwith accrued interest thereon till it's realization.

(iv) The award be drawn up accordingly.

(SANDIPKUMAR C. MORE, J.)