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

First Appeal No. 761 of 2011

(1) Mansing s/o Motising Rathod
Aged about 52 years, Occ. Labour.

(2) Sau. Kamala w/o Mansing Rathod,
Aged about 45 years, Occ. Household,
Both r/o Vitholi, Tq. Digras,
Dist. Yavatmal. ... **Appellants**

- Versus -

(1) Ganesh s/o Kisanrao Jadhav,
aged about adult, Occ. Driver,
r/o Vitholi, Tq. Digras,
Dist. Yavatmal.

(2) Sanjay s/o Sakharam Gajbhare,
aged adult, Occ. Owner,
r/o Vitholi, Tq. Digras,
Dist. Yavatmal.

(3) The Oriental Insurance Co. Ltd.
Through its Branch Manager,
Veer Wamanrao Chowk, Yavatmal,
Dist. Yavatmal. ... **Respondents**

- -

Mr. Vinay Dahat, Advocate for the appellants
Mrs. Mrunal S. Naik, Advocate for the respondent no. 3
None present for respondent nos. 1 and 2

- -

CORAM : ANIL L. PANSARE, J.

Date of reserving judgment : 25-4-2024
Date of pronouncing judgment : 30-4-2024

JUDGMENT

The appellants - original claimants have filed present appeal under Section 173 of the Motor Vehicle Act, 1988 (for short "the Act of 1988"), being aggrieved by the judgment and award dated 18-3-2011 passed by the Motor Accident Claims Tribunal, Darwha in M.A.C.P. No. 93/2009. Respondent no. 1 is the driver of the offending vehicle and respondent no. 2, the owner. Respondent no. 3 is the insurance company. The appellants will be hereinafter referred to as the claimants, respondent no. 1 as the driver, respondent no. 2 as the owner and respondent no. 3 as the insurance company. The claimants are aggrieved for two reasons viz. (1) inadequate compensation and (2) order exonerating the insurance company from payment of liability. These are the points for consideration in the appeal.

2. According to the claimants, deceased Devidas was their son. He was aged 20 years and was a bachelor when the accident occurred. He was, on 26-8-2009, proceeding in Tata Tempo bearing registration no. MH-24-A-3827. The vehicle was plying from Digras to Nagpur. It was carrying load of vegetables. When the vehicle reached near Village Waraj on Darwha – Yavatmal Road, the driver of the vehicle i.e. respondent no. 1 lost control because he was driving the vehicle in rash and negligent manner. He gave dash to another vehicle which was

jeep bearing registration no. MH-29-3077. Due to which, the vehicle of deceased turned turtle. The deceased sustained several injuries and died on the spot. The deceased was working as driver-cum-cleaner on the said vehicle but was not driving the vehicle. His salary was Rs. 4,500/- per month. Accordingly, the claim petition was filed.

3. The driver and owner contested the petition. Both admitted the fact as to who was driving and who was owner of the offending vehicle i.e. Tata Tempo. They have, however, denied that driver was rash and negligent in driving the vehicle. They have further denied that the deceased was earning Rs. 4,500/- per month. They blamed the driver of other vehicle i.e. jeep for the accident. According to them, driver of the said vehicle was under the influence of liquor and was driving the jeep in rash and negligent manner, which resulted into accident. The insurance company, though served, did not appear and petition proceeded *ex-parte* against it.

4. The Tribunal framed various issues and answered the same in following manner.

Issues	Findings
(1) Whether the applicants proves deceased Devidas s/o Mansing Rathod died in the motor vehicle accident occurred on	In the affirmative.

26.08.2009 at about 21.30 p.m. in between Darwha – Yavatmal road ?	
(2) Whether the applicants proves said accident took place due to rash and negligent driving of Matador bearing No. MH-24/A-3827 by the N.A.No. 1 ?	Proved, accident took place due to rash and negligent driving of Tata Tempo No. MH-24/A-3827 & Black Yellow Jeep No. MH-29/3077 by their drivers 50% each responsibility.
(3) Whether the applicants are entitled to receive compensation ? If yes, how much and from which of the non-applicants ?	Yes, Rs. 1,67,000/- from the N.A.No. 2.
(4) What order ?	As per final order.

5. As could be seen, the Tribunal found that Devidas suffered accidental death on 26-8-2009. The Tribunal further held that both the vehicles were fully responsible for the accident. The Tribunal directed the non-applicant no. 2 to pay Rs. 1,67,000/- i.e. 50% of total compensation to the claimants. The insurance company was, however, exonerated. The Tribunal, while attributing responsibility of accident on both the drivers, has observed thus :

> *"14. Apart it neither the Tempo driver nor the driver of black yellow jeep appear before the court to state the real facts and circumstances of the occurrence. Both of them have avoided to submit the report of the accident. The report of the accident is lodged by the person who has hear-say*

information about the accident. The report is thus interesting simply to put the liability on other vehicle about the accident. Considering the fact that the applicants were not eye witness to the accident and the evidence on record mostly disclosed that despite the accident is head on collision the concern police neglected to consider said aspect for the registration of crime against the driver of both the vehicles. Therefore I am of the view that the applicants proves accident took place on 26.8.2009 at about 9.30 p.m. at village Waraj on Darwha to Yavatmal road, however, I am of the confirm opinion and view that evidently said accident took place due to rash and negligent driving of Tata Tempo 407 No. MH-24/A-3827 and black yellow colour jeep No. MH-29/3077 by the respective drivers thereof. The drivers of both the vehicles were rash and negligent in causing accident and accidental death of deceased Devidas Mansing Rathod. Hence I answered the issue Nos. 1 & 2 accordingly."

6. Thus, it appears that the drivers of both the vehicles failed to enter the witness box. There is, thus, no direct evidence on the point of negligence. The learned counsel appearing before me could not show any cogent evidence to draw any other inference than what has been inferred by the Tribunal. The spot panchanama indicated that it was a head on collision. The body of the deceased was lying nearby. Thus, there is material to show that the drivers of both the vehicles were equally responsible and in that sense, this is a case of contributory negligence.

7. So far as the claimants are concerned, the deceased was not the driver but was working as cleaner-cum-driver with the owner of

Tata Tempo vehicle. He suffered accidental death. He being not responsible for the vehicular accident, the case of the claimants will have to be viewed from the point of view of composite negligence in terms of law laid down by the Hon'ble Supreme Court in the case of ***Khenyei Vs. New India Assurance Co. Ltd. and others [(2015) 9 SCC 273].*** The Supreme Court held that in the case of composite negligence, the person who has suffered has not contributed to the accident but due to the outcome of combination of negligence of two or more other persons and in such case, the claimant is entitled to sue both or any one of the joint tortfeasors and to recover the entire compensation as liability of joint tortfeasors is joint and several. In the present case, the claimants chose to file claim petition against the owner of the Tata Tempo vehicle. Such approach is permissible in law and, therefore, the joinder of the owner of another vehicle was not necessary. The Tribunal committed an error of law by reducing the compensation by 50% on the ground of contributory negligence, when the case was of composite negligence.

8. The counsel for the insurance company has invited my attention to some of the observations made by the Tribunal to exonerate the insurance company. The Court noted that though Tata Tempo vehicle was a goods carrier but the permit thereof was not brought on

record. The Court also noted that even licence of non-applicant no. 1 was not filed. The Court noted that though the Advocate for driver sought permission to produce verified photocopy of licence and though the original licence was available with him, he declined to produce it. The Tribunal, therefore, took a view that photocopy of driving licence verified voluntarily by the party without the order of the Court and the original having been declined to produce for perusal of the Court, the driver and owner failed to prove that the driver was having valid driving licence. Accordingly, the Tribunal proceeded to exonerate the insurance company on the ground that though the matter proceeded *ex-parte* against insurance company, the non-applicants failed to produce driving licence, permit of vehicle and, therefore, they have committed breach of terms and conditions of the policy.

9. The learned counsel for the insurance company has, thus, supported the findings of the Tribunal. She submits that though matter proceeded *ex-parte*, the insurance company can be exonerated and issue of permit can be considered by the trial Court. According to her, the crux of the matter is that the driver and owner failed to produce valid licence and valid permit and that itself is sufficient to exonerate the insurance company.

10. This argument has been countered by the learned counsel appearing for the appellants by placing reliance upon the judgment of the Supreme Court in the case of ***Amrit Paul Singh and another Vs. Tata AIG General Insurance Co. Ltd. and others [(2018) 7 SCC 558]***. The facts before the Court were such that insurance company therein opposed the claim on the ground that vehicle was driven in violation of terms of insurance policy. The driver was not having valid and effective driving licence and the vehicle did not have the permit on the date of accident. The Tribunal exonerated the insurance company. The award was challenged before the Punjab and Haryana High Court. The High Court confirmed the award. The Supreme Court, taking note of various earlier decisions, proceeded to dismiss the petition in following terms.

> *"24. In the case at hand, it is clearly demonstrable from the materials brought on record that the vehicle at the time of the accident did not have a permit. The appellants had taken the stand that the vehicle was not involved in the accident. That apart, they had not stated whether the vehicle had temporary permit or any other kind of permit. <u>The exceptions that have been carved out under Section 66 of the Act, needless to emphasise, are to be pleaded and proved. The exceptions cannot be taken aid of in the course of an argument to seek absolution from liability.</u> Use of a vehicle in a public place without a permit is a fundamental statutory infraction. We are disposed to think so in view of the series of exceptions carved out in Section 66. The said situations cannot be equated with absence of licence or a fake licence or a licence for different kind of vehicle, or, for that matter, violation of a condition of carrying more number of*

passengers. Therefore, the principles laid down in Swaran Singh and Lakhmi Chand in that regard would not be applicable to the case at hand. That apart, the insurer had taken the plea that the vehicle in question had no permit. It does not require the wisdom of the "Tripitaka", that the existence of a permit of any nature is a matter of documentary evidence. Nothing has been brought on record by the insured to prove that he had a permit of the vehicle. In such a situation, the onus cannot be cast on the insurer. Therefore, the tribunal as well as the High Court had directed that the insurer was required to pay the compensation amount to the claimants with interest with the stipulation that the insurer shall be entitled to recover the same from the owner and the driver. The said directions are in consonance with the principles stated in Swaran Singh and other cases pertaining to pay and recover principle."

(emphasis supplied)

11. Learned counsel for the appellants, taking note of above findings has argued and rightly so that the insurance company was required to establish the breach of policy by pleading and then by leading cogent evidence and having failed to do so, the Tribunal committed error in not directing insurance company to pay the amount of compensation and recover the same from the owner.

12. It is undisputed that the matter proceeded *ex-parte* against the insurance company. There is, thus, no question of insurance company pleading and proving breach of insurance policy. The evidence led before the Tribunal, however, indicate that the owner failed to produce the valid driving licence in favour of driver and also

the permit of the vehicle. This failure by itself may not lead to the conclusion that the owner has committed breach of insurance policy. The Supreme Court noted that the exceptions under Section 66 of the Act are to be pleaded and proved. The exceptions cannot be taken aid of in the course of an argument to seek absolution from liability.

13. The insurance company in the present case has for the first time in the appeal come up with a case of breach of policy. It has not pleaded and proved the same before the trial Court because the petition proceeded *ex-parte* against it. In the circumstances, it will be impermissible to the insurance company to raise such plea during the course of argument to support absolution from the liability. There is, thus, no merit in the submissions of insurance company that the Tribunal has rightly absolved the insurance company. What best could have been done by the Tribunal, in the peculiar facts and circumstances of the case, is to direct insurance company to pay the amount of compensation and recover the same from the owner. Having not done so, the said part of the impugned award is liable to be set aside and would require appropriate modification.

14. As regards inadequate compensation, the Tribunal noted that though the claimants pleaded that the deceased earned Rs. 4500/- per month, no cogent evidence was placed on record. The Tribunal, by

adopting the theory of notional income, held that the deceased was earning Rs.3,000/- per month. The Tribunal then observed that the claimants did not lead evidence as regards age of deceased and accordingly applied the multiplier of 13 considering the age of the claimants. The Tribunal then held that since the case was of contributory negligence, the claimants will be entitled to only 50% from the present owner. In addition, the Tribunal awarded Rs. 10,000/- on account of loss of love and affection, Rs. 2,000/- for funeral and other customary expenses and Rs. 10,000/- on account of mental shock and agony.

15. Learned counsel for the claimants has invited my attention to the judgment of the Supreme Court in the case of ***National Insurance Co. Ltd. Vs. Pranay Sethi [AIR 2017 SC 5157]*** to submit that future prospects of 40% ought to be added in the yearly income of the deceased. In addition, the expenses after death ceremonies, loss of estate should be proportionately enhanced. He has then referred to the case of ***Magma General Insurance Vs. Nanu Ram [2018(18) SCC 130]*** to submit that in case of death of bachelor son, each parent will be entitled to Rs. 40,000/- and, therefore, the Tribunal ought to have awarded Rs. 80,000/- towards filial consortium.

16. Considering the aforesaid judgment, in my view, proportionate enhancement in the compensation will have to be extended to the claimants. Further, the Tribunal has committed error in applying the multiplier by taking into consideration the age of parents. The Supreme Court in the case of ***Pranay Sethi*** has clarified that multiplier of the deceased and not parents should be applied while granting compensation. The police papers and evidence led before the Tribunal indicate that deceased was 20 years. The multiplier of 18 will be thus applicable in terms of law laid down in the case of ***Sarla Verma and others Vs. Delhi Transport Corporation and another [(2009) 6 SCC 121]***.

17. In addition, the claimants will be entitled for 20% enhancement under the conventional heads in terms of judgment of the Supreme Court in the cases of ***Pranay Sethi*** read with ***Anjali and other (Smt.) Vs. Lokendra Rathod and others [2023 AIR(SC)44]***. The award passed by the Tribunal would require modification in the light of what has been said hereinabove. The modified amount of compensation is tabulated below.

Sr. No.	Particulars	Amount
1.	Monthly income of deceased	Rs. 3,000/-
2.	Addition of income in view of future prospects 40% of Rs. 3,000/- to be added considering the age of deceased – 20 years	Rs. 4,200/- (3000 + 1200)
3.	Annual Income	Rs. 50,400/- (4200 x12)
4.	Deductions towards personal and living expenses (1/2)	Rs. 25,200/- (50400/2)
5.	Multiplier Age of deceased was 20 years	18
6.	Loss of dependency or earnings	Rs. 4,53,600/- (25,200x18)
7.	Loss of estate (including mental shock and agony)	Rs. 18,000/- (Rs. 15,000/- to be enhanced at the rate of 10% in every 3 years in terms of ***Pranay Sethi***'s case. Thus increase will be 20%)
8.	Funeral expenses (which includes after death ceremonies)	Rs. 18,000/- (Rs. 15,000/- to be enhanced at the rate of 10% in every 3 years in terms of ***Pranay Sethi***'s case. Thus increase will be 20%)
9.	Filial consortium to both the parents Rs. 40,000/- each (which include love and affection)	Rs. 80,000/- (in terms of ***Magma***'s case)
10.	Total amount of compensation (6)+(7)+(8)+(9)	Rs. 5,69,600/-
11.	Less amount received towards no fault liability	- Rs. 50,000/-
12.	Total	Rs. 5,19,600/-

Hence, following order.

ORDER

The judgment and award passed by Motor Accident Claims Tribunal, Darwha in M.A.C.P. NO. 93/2009 is set aside and modified as follows.

(i) The respondent no. 2 – owner and respondent no. 3 – insurance company shall jointly and severally pay the amount of Rs. 5,19,600/- to the claimants/appellants.

(ii) The insurance company shall pay the amount of compensation and recover the same from the owner.

(iii) Rest of the award shall stand intact.

(Anil L. Pansare, J.)

wasnik