

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO.722 OF 2012

**IFFCO TOKIO GENERAL INSURANCE COMPANY)
LIMITED,AFL House,2nd Floor, Lok Bharti Complex)
Marol Maroshi Road,Andheri-(E),Mumbai-400059)...APPELLANT**

V/s.

1	SHANKAR G. RANE	)	
	Age 50 years, Occupation : Nil	)	
		)	
2	MRS.SUHASINI SHANKAR RANE	)	
	Age 43 years, Occupation : Nil	)	
		)	
	Both R/at Rupadevi Pada, Indira Nagar,	)	
	Pada No.1, Road No.2, Thane West,	)	
	Taluka and District – Thane	)	
		)	
3	MR.SUKHDEV BHAURAO KALE	)	
	House No.1177, Behind Mahakali Mitra	)	
	Mandal, Road No.22, Indira Nagar,	)	
	Wagle Estate, Thane-West, Taluka and	)	
	District – Thane	)	
	(Owner of Motorcycle bearing No.	)	
	MH-04/DM-1494)	)	...RESPONDENTS

Mr.Nikhil Mehta i/b. KMC Legal Venture, Advocate for the Appellant.

Ms.Rina Kundu, Advocate for the Respondents No.1 and 2.

CORAM : ABHAY AHUJA, J.

DATE : 30th JUNE 2023

ORAL JUDGMENT :

1. This is an Appeal preferred by Iffco Tokio General Insurance Company Limited against the judgment and award dated 10th May 2011 passed by the Motor Accident Claims Tribunal, Thane (M.A.C.T.) in Motor Accident Claim Petition No.651 of 2009 filed by the claimants, who are the parents and legal heirs of one Sachin Shankar Rane, who died on 5th April 2008 in a motor accident.

2. The brief facts are that, on 5th April 2008, at about 21.45 hours, Sachin Rane was travelling by a Pulsar motorcycle bearing no.MH-04/DM-1494 owned by his friend Milind Kale, as a pillion rider. That, they were proceeding from Manpada to Thane by Ghodbunder Road and while they were near Tatwadyan Vidhyapith, one unknown Maruti car coming from Tulsidham Road dashed into the said motorcycle at the crossing of Ghodbunder Road, resulting in grievous injuries to Sachin, who succumbed to his injuries at Civil Hospital, Thane. At the time of the accident, Sachin was 19 years old and he was serving with Graphic Charms Printers at Khopat, Thane as a Technician and was earning Rs.3,300/- per month. The motorcycle was owned by his friend, who was arraigned as Opponent No.1, (Respondent No.3

herein) in the Claim Petition, and insured by Opponent No.2, the Appellant herein. The Claim Petition was filed against both the opponents for compensation of Rs.4,26,900/-. Since the owner of the motorcycle did not appear in the Claim Petition, the Petition proceeded *exparte* against the owner. There is no dispute that the motorcycle was validly insured by the Appellant-Insurance Company. There is also no dispute that the accident took place on the date and time mentioned by the claimants. However, the issue that has been raised by the Insurance Company is that, the driving licence filed by the Applicants in the name of one Milind Sukhdev Kale, who was driving the motorcycle, has been found to be in the name of one Gafar Abdul Hasan Saiyyed, and that, at the time of the accident, the driver was not holding a valid driving licence and therefore there was breach of the terms and conditions of the insurance policy, and therefore, according to the Appellant-Insurance Company, the claim should have been rejected.

3. With respect to the issue regarding driving licence, the Tribunal has observed that although the numbers of the driving licences in the name of Milind Sukhdev Kale and Gafar Abdul Hasan Saiyyed bear the same number, but the date of issuing both these driving licences are different and their validity periods are also different. The Tribunal has

observed that, no doubt, by way of putting on record the driving licence in the name of Gafar Abdul Hasan Saiyyed, the Insurance Company has created some suspicion but the Insurance Company could not clarify the ambiguity by confronting the copy of driving licence of Milind Sukhdev Kale to the employee of the Regional Transport Office (R.T.O.) who was a witness examined in the matter. The Tribunal has held that, in this backdrop, it could not be said that the insurer had discharged their burden and succeeded to prove that the driving licence issued in the name of Milind Sukhdev Kale was bogus. The Tribunal, in my view, therefore, rightly observed that, with respect to the objection taken by the insurer-Appellant to the driving licence of Milind Sukhdev Kale, that the burden heavily lied on the insurer to prove that Milind Sukhdev Kale was not holding the driving licence at the time of the accident and the owner of the vehicle viz., the Opponent No.1, (Respondent no.3 herein) has committed breach of the terms and conditions of the policy. The Tribunal has rightly relied upon the decision of the Hon'ble Supreme Court in the case of **National Insurance Company Ltd. vs. Swaran Singh and Others**¹. In paragraph 15, the Tribunal has categorically held that the Applicants had proved that the accident did take place when the deceased Sachin Rane was

¹ (2004) 3 SCC 297

riding the motorcycle as a pillion rider and due to the dash of a Maruti car, he died. The Tribunal has also held that the insurer did not lead any evidence in order to prove that the driver of the motorcycle was at fault or that he contributed to the cause of the accident. Therefore, there is also no issue regarding contributory negligence in this matter nor is it being agitated on behalf of the Appellants herein. The Tribunal has gone ahead and held that in view of the law laid down by the Hon'ble Supreme Court, the insurer cannot avoid its liability to pay reasonable compensation to the claimants.

4. With respect to the quantum of the compensation, the Tribunal has, on the basis of evidence, held that, at the time of the accident, the age of the deceased was 19 years and was earning Rs.3,300/- and has calculated the yearly dependency to Rs.39,600/- and after deducting 1/3rd of expenses towards maintaining himself, had he been alive, the dependency for the Respondents-claimants has been worked out to Rs.26,400/-. Considering the age group of the deceased as 19, the multiplier of 16 has been applied, and accordingly, the total amount of future dependency has been worked out to Rs.4,22,400/-. In addition, an amount of Rs.5,000/- has been awarded towards funeral expenses and the total claim that has been awarded is Rs.4,27,400/-. However,

the Tribunal has gone ahead and held both, the owner of the motorcycle as well as the Insurance Company, jointly and severally liable to pay compensation to the claimants. Both Mr. Mehta for the Appellant and Ms.Kundu for the Respondents-claimants, submit that in view of the decision of the Hon'ble Apex Court, starting from **National Insurance Company Ltd. vs. Swaran Singh and Others (supra)** followed by **Shamanna and Another vs. The Divisional Manager, The Oriental Insurance Company Ltd. and Others²** relied upon by this Court in several cases including the case of the Appellant in **Iffco Tokio General Insurance Company vs. Smt.Namrata Namdeo Vishe & Others³**, where following the above two Apex Court decisions, this Court has held that in case of third party risks, the insurer has to indemnify the compensation amount to the third party and after paying the third party, the Insurance Company may recover the same from the insurer.

5. I have considered the above judgments referred to by the learned Counsel in the light of the facts of this case. It is not in dispute that Sachin Rane died in the said accident and that his parents are entitled to the amount of compensation as awarded by the Tribunal. The only

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

3 First Appeal No.50 of 2019 decided on 22nd December 2022

question is whether the order of joint and several liability passed by the Tribunal can be sustained. In the light of the Hon'ble Supreme Court decisions in such matters where the Hon'ble Supreme Court has categorically directed that pay and recover is the way forward, I am inclined to respectfully follow the same course of action. The deceased was a pillion rider, as in the case cited by the learned Counsel, viz., **Iffco Tokio General Insurance Company vs. Smt.Namrata Namdeo Vishe & Others (supra)**. In that case also, this Court, after considering in detail the decisions of the Hon'ble Supreme Court in **National Insurance Company Ltd. vs. Swaran Singh and Others (supra)** and **Shamanna and Another vs. The Divisional Manager, The Oriental Insurance Company Ltd. and Others (supra)**, dismissed the Appeal and granted liberty to the Insurance Company to recover the amount from the insurer, if so advised.

6. A perusal of the above mentioned decisions would make it clear that the 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 (the 'said 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 licence being a breach of the

insurance policy conditions. It is clear from paragraphs 110(iii), (iv), (vi), (vii) and (viii) of the decision in the case of **National Insurance Company Ltd. vs. Swaran Singh and Others (supra)** that, in the event, the insurer is desirous of raising the defence of invalid driving licence to avoid the liability, the onus is always upon the Insurance company to prove the same that there was a breach of the Insurance policy conditions. It is gathered from this decision that there is a very heavy burden on the Insurance Company to prove the breach of policy on the ground of invalidity of driving licence. Paragraph 110 of the said decision is usefully quoted 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)

7. Paragraph 7 of the decision in the case of **Shamanna and Another vs. The Divisional Manager, The Oriental Insurance Company Ltd. and Others (supra)** is also 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.”

(emphasis supplied)

8. As mentioned above, this Court in a number of decisions including **Iffco Tokio General Insurance Company vs. Smt.Namrata Namdeo Vishe & Others (supra)** has observed that in case where the driver does not possess a valid driving licence and there is a breach of policy conditions, a pay and recover order can be passed, in case of third party risks.

9. In view of the above discussion, the order of the Tribunal which directs both the Appellant and Respondent no.3 to jointly and severally pay the compensation, would require to be modified to include the pay and recover principle, so that, the Insurance Company pays the compensation amount to the Respondents No.1 and 2 after which it would be at liberty to recover the same from the owner of the vehicle. Accordingly, clause (ii) of the order dated 10th May 2011 of the Tribunal as well as the award is modified as under :

“The Respondent No.2 to pay total compensation of Rs.4,27,400/- with simple interest at the rate of 8 percent per annum to both the Applicants from the date of the Petition till realization of entire amount.”

10. The Appeal stands disposed in the above terms. Parties to bear their own costs.

11. Statutory deposit, if any, deposited in this Court, be transferred with accrued interest, if any, to the M.A.C.T., Thane.

(ABHAY AHUJA, J.)