IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

FIRST APPEAL NO. 2631 OF 2016

1. Jivraj S/o Amba Gurjar,
Age 42 years, Occ: Labour,

2. Smt. Koyali W/o Jivraj Gurjar,
Age 40 years, Occ: Housewife,

3. Smt. Fulla Ramdeo Gurjar,
Age 19 years, Occ: Housewife,

4. Champalal S/o Jivraj Gurjar,
Age 16 years, Occ: Education,

5. Ramraj S/o Jivraj Gurjar,
Age 13 years, Occ: Education

Appellant nos. 4 and 5 u/g
Appellant no. 1
All R/o. Kaniya, Tq. Hurde, **...Appellants**
Dist. Bhilwada (Rajasthan) **(Orig.Claimants)**

Versus

1. Ganesh S/o Vishnu Sonawane,
Age 31 years, Occ. Driver,
R/o Nimbhora, Tq. Kannad,
Dist. Aurangabad.

2. Mr. Nandkishore S/o Vishnu
Sonawane,
Age 33 years, Occ: Business
R/o. As above

3. The Divisional Manager,
New India Assurance Co. Ltd.
Ajay Engineering Compound, 2^{nd}
Floor, Adalat Road, Aurangabad **...Respondents**

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Mr. R. B. Dhakane, Advocate for Appellants
Mr. S. R. Bodade, Advocate for Respondent No. 3

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CORAM : R.M. JOSHI, J.

DATE : JANUARY 29, 2024

PER COURT:

1. This Appeal is filed by the claimants challenging exoneration of insurer from payment of compensation.

2. There is no dispute about the fact that the accident took place on 01.02.2013 while deceased Ramdeo was proceeding on motorcycle from Vaijapur to Aurangabad. When he reached to the spot of accident, a tractor bearing registration no. MH-20-AB-8693 was standing in the middle of the road without indicating parking lights at the night hours. For want of parking lights being kept on, the deceased's motorcycle was dashed against tractor resulting into sustainment of serious injuries to him. He was brought dead to the hospital. Crime bearing no. I-36/2013 came to be registered against the driver of the tractor at MIDC Waluj Police Station. The claim of the claimants for compensation was determined and allowed to the extent of Rs. 28,55,000/-. Neither claimant nor insurer or owner has challenged the said determination of

compensation by learned Tribunal. Present Appeal is filed on the ground that the Tribunal has committed error in absolving the liability of the insurer to pay compensation.

3. At the outset, learned Counsel for the Claimants submit that the deceased was third party and hence, irrespective of any breach of condition of policy, the liability of insurer ought not to have been absolved by Tribunal. It is his submission that even otherwise alleged breach of condition of insurance policy has not been proved by the insurer, to deny liability. In support of his submissions, he placed reliance on the judgment of Hon'ble Apex Court in case of ***Pappu and Others Vs. Vinod Kumar Lamba and Another, 2018 (6) MH.L.J. 760***. Without admitting the fact that the insurer has succeeded in proving the breach of conditions of policy in alternate it is submitted that there needs to be an order of pay and recover against insurer.

4. Learned Counsel for the Insurer opposed the said contentions with submissions that in view of the breach of conditions of the insurance policy, the

liability of insurer stands absolved. It is his further submission that the driver of the tractor was not holding license to driver tractor with trolley. According to him, the Tribunal has rightly held that he did not possess valid and effective license to drive tractor with trolley.

5. It is not the case of the insurer that the driver of the vehicle was not holding any license. It is sought to be contended that he was not holding license to drive tractor with trolley. In this regard, it would be relevant to take note of the judgment of Hon’ble Apex Court in case of ***Mukund Dewangan Vs. Oriental Insurance Company Ltd, (2017) 14 SCC 663*** which shows that in absence of any evidence indicating unladen weight of the tractor and trolley beyond 7500 kgs, it remains a light motor vehicle and license to drive LMV is considered as valid and effective license. In view of this settled position of law, there is no substance in the contention of the insurer that the driver of the tractor was not holding a valid license. Thus, in absence of proof of the breach of conditions of insurance policy, it would not be open for the Tribunal to absolve the liability of the insurer.

6. Learned Counsel for the Insurer submits that the Claimants have not sought direction of holding insurer jointly and severally liable for payment of compensation and the direction is sought only to pay and recover.

It is pertinent to note that the claimants have challenged the findings of the Tribunal absolving the liability of the insurer. In such circumstances, it is open for the claimants to seek joint and several liability. In any case, ground no. D. of the Appeal memo indicates that the claimants seeks to argue that the insurer ought to have been liable to pay compensation or at the most Tribunal ought to have passed order of pay and recover. This shows that specific ground is raised by the claimants in this regard. Thus, this Court finds no substance in the contention of learned Counsel for the insurer.

7. Having regard to the fact that the insurer has failed to prove breach of terms of the insurance policy, and in any case, the deceased was third party, the order of Tribunal of absolving the insurer from the liability to pay compensation cannot sustain. Hence,

impugned judgment and award deserves modification. Hence, the order

O R D E R

(a) Appeal is allowed.

(b) Insurer is jointly and severally liable with owner and driver to pay compensation as determined by the Tribunal.

(c) Rest of judgment and award to remain unchanged.

(d) In view of disposal of Appeal, pending applications, if any, are also disposed of.

(R. M. JOSHI, J.)

Malani