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

FIRST APPEAL NO. 1624 OF 2008

APPELLANT: (Original Resp.) No.3) (On R.A.)	The New India Assurance Company Ltd. Akola, through its Divisional Manager, Division Office, Near Royat Haweli Building, Old Cotton Market Akola, Tq. & Dist. Akola.

...V E R S U S...

RESPONDENTS (Original Applicants) (On R.A.)	1]	Shrikant s/o Govindrao Chahare, Aged about 50 years, Occu: Service, R/o, Washim Tq. & Dist. Washim.
	2]	Milind s/o Bhimrao Sarkate, Aged : Adult, Occu: Driver, R/o Lakhala, Washim, Tq. & Dist. Washim.
	3]	Bhimrao s/o Ganpat Sarkate, Aged: Adult, Occu: Owner of the Vehicle, R/o Lakhala, Washim, Tq. & Dist. Washim.

Mr Akhilesh Potnis, counsel holding for Mr Mohan Sudame, counsel for the appellant.
Mr P.R. Agrawal, counsel for the respondent No.1
Ms Aparna Telenge, counsel holding for Mr A.P.Tathod, counsel for the respondent Nos. 2 and 3.

CORAM : URMILA JOSHI-PHALKE, J. .
DATE : 27/03/2023

ORAL JUDGMENT :

1. The present appeal is preferred by the New India Assurance Company Ltd., Akola under Section 173 of the Motor Vehicles Act, 1988 against the judgment and award passed by the Member, Motor Accident Claims Tribunal, Akola in M.A.C.P. No. 124/2007, dated 04/08/2008, by which the respondent Nos.1 and 2 are held liable to pay compensation of Rs.81,638/- to the petitioner along with NFL amount. The Tribunal further directed respondent No.3/Insurance Company to pay and recover the said amount from respondent Nos. 1 and 2.

2. Brief facts of the case which are necessary for disposal of the appeal are as under:-

On 05/11/2006 at about 2.00 p.m., the applicant was proceeding towards the Market as it was the weekly market day from his house on his Motorcycle bearing No. MH-37-C/4177 along with his wife. At the relevant time, one Hero Honda motorcycle bearing No. MH-37-C/4177 came from the opposite side in a rash and negligent manner without observing the traffic rules and regulations and dashed against the motorcycle of the claimant.

3. It is contended that the rider of the motorcycle was riding the vehicle in a rash and negligent manner at an excessive speed, lost his control over his vehicle, and dashed against the motorcycle from the front side of the claimant. Due to the sudden and severe dash, the claimant and his wife fell down on the ground and the claimant sustained multiple injuries to his head, face, and other parts of the body. After the accident, the claimant was

immediately referred to Civil Hospital, Washim. Thereafter, he was treated at Vidharbha Neuro Surgical Hospital, Akola by Dr. Manoj Jain. He was an indoor patient from 05/11/2006 to 18/11/2006. Due to the accidental injuries, he sustained permanent disablement and therefore, he is claiming compensation for pecuniary and non-pecuniary damages.

4. As per the contention of the claimant, the alleged accident took place due to the rash and negligent driving of the offending vehicle/driver i.e. opponent No.1. The motorcycle was owned by opponent No.2 and validly insured with opponent No.3. Therefore, opponent Nos. 1 to 3 are jointly and severally liable to pay the compensation to the claimant.

5. Respondent Nos.1 and 2 resisted the proceedings by filing a written statement vide Exhibit No.70 and denied the contention of the claimants. As per respondent Nos. 1 and 2, the accident took place due to the rash and negligent driving of the claimant himself, and therefore, he is not entitled to pay the compensation. Respondent No.3/Insurance Company also resisted the proceedings vide Exhibit 20 and denied all the allegations made by the claimants.

6. As per the contention of respondent No.2 as two motorcycles are involved in the accident, the claimant has claimed compensation against the respondents i.e. owner of the offending vehicle. The application is bad in law for non-joinder of necessary parties and prayed for dismissal of the petition.

7. The learned trial Court has framed necessary issues. The

claimants have adduced the evidence as well as placed reliance on various documents. After appreciating the evidence, the tribunal come to the conclusion that opponent No.1 was not holding a valid driving license, and therefore, the insurance company is not liable to pay compensation, however, directions were given to the Insurance Company to pay the compensation amount and recover the same.

8. Being aggrieved and dissatisfied with the judgment and award passed by the learned trial Court, the present appeal is preferred by the Insurance Company on the ground that the learned tribunal had not considered that the insurance company is not liable to pay the said amount because at the time of the said accident, the respondent No.1 was not having valid driving license, and therefore, owner of the offending vehicle has committed the breach of the terms and conditions of the policy and hence, the insurance company is not liable to pay the compensation. As the owner of the vehicle had committed a breach, the insurance company is not liable to pay compensation and therefore, the directions of the learned trial Court are erroneous and liable to be set aside.

9. Heard learned counsel Mr Potnis holding for learned counsel Mr Sudame for the appellant/insurance company. He submitted that the driver was directed to produce his driving license which he fell to produce, and therefore, the learned trial Court has drawn an adverse inference. Despite drawing the adverse inference, the insurance company was directed to pay the compensation amount and recover the same which is an erroneous one. In fact, the owner of the vehicle has committed a fundamental breach of the

policy and therefore, the insurance company is not liable to pay compensation. Hence, the judgment and award passed by the learned trial Court, directing the insurance company to pay and recover is liable to be quashed and set aside.

10. Per contra, learned counsel Mr P.R. Agrawal appearing for the original claimants submitted that now the issue regarding directions of pay and recover is well settled. The learned trial Court by placing reliance on the decision of the Apex Court, directed the insurance company to pay and recover. The Hon'ble Apex Court, specifically observed in a catena of decisions that, in certain situations, the Court while fastening the liability on the owner of the vehicle, may direct the insurance company to pay the claimants and recover the same from the owner. Therefore, no illegality is committed by the learned trial Court, the appeal is devoid of merits and liable to be dismissed.

11. Learned Counsel Ms Telange for the respondent Nos. 2 and 3 submitted that in fact insurance company has not raised the defence of a driving license, which the learned trial Court has taken into consideration on its own. The insurance company is also failed to prove by adducing the evidence that the driver of the motorcycle was not having a valid driving license and therefore, the directions given by the learned trial Court to pay and recover are legal one. She further submitted that in fact, the vehicle was validly insured with the insurance company i.e. appellant and the learned trial Court has erroneously saddled the responsibility to pay the compensation to the driver and owner of the vehicle. After hearing

both sides and after perusal of the record, the following point arises for my consideration:-

> *a) Whether the learned trial Court justified in directing the appellant/insurance company to pay the compensation amount and to recover the same from the owner?*

12. The claimant has filed the application for grant of compensation on account of accidental injuries sustained which resulted in permanent disability. To substantiate the contention, he stepped into the witness box by filing an affidavit of evidence vide Exhibit No.23. In support of his contention, he further relied upon the documents i.e. Form-AA Exhibit No.25, FIR Exhibit No.26, Insurance Policy Exhibit No. 29, Medical papers Exhibit No.30, medical treatment papers Exhibit Nos. 32 to 38, 48 to 57, Exhibit No. 59/1 to 59/45, and salary certificate etc. He had also examined Anil Dayaramji Uike at Exhibit 45, Santosh Vasantrao Jog at Exhibit No.47, and Sunil Devidas Kamble at Exhibit. 58.

13. The insurance company has raised the defence that the rider of the motorcycle was not holding a valid and effective driving license and therefore, the owner of the offending vehicle has committed a breach of terms and conditions of the policy, hence, the insurance company is not liable to pay compensation.

14. There is no dispute that, the claimant met with an accident on 05/11/2006, when he was proceeding on his motorcycle. At the relevant time, the offending vehicle MH-37-C/4177 came from the opposite side and gave dashed to the

motorcycle of the claimants. Regarding the said accident, the crime was registered against a motorcycle rider, who was riding motorcycle No. MH-37-C/4177. The claimant has adduced his evidence vide Exhibit No. 23 and narrated about the occurrence of the accident. He further testified that he was under treatment, initially in the hospital at Washim and subsequently, he was treated in the hospital Vidharbha Neuro Surgical Hospital, Akola. His evidence further shows that due to the accidental injuries, he was permanently disabled, and therefore, he is claiming compensation. Though he is cross-examined at length, nothing incriminating came on record to show that, he had also contributed to the said accident. In support of his contention, he further relied upon the accident Form-AA Exhibit No.25, FIR Exh. No.26, Spot Panchanama Exhibit 27, Insurance Policy Exhibit No.29, and medical treatment payers Exhibit No. 30.

15. To prove his income, he examined Anil Dayaramji Uike, who has proved his salary certificate Exhibit 46. As per his evidence, the injured was serving as an Assistant Engineer in M.S.E.D.C.L and was drawing a salary of Rs. 29,075/-. PW-3 Santosh Vasantrao Gaur was examined to prove the medical bills. He testified that he was serving in Vidharbha Neuro Surgical Hospital, Akola, and the petitioner was admitted in the said hospital from 05/11/2006 to 18/11/2006. He had paid Rs. 50,750/-. Both these witnesses are cross-examined by the opponents. Though the insurance company has raised the defence that the offending vehicle motorcycle rider was not holding valid driving license, the insurance company has

not adduced any evidence, in support of the contention. When the insurance company has came up with a specific defence, the burden is on the insurance company to prove the same. In the present case also, the burden was on the insurance company to adduce the evidence by examining the officials from Regional Transport Office. However, the insurance company has not adduced any evidence to the extent that, the driver of the motorcycle, who was driving the offending vehicle at the relevant time was not holding a driver's license. Respondent Nos. 1 and 2 were directed by the Tribunal to produce on record the driving licence but they fail to produce the same. Therefore, the adverse inference was drawn by the learned trial Court, and it is held that the motorcycle driver was not holding a valid driving license. Thus the owner of the motorcycle had committed a breach of the terms and conditions of the policy and hence, the insurance company was exonerated from the liability. While exonerating the insurance company from liability, the learned trial Court had considered the judgment of the Hon'ble Apex Court in the case ***Sardari and another Vs Sushil Kumar reported in Consumer Protection Judgment Vol.II (SC) 21,*** wherein the Hon'ble Apex Court has observed that the Act, however, itself provides for the cases where the insurance company can avoid its liability. Avoidance of such liability would largely depend upon violation of the conditions of the contract of insurance. Where the breach of conditions of contract is ex-facie apparent from the records, the Court will not fasten the liability on the Insurance Company. In certain situations, however, the Court while fastening the liability on the owner of the vehicle may direct the Insurance

Company to pay to the claimants the awarded amount with liberty to it to recover the same from the owner.

16. Thus, in view of the judgment of the Hon'ble Apex Court, considering it is difficult for the claimant to recover the amount from the owner by filing the execution petition, and again asking the claimant to knock the door of the Court to recover the amount of compensation, the said directions are given. Subsequently also, in a catena of decision, the Hon'ble Apex Court held that the tribunal has the power to issue such type of directions therefore, the contention of the insurance company that the Tribunal has erroneously directed the insurance company to pay the compensation amount and recover it from the owner is not sustainable. While awarding the compensation, the tribunal had considered on the basis of the documents on record that the claimant has also contributed to the said accident and contributory negligence was attributed to the claimant also and thereafter awarded the compensation of Rs. 81,638/- to the petitioner along with NFL amount with interest @ 7% per annum.

17. The present appeal is preferred by the appellant/ insurance company only on the ground that, the tribunal has erroneously directed the Insurance Company to pay and recover the said amount of compensation. Now the issue regarding the directions by the tribunal for pay and recover by upholding the power of the tribunal that, such types of directions can be given by the tribunal and the tribunal is empowered to give such directions is well settled. In view of that, no illegality is committed by the

Tribunal by directing the insurance company to pay and recover the amount of compensation. Such type of directions of course can be given in appropriate cases.

18. In the present case, considering that the claimant has sustained the injuries in an accident which took place due to the rash and negligent driving of the offending vehicle/driver and now, it is difficult for the claimant to recover the said amount again after knocking the door of the Court. So, I do not find any illegality in the order passed by the tribunal, directing the insurance company to pay the amount and recover the same. Hence, I pass the following order:

a) The appeal is **dismissed** no order as to costs.

b) The amount of compensation which is deposited by the Insurance Company be transmitted to the Member, Motor Accident Claims Tribunal, Akola with accrued interest.

JUDGE

RKN