IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.

FIRST APPEAL NO.101 OF 2020

SBI General Insurance Company Ltd.
through its Divisional Manager,
'Natraj', 301, junction of Western Express
Highway and andheri Kurla Road,
Andheri (East), Mumbai 400069

...APPELLANT

VERSUS

1. Prashant s/o Wasudeo Bhatkar
Aged 29 yrs., Occupation – Driver,
R/o. Kasli Khurd, Tq.& District Akola

2. Subhash s/o Govindrao Chalpate
Age 61 yrs., Occupation – Owner & driver
of I-10 Car, bearing Registration
No.MH-30/AA-2684
R/o. Ward No.34, Ujwal Nagar,
Akot, Tq. Akot, District Akola

3. Vinay s/o Keshavrao Bhatkar
Aged about 28 yrs.,
Occupation – Driver-Owner of
Honda M.cy bearing Registration
No.MH-30/AH-7123
R/o. Kasli Khurd, Tq. & District Akola

4. The Oriental Insurance Company Ltd.
through its Divisional Manager,
Rayat Haweli, Old Cotton Market,
Akola, Tq. & District Akola

...RESPONDENTS

Mrs. Mrunal Naik, Advocate for the appellant.
Shri Pushkar Ghare, Advocate for respondent No.1.
Shri P.U. Kavishwar, Advocate for respondent No.2.
Shri A.W. Paunikar, Advocate for respondent No.4.

CORAM : URMILA JOSHI-PHALKE, J.
RESERVED ON : APRIL 11, 2023.
PRONOUNCED ON : JUNE 06, 2023

JUDGMENT :

Heard learned Counsel for the parties.

2. The appellant – SBI General Insurance Company Ltd. has challenged the judgment and award passed by Motor Accident Claims Tribunal, Akola in Claim Application No.16/2016 dated 12/03/2019 by which the Insurance Company along with the owner was directed to pay compensation of Rs.3,35,200/- along with the interest @ 8% per annum from the date of petition till realisation of the amount.

3. The brief facts which are necessary to decide the appeal are as under :

(The parties hereinafter referred as per their original nomenclature.).

A] On 22/08/2014, the claimant was proceeding towards Kasli Khurd from Akola on motorcycle bearing No.MH-30-AH-7123 along with his relative. When they reached at Chohotta near M.S.E.B. office on Akola-Akot road at about 7.00 p.m. one I-10-Hyundai Car bearing No.MH-30-AA-2684 came from opposite direction in a very high and excessive speed and dashed against the motorcycle. Due to the severe dash, the motorcycle rider fell down on the road and sustained severe injuries.

4. As per the contention of the claimant, the motorcycle rider was riding his motorcycle in a moderate speed. But the driver of the offending car lost his control and dashed against the motorcycle. In the said accident, he had sustained severe injuries to his right leg and fracture of tibia, fibula and shaft femur. The claimant was treated in Dr. Patil's Hospital and Polyclinic at Akola from 22/08/2014 to 01/09/2014. During his treatment, the implants were inserted in his right leg and supporter was fixed to his thigh. Thus, accidental injuries resulted into 16% permanent disability.

5. As per contention of the claimant, the offending car was driven and owned by respondent No.1 and validly insured with respondent No.2. Therefore, he is claiming compensation from them. Respondent No.3 is the owner of motorcycle and motorcycle validly insured with respondent No.4. At the time of accident, claimant was 27 years old and was working as a driver and earning Rs.15,000/- per month. He was also having agricultural land. Due to the accidental injuries, there is nobody to look after his agricultural land, his marriage

prospects are also affected, therefore, he claimed compensation under pecuniary and non-pecuniary damages.

6. Respondent No.1 in response to the notice resisted the claim on the ground that the alleged accident took place due to the rash and negligent driving of motorcycle rider, therefore, respondent Nos.3 and 4 are responsible to pay the compensation. Respondent No.2 – Insurance Company raised the defence that the driver of the offending car was not holding valid driving license as well as the said accident took place due to the contributory negligence of the motorcycle rider. Hence, liability is to be saddled on respondent Nos.3 and 4.

7. Respondent Nos.3 and 4 also contested the claim on the ground that the alleged accident took place due to the rash and negligent driving of the car driver. Crime is also registered against the car driver, hence, they are not liable to pay the compensation.

8. To substantiate the contention, claimant has led his evidence vide Exhibit 31. He had also examined PW-2 – Dr. Vinay Bhawandas Virwani and PW-3 - Dr. Abhay Kashinath Patil. He further relied upon the accident form (Exhibit 41), copy of FIR (Exhibit 42), crime detail form (Exhibit 43), final report form (Exhibit 44), injury report issued by Civil Hospital, Akola (Exhibit 45), copy of driving license (Exhibit 46),

copy of registration certificate of Hyundai Car (Exhibit 47), copy of Insurance Policy of Hyundai Car (Exhibit 48), Driving license of Vinay K. Bhatkar – motorcycle rider (Exhibit 49), copy of Certificate of registration of motorcycle (Exhibit 51) and driving license of Nilkanth Bhatkar (Exhibit 53).

9. Respondent No.1 - Subhash Chalpate has led his own evidence vide (Exhibit 64). Respondent No.2 examined two witnesses Smt. Harshada Chavat, Senior Clerk of Deputy Road Transport Office, Akola (Exhibit 59) and RW-2 - Krushnakant Samtani, Legal Manager of respondent No.2 (Exhibit 65).

10. Besides oral evidence, respondent No.2 relied upon letter (Exhibit 61) and particulars of driving license (Exhibit 62). After appreciating the evidence, the Tribunal has hold that the alleged accident took place due to the rash and negligent driving of the I-10 Hyundai Car driver which is validly insured with respondent No.2 and held respondent Nos.1 and 2 are liable to pay the compensation.

11. Being aggrieved with the judgment and award passed by the Tribunal, present appeal is preferred by the Insurance Company on the ground that the learned Tribunal ought to have considered that both the vehicle drivers contributed for the said accident, therefore, respondent

Nos.3 and 4 are also liable to pay compensation. The Tribunal further failed to appreciate that the license granted to respondent No.1 for motorcycle with gear which has been renewed on 16/09/2014. On 20/09/2011, he applied for license of Light Motor Vehicle which was granted to him from 20/09/2011 to 03/02/2014. Both the licenses were renewed on 16/09/2014 and continued till 15/09/2019. Thus, on the date of accident, respondent No.1 was not having valid and effective driving license to drive the vehicle.

12. Heard Mrs. Mrunal Naik, learned Counsel for the appellant. She submitted that the defence of the Insurance Company that respondent No.1 was not having valid driving license on the date of accident is proved by the Insurance Company by examining the witness RW-1 - Harshada Pramod Chavat who testified that respondent No.1 was having driving license for driving the motorcycle with gear. He had obtained the driving license of driving light motor vehicle on 20/09/2011. Said license was valid till 15/09/2019. The alleged accident took place on 22/08/2014. Thus, on the day of accident, respondent No.1 was not having valid driving license hence, Insurance Company is not liable to pay the compensation. She further submitted that both the vehicles contributed for the said accident, therefore, respondent Nos.3 and 4 also liable to pay compensation.

13. In support of her contention, she placed reliance on the following judgments :

(i) Bimla Devi Vs. Surjeet Singh and ors., 2016 SCC OnLine Punjab and Haryana High Court 19701,

(ii) Lakshmi and ors. Vs. M. Shanmuganathan and ors., 2021 ACJ 1035,

(iii) Pawan Kumar and anr. Vs. Harikishan Dass Mohan Lal and ors., (2014) 3 SCC 590 and

(iv) Khenyei Vs. New India Assurance Co. Ltd. and ors. In Civil Appeal No.4244 of 2015 decided on 07/05/2015.

14. *Per contra*, learned Counsel Shri Ghare for respondent No.1 submitted that the claimant was not riding the motorcycle, therefore, the contributory negligence is not attributed to him. The crime was registered regarding the said accident against the Car driver. At the most it can be case of composite negligence. In case of composite negligence the claimants can recover the damages from any of the tortfeasor. Therefore, contention of the appellant – Insurance Company is not sustainable.

15. Heard Shri P.U. Kavishwar, learned Counsel for respondent No.2 and Shri Paunikar, learned Counsel for respondent No.4.

16. Having heard both the sides and on perusal of the evidence on record with the able assistance of Counsel for both the parties, the point arises for the determination is :

(i) whether the Insurance Company is liable to be exonerated as driver of the car was not holding valid driving license?

(ii) whether the motorcycle rider – respondent No.3 and respondent No.4 - Insurance Company are also liable to pay compensation?

17. The appellant – Insurance Company has challenged the judgment and award on the ground that the driver of the car was not having valid driving license hence, Insurance Company is not liable to pay compensation. Another ground raised by the Insurance Company is that the motorcycle rider is also responsible for the said accident. As far as the ground raised by the appellant in respect of driving license is concerned, the Insurance Company has adduced the evidence of Harshada Pramod Chavat whose evidence shows that as per the record the car driver was not having valid driving license on the date of accident i.e. on 22/08/2014. The car driver has obtained the driving license from 16/09/2014 to 15/09/2019. The accident took place on 22/08/2014. Though this witness is cross-examined but the fact that the car driver was not having valid driving license is sufficiently proved by

the Insurance Company. The terms and conditions of the policy shows that the insured will not be indemnified if the vehicle is used or driven otherwise than in accordance with the schedule. In view of the policy, only the person who is having valid driving license can drive the said vehicle. Thus, there is a clear breach of the terms and conditions of the policy. The said breach is proved by the Insurance Company.

18. The another contention raised by the insurance company is that as both the drivers involved in the accident and have driven their vehicles in a rash and negligent manner thus, both the vehicle drivers contributed for the said accident. Hence, respondent Nos.3 and 4 owner and Insurance Company of motorcycle are also liable to pay compensation. Admittedly, the crime was registered against both the vehicle drivers. The recitals of the FIR shows that both the vehicle drivers driven their vehicle in a rash and negligent manner and there was head on collision between the two vehicles. The recitals of the FIR sufficiently shows that the accident took place as both the vehicles dashed against each other which is head on collision. The spot panchnama also supports the said contention. After completion of the investigation, charge-sheet was filed against both the vehicle drivers. Respondent No.3 has not adduced any evidence to show that he has not contributed for the said accident. Admittedly, the claimant was not

riding the said motorcycle. Whether the said accident took place due to the contributory negligence or composite negligence is the material aspect. The principle underlying the doctrine of contributory negligence is the application of the maxim '*in pari delicto, potior est conditio defendentis*' which means when both parties are equally to blame, neither can hold the other liable. There is clear difference between the contributory negligence and composite negligence. Where a person is injured without any act or omission from his part, but as combined effect of the negligence of two or more persons, it is a case of composite negligence and not a case of contributory negligence. The expression contributory negligence applies solely to the conduct of the claimant, in a case of personal injury and in case of compensation for death, it applies to the conduct of the victim. It means that there was an act or omission from the part of the injured claimant or victim, which has materially contributed to the damage.

19. In the instant case, the FIR and the spot panchnama are supporting the contention of the Insurance Company that the motorcycle rider has contributed the said accident. The Insurance Company has relied upon the documentary evidence of spot panchnama and FIR. Respondent No.1 has also adduced his evidence which shows that the alleged accident took place due to the head on collision between the two

vehicles. There is a clear difference between the contributory negligence and composite negligence. Where person is injured without any act of omission on his part, but as a combined effect of the negligence of the two or more persons, it is a case of composite negligence and not a case of contributory negligence. The expression ‘contributory negligence’ applies solely to the conduct of the claimant, in case of personal injury and in case of compensation for death, it applies to the conduct of the victim. It means that there was an act or omission from the part of the injured, claimant or victim, which has materially contributed to the damage. In the instant case, neither the claimant was driving the vehicle nor he was driver of the other vehicle, he was travelling in the vehicle. Thus, it is clear that there was no act or omission on the part of the injured to contribute the said accident. Thus, the contention of the insurance company that it is a contributory negligence and the petitioner is entitled to receive the compensation from the motorcycle owner and insurance company i.e. respondent Nos.3 and 4 is not acceptable. It is well settled that right of the claimants to recover the damages from the tortfeasor is well settled. Once Court comes to the conclusion that the case is of composite negligence, damages cannot be apportioned. Petitioner is entitled to recover entire compensation from all or any of the joint tortfeasor. The liability in the case of composite negligence normally should not be apportioned, as both the wrongdoers and jointly and severally liable for the whole loss. It is the choice of the petitioner either to claim compensation from both the tortfeasor or any of them. Thus, the tentativeness for the purpose of contribution between two joint tortfeasor do not at all affect the right of the petitioner to recover the full damages.

20. The Hon'ble Apex Court in the case of ***T. O. Anthony Vs. Karvarnan and ors., 2008(3) ALL MR 902*** held as composite negligence refers to the negligence on the part of two or more persons. Where a person is injured as a result of negligence on the part of two or more wrongdoers, it is said that the person was injured on account of the composite negligence of those wrongdoers. In such a case, each wrongdoer is jointly and severally liable to the injured for payment of the entire damages and the injured person has the choice of proceeding against all or any of them. In such a case, the injured need not establish the extent of responsibility of each wrongdoer separately, nor is it necessary for the Court to determine the extent of liability of each wrongdoer separately. On the other hand where a person suffers injury, partly due to the negligence on the part of another person or persons, and partly as a result of his own negligence, then the negligence of the part of the injured which contributed to the accident is referred to as his contributory negligence. Where the injured is guilty of some negligence,

his claim for damages is not defeated merely by the reason of negligence on his part but the damages recoverable by him in respect of the injuries stands reduced in proportion to his contributory negligence.

21. As already observed that the Insurance Company has proved that respondent No.1 was not having valid driving license at the time of alleged accident which is a breach. The Insurance Company is not liable to pay compensation to the claimants however, the directions can be given to the Insurance Company to pay and recover the same.

22. This Court has also in the case of ***Bajaj Allianz General Insurance Limited Vs. Smt. Sangita w/d Bhagwan Raut and others, 2015(1) ALL MR 305*** referred the judgment of this Court in the case of ***Traders Private Limited, Ahmedabad and another Vs. Sunanda wd/o Krishna Machivale and others, 2008(5) ALL MR 757*** wherein the Division Bench of this Court has observed in paragraph No.59 that such directions have been issued by the Honourable Apex Court in exercise of its jurisdiction under Article 142 read with Article 146 of the Constitution of India for doing complete justice for the parties and that such powers do not vest in the High Court to pass similar order. At the same time, the Division Bench in paragraph No.56 observed that such directions cannot be issued in all cases thereby implying that where facts and circumstances of the case warrant, the direction to first pay the

compensation and then recover it from the owner of the offending vehicle can be issued.

23. In the case of ***United India Insurance Company Vs. Sindhubai, 2010 ALL MR (Supp.) 220***, after referring the catena of judgments of the Honourable Apex Court as well as this Court, has held that “therefore, as the legal position stands today, there is a power vesting in tribunal and in this Court, depending upon the facts and circumstances of each case. to direct the insurer to pay compensation amount and, thereafter, to recover the same from the insured.

24. From the above discussion, it is crystal clear that it is not in every case the tribunal must direct the Insurance Company to pay first the amount of compensation and then recover it, but it depends upon the facts and circumstances of each case.

25. Upon going through the decisions of the Hon’ble Apex Court, the directions to the Insurance Company to pay and recover would be just and proper. The claimant has sustained the injuries which resulted into permanent disability. It will be extremely difficult for the claimant to once again knock doors of the Court by preferring execution proceeding against the owner of the said vehicle and it is difficult for the claimant who became handicapped to recover the amount of

compensation from the owner. On the other hand, the Insurance Company would be in a position to recover the amount from the owner of the said vehicle, and therefore, there is no illegality if the Insurance Company is directed to pay compensation amount first and then recover the same from the insured.

26. In view of the above discussion, the first appeal deserves to be allowed partly with directions to the Insurance Company to first pay the compensation amount and recover the same from the insured.

27. The Insurance Company is exonerated from the liability with direction to pay the amount of compensation and recover the same from respondent No.1 – owner. The rest of the finding of the Tribunal is maintained.

28. Appeal is disposed of with no order as to costs.

(URMILA JOSHI-PHALKE, J.)

**Divya*