

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO. 50 OF 2019

IFFCO TOKIO GENERAL INSURANCE COMPANY)
LTD., AFL HOUSE, 2nd Floor, Lok Bharti Complex)
Marol Maroshi Road, Andheri (E), Mumbai - 59)...APPELLANT

V/s.

1 SMT.NAMRATA NAMDEO VISHE	)ORIGINAL
Age : 27 years, Occupation : Household	)APPLICANT NO.1
	)
2 MASTER MANTHAN NAMDEO VISHE	)ORIGINAL
Age : 4 years, Occupation : Nil	)APPLICANT NO.2
	)
3 SMT. YASHODA YASHWANT VISHE	)ORIGINAL
Age : 50 years, Occupation : Labourer	)APPLICANT NO.3
	)
The Applicant no.2 being minor is represented	)
through his mother i.e. Applicant No.1	)
	)
All are residing at Dinkarpada, Post Kondhale	)
Taluka Wada, District Thane	)
	)ORIGINAL
4 MR. MANGESH YASHWANT SHELAR	)OPPOSITE PARTY
At Vashind, Taluka Shahpur, District Thane	)...RESPONDENTS

Mr. Nikhil Mehta i/b. KMC Legal Venture, Advocate for the Appellant.
None for the Respondents.

CORAM : ABHAY AHUJA, J.

RESERVED ON : 20th DECEMBER 2022
PRONOUNCED ON : 22nd DECEMBER 2022

JUDGMENT :

1 This is an appeal preferred by the Iffco Tokio General Insurance Company Ltd. against the judgment and award dated 21st May 2013 passed by the Motor Accidents Claims Tribunal (for short the “M.A.C.T.”), Thane in Motor Accident Claim Application No. 965 of 2009.

2 The brief facts are that in the intervening night of 24th October 2008 to 25th October 2008, at about 00.35 hours, one Namdeo Yashwant Vishe was traveling as a pillion rider on motorcycle bearing no.MH-04-CN-9565 and one Mr.Mahesh Choudhary was riding the said motorcycle, when the motorcycle having reached opposite Bunty dhaba at Borpada village situate on Bhiwandi Wada road being driven at high and excessive speed by the rider, suddenly applied brakes, as a result of which the motorcycle skidded and Mr. Namdeo Yashwant Vishe, the pillion rider, fell down on the road. In the said accident he sustained injuries all over his body; he was taken to IGM Hospital at Bhiwandi for medical treatment, however, he succumbed to the injuries. The subject motorcycle was owned by one Mr. Mangesh Yashwant Shelar and the motorcycle was fully insured by the appellant-Insurance company. An

offence of rash and negligent driving was registered against the rider of the motorcycle with the Bhiwandi Taluka Police Station.

3 The widow, minor son and the mother of the the deceased filed an application for getting compensation under Section 166 of the Motor Vehicles Act, 1988 (for short the “M. V. Act”) on account of the vehicular accidental death of Namdeo Yashwant Vishe, the pillion rider of the subject motorcycle. The claim was made against the owner of the vehicle Mr. Mangesh Yeshwant Shelar and the appellant-Insurance company. The M.A.C.T. granted compensation to the claimants holding that the appellant was liable to pay an amount of Rs.7,25,136.00 under the provisions of Section 166 of the M. V. Act.

4 It is the case of the appellant – Insurance company that although the motorcycle was validly insured with the Insurance company on the day of the accident, however, there has been a breach of the condition of the insurance policy, inasmuch as the rider of the motorcycle namely Mahesh Gajanan Chowdhary was not holding valid driving license at the time of the accident. That, he was in possession of a driving license qualified to drive a light motor vehicle, non-transport and heavy goods

vehicle and not two wheeler motorcycle which is altogether a different class/category of vehicle. It is, therefore, submitted that the Insurance company was not liable to pay any compensation to the claimants or applicants as the insured/driver had committed breach of an important term and condition of the policy.

5 The respondents, though served, are not present nor represented today.

6 Mr. Nikhil Mehta, learned counsel for the appellant – Insurance company, would submit that although the Insurance company has preferred this appeal against the order of the Tribunal, primarily on the ground that the rider of the motorcycle was not holding a valid driving license at the time of the accident, which was a breach of the terms of the policy, he would submit in all fairness that after the decision of the Hon'ble Supreme Court in the case of **National Insurance Company Ltd. vs. Swaran Singh and Others**¹, the insurer had to indemnify the compensation amount payable to the third party and the Insurance company may recover the same from the insured. Learned counsel would submit that the doctrine of pay and recover was considered by

¹ (2004) 3 SCC 297

the Hon'ble Supreme Court in the case of **National Insurance Company Ltd. vs. Swaran Singh and Others (supra)** wherein the Supreme Court examined the liability of the Insurance company in cases of breach of policy conditions, due to disqualifications of the driver or invalid driving license of the driver and held that in case of third party risks, the insurer has to indemnify the compensation amount to the third party and the Insurance company may recover the same from the insured. Learned counsel further submits that as per the decision in **National Insurance Company Ltd. vs. Swaran Singh and Others (supra)**, the onus is always upon the Insurance company to prove that the driver had no valid driving license, and that, there was breach of policy conditions. He further submits that where the driver did not possess a valid driving license and there are breach of policy conditions, pay and recover can be ordered in case of third party risks. Learned counsel would therefore submits that this Court pass appropriate orders in the light of the decision in **National Insurance Company Ltd. vs. Swaran Singh and Others (supra)**. He would submit that the decision in **National Insurance Company Ltd. vs. Swaran Singh and Others (supra)** has also been relied upon in the case of **Shamanna and Another vs. The Divisional Manager, The Oriental Insurance Company Ltd. and Others²**.

² Judgment of Supreme Court in Civil Appeal No.8144/2018 (arising out of SLP(C) No.26955/2017 dated 8th August 2018

7 There is no dispute on the facts in this case. The Apex Court in the case of **National Insurance Company Ltd. vs. Swaran Singh and Others (supra)** holding that in case of third party risks, the insurer has to indemnify the compensation amount to the third party and the Insurance company may recover the same from the insured, has elaborated considering the insurer's contractual liability as well as statutory liability vis-a-vis the claims of third party and issued detailed guidelines as to how and in what circumstances pay and recover can be ordered. Paragraph 110 of the decision of the Supreme Court is set out as under :

“110. The summary of our findings to the various issues as raised in these petitions is as follows:

(i) Chapter XI of the Motor Vehicles Act, 1988 providing compulsory insurance of vehicles against third-party risks is a social welfare legislation to extend relief by compensation to victims of accidents caused by use of motor vehicles. The provisions of compulsory insurance coverage of all vehicles are with this paramount object and the provisions of the Act have to be so interpreted as to effectuate the said object.

(ii) An insurer is entitled to raise a defence in a claim petition filed under Section 163-A or Section 166 of the Motor Vehicles Act, 1988, inter alia, in terms of Section 149(2)(a)(ii) of the said Act.

(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 wherefore 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 fulfill the requirements of law or not will have to be determined in each case.

(viii) If a vehicle at the time of accident was driven by a person having a learner's licence, the insurance companies would be liable to satisfy the decree.

(ix) The Claims Tribunal constituted under Section 165 read with Section 168 is empowered to adjudicate all claims in

respect of the accidents involving death or of bodily injury or damage to property of third party arising in use of motor vehicle. The said power of the Tribunal is not restricted to decide the claims inter se between claimant or claimants on one side and insured, insurer and driver on the other. In the course of adjudicating the claim for compensation and to decide the availability of defence or defences to the insurer, the Tribunal has necessarily the power and jurisdiction to decide disputes inter se between the insurer and the insured. The decision rendered on the claims and disputes inter se between the insurer and insured in the course of adjudication of claim for compensation by the claimants and the award made thereon is enforceable and executable in the same manner as provided in Section 174 of the Act for enforcement and execution of the award in favour of the claimants.

(x) Where on adjudication of the claim under the Act the Tribunal arrives at a conclusion that the insurer has satisfactorily proved its defence in accordance with the provisions of Section 149(2) read with sub-section (7), as interpreted by this Court above, the Tribunal can direct that the insurer is liable to be reimbursed by the insured for the compensation and other amounts which it has been compelled to pay to the third party under the award of the Tribunal. Such determination of claim by the Tribunal will be enforceable and the money found due to the insurer from the insured will be recoverable on a certificate issued by the Tribunal to the Collector in the same manner under Section 174 of the Act as arrears of land revenue. The certificate will be issued for the recovery as arrears of land revenue only if, as required by sub-section (3) of Section 168 of the Act the insured fails to deposit the amount awarded in favour of the insurer within thirty days from the date of announcement of the award by the Tribunal.

(xi) The provisions contained in sub-section (4) with the proviso there under and sub-section (5) which are intended to cover specified contingencies mentioned therein to enable the insurer to recover the amount paid under the contract of insurance on behalf of the insured can be taken recourse to

by the Tribunal and be extended to claims and defences of the insurer against the insured by relegating them to the remedy before regular court in cases where on given facts and circumstances adjudication of their claims inter se might delay the adjudication of the claims of the victims.”
(emphasis supplied)

8 As can be seen in from (ii) above that an insurer is entitled to raise a defence in a claim petition filed under Section 163-A or Section 166 of the M. V. Act, as in this case *inter alia* in terms of Section 149(2)(a)(ii) of the said Act. Section 149(2)(a)(ii) refers to the disqualification of the driver on account of invalid driving license being a breach of the insurance policy conditions. Paragraphs (iii), (iv), (vi), (vii) and (viii) all impose additional obligations on the Insurance companies, in the event they are desirous of raising the defence of invalid driving license to avoid the liability. As it appears, the onus is always upon the Insurance company to prove that the driver had no valid driving license and that there was a breach of the policy conditions. When the driver does not possess a valid driving license and there are breach of policy conditions, pay and recover can be ordered in case of third party risks.

9 The decision of the Hon'ble Supreme Court in the case of **Shamanna and Another vs. The Divisional Manager, The Oriental**

Insurance Company Ltd. and Others (supra) also re-emphasizes that in the case of third party risks the insurer has to indemnify the amount and if so advised, to recover the same from the insured. Paragraphs 7 and 8 are relevant and are usefully quoted as under :

“7. As per the decision in Swaran Singh case, onus is always upon the insurance company to prove that the driver had no valid driving licence and that there was breach of policy conditions. Where the driver did not possess the valid driving licence and there are breach of policy conditions, “pay and recover” can be ordered in case of third party risks. The Tribunal is required to consider as to whether the owner has taken reasonable care to find out as to whether the driving licence produced by the driver, does not fulfill the requirements of law or not will have to be determined in each case.

8. The Supreme Court considered the decision of Swaran Singh case in subsequent decision in National Insurance Co. Ltd. v. Laxmi Narain Dhut, (2007) 3 SCC 700, wherein this Court held that “the decision in Swaran Singh case has no application to cases other than third party risks and in case of third party risks the insurer has to indemnify the amount and if so advised, to recover the same from the insured”. The same principle was reiterated in Prem Kumari v. Prahlad Dev and Others (2008) 3 SCC 193.”

10 In view of the above discussion, I have no hesitation in holding that this appeal is devoid of any merit and deserves to be dismissed in view of the law settled by the Apex Court.

11 The appeal is hereby dismissed. No costs.

12 The appellant-Insurance company is at liberty to recover the amount from the insured, if so advised, keeping in mind the principles and the guidelines laid down by the Apex Court in the case of **National Insurance Company Ltd. vs. Swaran Singh and Others (supra)** and other decisions in line with the said case.

(ABHAY AHUJA, J.)

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