IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

FIRST APPEAL NO. 3544 OF 2011

United India Assurance Company Ltd.,
Through its Deputy Manager,
T.P. Cell, Divisional Office – I,
Osmanpura, Aurangabad. ...Appellant
(Ori. Respondent No. 3)

Versus

1) Pratap s/o Baburao Salve
Age: 27 years, Occu: Driver,
R/o. Mahu Nagar, Sindhi Colony,
Dist. Aurangabad.

2) Arun s/o Ramrao Bankar
Age: 49 yrs, Occ: Service,
R/o. As above.

3) Bharat s/o Eknath Jadhav
Age: 45 yrs, Occ: Business,
R/o. Mukundwadi, Aurangabad. ...Respondents
(Resp. Nos. 1 Ori. Claimant)
Resp. No. 2 & 3 Orig.
Resp. No. 1 & 2)

Mr Swapnil S. Rathi, Advocate for Appellant
Mr Parikshit S. Mantri h/f Mr Parag Barde, Advocate for Respondent No. 1

...

**CORAM : S. G. CHAPALGAONKAR, J.**

**RESERVED ON : 24-02-2023**
**PRONOUNCED ON: 08-03-2023**

**JUDGMENT :**

1. The present appeal impugns the Judgment and award dated 28-07-2011 passed by the Motor Accident Claims Tribunal, Aurangabad in MACP No. 82/2006. The appellant is original

respondent No.3 / insurer of the motorcycle Registration No.MH-20-K-8620.

2. The factual matrix leading to this appeal is as under:-

(a) On 19-05-2005, respondent No.1/original claimant was proceeding on motorcycle bearing Registration No.MH-20-K-8620 as a pillion rider. The rider of the motorcycle lost the control over the vehicle. The motorcycle dashed against the road side tree. The claimant suffered serious injuries on account of said accident. The incident was reported to the Police Station, vide Crime No. 61/2005. The rider of the motorcycle suffered prosecution in pursuance of registration of offence.

(b) The claimant instituted a MACP No. 82/2006 before the Motor Accident Claims Tribunal at Aurangabad under section 163-A of the Motor Vehicles Act claiming compensation of Rs.3,00,000/- from the owner, driver and insurer of the motorcycle. He pleaded that he was aged 22 years and earning his livelihood by serving as a driver at the time of accident. He suffered permanent disablement resulting loss of earning capacity. Respondent No. 2 is owner of the motorcycle and respondent No.3 had insured the same. According to claimant, both of them are jointly and severally liable to pay the compensation.

(c) The claimant relied upon his own evidence and oral evidence of Dr Bhavna Takalkar in support of his claim regarding permanent disablement. The Tribunal after considering the evidence on record passed an award of Rs. 99,550/- against the respondent Nos. 1 to 3 directing them jointly and severally to pay the compensation along with interest @ 7% per annum.

(d) Mr S.S. Rathi, learned advocate appearing for the appellant/insurer would submit that the offending motorcycle was insured under liability only policy. The risk of pillion rider of the motorcycle is neither statutorily covered nor is there contractual obligation on the insurer to pay the compensation. To buttress his contention, he would rely upon the Judgment of the Supreme Court of India in the matter of ***United India Insurance Company Vs. Tilak Singh and others reported in 2006 AIR SCW 1822, New India Assurance Company Vs. Babasaheb Anna Mali reported in 2001 (4) Mh.L.J. 562, Oriental Insurance Company Vs. K.V. Sudhakaran and others reported in 2008 AIR SCW 4549.***

(e) The learned advocate Mr Parikshit Mantri holding for Mr Parag Barde, learned advocate appearing for respondent No.1 submitted that the written statement filed by the appellant/Insurance company is silent about defence of limited statutory liability. He would further submit that even during hearing such defence was never raised before the Tribunal. He would invite attention of this Court to the contents of the Judgment passed by the Tribunal which suggests that the insurer has never raised the defence regarding the limits of liability or no liability for pillion rider. On the contrary, the insurer has raised defence of breach of terms and conditions of insurance contract.

(f) Mr S.S. Rathi, learned advocate appearing for the appellant/insurance company submits that a photo copy of insurance policy is filed along with appeal. He would point out that the insurer has not charged premium to cover the risk of the pillion rider.

3. Having considered the submissions advanced by the learned advocates appearing for the respective parties, this Court observed that the appellant/insurer is first time raising defence that the risk of pillion rider of the motorcycle is not covered under the insurance policy of motorcycle registration No. Mh-20-K-8620. The insurer never raised such defence before the Tribunal. The written statement filed at Exh. 22 would show that the insurer has simply averred breach of terms of insurance contract. The pleading sans defence regarding absence of the insurance cover to pillion rider.

4. The single page of the insurance policy is placed on record before the Tribunal along with list at Exh.15. The said document does not show schedule of premium that has been charged by the insurance company. It is possible that insurer had issued wider policy by charging premium for pillion rider. From the document placed on record, it would be difficult to hold that the insurer has issued the policy with limited cover. If the insurer has not raised the defence in written statement regarding restricted liability under section 147 of the Motor Vehicles Act or withhold the document in its possession before the Tribunal, the adverse inference will have to be drawn against the insurer that the insurance policy was issued with wider cover of the pillion rider.

5. Mr S.S. Rathi, learned advocate appearing for the appellant submits that the copy of the insurance policy is placed on record of this appeal which shows that the premium for pillion rider has not been charged. However, the document which is first time tendered in appeal without application seeking permission to lead the additional evidence, cannot be looked into. The appellant will have to establish the case on the basis of the pleadings and documentary evidence that was before the Tribunal while passing the impugned Judgment and award. The present appeal is filed in the year 2011. No attempts were made to lead the additional evidence till this date. Even appeal memo does not contend any

explanation for not raising such defence in the written statement or not placing copy of the insurance policy before the Tribunal. In that view of the matter, the xerox copy of insurance policy that is sought to be relied in appeal cannot be looked into.

6. It is the trite of law that the risk of the pillion rider of the motorcycle would not be covered in a statutory insurance contract in terms of section 147 of the Motor Vehicles Act. There cannot be any dispute regarding proposition of law endorsed by the Hon'ble Supreme Court of India as well as this Court in the Judgment that have been relied upon by the learned advocate appearing for the appellant, however, in absence of the requisite pleadings in the written statement and the insurance policy on record before the Tribunal, the award passed by the Tribunal holding that the respondents are jointly and severally pay the compensation cannot be disturbed. Hence, there is no merit in appeal.

7 The appeal is dismissed with costs.

8. In view of disposal of appeal, the amount of compensation deposited by the appellant be paid to the claimant.

**[ S.G. CHAPALGAONKAR, J. ]**

mta