IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

FIRST APPEAL NO. 1187 OF 2018
WITH CIVIL APPLICATION NO. 13486 OF 2018

BJAJ ALLIANZ GENERAL GENERAL INSURANCE CO.LTD
THROUGH ITS AUTHORIZED SIGNATORY/BRANCH MANAGER
VERSUS
NIMBA ATMARAM PATIL AND ANOTHER

Mr. Mohit R. Deshmukh, Advocate for the appellant
Mr. R. P. Adgaonkar, Advocate h/f Mr. V. B. Patil, Advocate for respondent Nos. 1 and 2

CORAM : R. M. JOSHI, J.
DATE : 13th FEBRUARY, 2024

P.C. :-

1. This First Appeal under Section 173 of Motor Vehicle Act is filed by Insurer taking exception to the judgment and award dated 3rd May, 2017 in M.A.C.P. No. 204 of 2012.

2. Parties are referred to as Claimants, Owner, Driver and Insurer for the sake of convenience.

3. On 2nd February, 2012 at about 12.30 mid night Sagar, son of claimants was proceeding as pillion rider on motorcycle bearing No. MH-19-BE-7131 road by his friend Sonu alias Kalpesh Ramesh Choudhari. They were coming from Parola towards Erandol. At the spot of accident due to the negligence driving of the motorcycle by its rider, Sagar fell

down and sustained injuries to his head and died on the spot. Without intimating about accident the rider of the motorcycle fled away from the spot. Claimants have claimed compensation of Rs. 4 lakhs.

4. Owner and rider of motorcycle did not file written statement. Whereas the Insurer filed written statement at Exhibit 20 denying the contentions of the claimants with regard to the age, occupation, income and death of the deceased. It is specifically claimed that the accident as did not occur due to the negligence on the part of the rider of the motorcycle. It is claimed that the deceased was lying near the speed breaker and was given dash by unknown vehicle and it is a case of hit and run. There is also averment made with regard to the rider of the motorcycle not having valid and effective license and therefore, there is breach of terms of insurance policy which renders Insurer not liable for the payment of compensation.

5. On behalf of the claimants Nimba Patil -claimant No.1 was examined at Exhibit 23. He placed reliance on the FIR (Exhibit 24), supplementary statement (Exhibit 25), spot panchanama (Exhibit 26), inquest panchanama (Exhibit 27), PM notes (Exhibit 28) to prove the allegation with regard to the negligence on the part of the rider of the motorcycle and death of deceased in the said accident. Reference is also made to form AA (Exhibit 30) and the copy of insurance policy (Exhibit

29).

6. The Insurer examined two witnesses i.e. Sachin Sanap (Exhibit 40) and Shrikant Khade (Exhibit 52). Insurer relied upon receipt (Exhibit 41), LMV Transport car license (Exhibit 42) and the statements recorded of the witnesses in the investigation (Exhibits 45 to 48).

7. The learned Tribunal by impugned judgment and award has directed both owner and insurer to jointly and severally pay compensation of Rs. 9,35000/- along with interest at the rate of 9%. The insurer being aggrieved by the said judgment and award has preferred this appeal.

8. Learned counsel for the insurer submits that there is absolutely no evidence on record to hold that the deceased has died in an accident arising from the use of motorcycle in question. It is submission that there is no witness examined by the claimants in order to prove the actual occurrence of the accident. It is his submission that on the basis of the investigation papers it can be said that the deceased was ran over by unknown vehicle. Thus, according to him claimants have failed to prove the factum of accident involving motorcycle in question. On the point of liability to pay compensation to the claimants it is submitted that once the claimants failed to prove the involvement of the

said motorcycle, question of insurer being liable to pay compensation does not arise. Without prejudice to this submissions he urges that the insurer had led evidence in order to show that the rider of the motorcycle did not have license to drive two wheeler and as such it is a fundamental breach of condition the policy as contemplated by Section 149(2) of Motor Vehicle Act and hence the Insurer cannot be held liable for the payment of compensation. To support his submissions, reliance is placed on following judgments.

> *(i) Bajaj Allianz General Insurance Co. Ltd. Vs. Manisha w/o Lahu Kale and another in First Appeal No. 2742 of 2015 dated 04/09/2018.*
>
> *(ii) Shriram Insurance Company Ltd., Vs. Vanita and Others, 2019 SCC OnLine bom 2058 (2020) 2 TAC 922.*

9. Learned counsel for the claimants opposed the said submission by claiming that since the deceased was third party, the irrespective of any breach of condition of policy the Insurer would be liable to pay the compensation to the claimants.

10. There is no dispute about the fact that the deceased died in road traffic accident. The question arises as to whether the claimants have been able to prove that the deceased died in the accident involving motorcycle owned and driven by owner. Claimants have not witnessed the occurrence of the accident. The accident in question has occurred at 12.30 a.m. It is not more *res integra* that the claimants can place

reliance on police papers, to prove the factum of the accident and negligence. Genuineness of investigation papers is not in dispute. Undisputedly the FIR was registered against the owner/ rider of the motorcycle. During the course of investigation statements of witnesses were examined (Exhibits 45 to 48). These statements clearly show that the deceased was riding as pillion rider along with owner of motorcycle and he fell down from the motorcycle resulting in to occurrence of the accident. There is nothing on record to indicate that quashment of charge-sheet against the rider of the motorcycle was sought at any time. Thus, this evidence is sufficient for the claimants to discharge initial burden on them to prove the occurrence of the accident as negligence of the rider of the motorcycle.

11. The onus, therefore, shifts upon the owner and insurer to prove otherwise. Though the insurer has examined the Investigating Officer but nothing was brought on record in order to show that the statements of the witnesses who have not reliable and trustworthy. The Insurer, therefore, has not succeeded to discharge the onus to prove that the accident has occurred on account of dash given by any unknown vehicle to the deceased.

12. Therefore, no fault can be found with regard to the findings recorded by Tribunal, regarding factum of accident, death of deceased

involving motorcycle in question and negligence of its sides. The Insurer, however, has examined witness from RTO in order to prove that the rider of the motorcycle was having license for driving light motor vehicle but there is no license to drive motorcycle with gear. It was for the owner to lead evidence in order to rebut the same. Neither pleadings nor evidence is there before the Tribunal on behalf of the owner/driver of the motorcycle. It is therefore, held that the Insurer has succeeded in proving the breach of condition of policy as the rider of the motorcycle was not having valid and effective license to ride the said vehicle.

13. The question arises as to whether the liability of the Insurer can be absorbed completely in payment of compensation once the Insurer succeeds to prove the breach of condition of policy. There cannot be any dispute about the fact that the deceased was a third party. He was not responsible for the occurrence of the accident being pillion rider. Section 146 of the Motor Vehicle Act mandates coverage of risk of third party. Even Section 149(1) of the said Act clearly shows that though it is open for the Insurer to raise plea of the breach of condition of policy, however, any such defence would be available when the compensation is payable to a third party. Conjoint reading of Sections 165 and 168 of the Act empowers the Tribunal to pass appropriate order of pay and recover. Claimant being of third party, Insurer is obliged to satisfy the award and

recover the same from the owner.

14. Hence, Appeal is partly allowed. Insurer to pay compensation to the claimants and recover the same from the owner. Rest of judgment and award to remain unchanged. Pending civil application stands disposed of.

(R. M. JOSHI, J.)

ssp