2025:BHC-AUG:2645

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

911 FIRST APPEAL NO. 2349 OF 2024

1. RAJENDRA S/O NARAYAN WAKHRE
2. CHHAYA RAJENDRA WAKHRE

VERSUS

BABAN APPARAO UDHAR AND ANR

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Advocate for Appellants : Mr. Shirse Shivaji K.
Advocate for Respondent No. 1 : Mr. J. R. Nawale
Advocate for Respondent No. 2 : Mr. M. R. Deshmukh

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CORAM : S. G. CHAPALGAONKAR, J.
Dated : January 23, 2025

PER COURT :-

1. Heard learned Advocates appearing for respective parties.

2. The appellants / original claimants impugns judgment and award dated 03.05.2024 passed by the Motor Accident Claim Tribunal, Aurangabad in MACP No. 673/2019.

3. The appellants/original claimants instituted MACP No. 673/2019 before Motor Accident Claims Tribunal at Aurangabad, contending that on 25.07.2018, deceased Deepak Rajendra Wakhare was proceeding on his motor cycle. The said motor cycle was dashed by another motor cycle bearing registration No. MH-20-ES-8164. The driver of said motor cycle was rash and negligent in driving motor cycle. Consequently, accident occurred, causing into fatal injuries to the deceased Deepak. He was 24 years of age at the time of

accident and working as a barber with one Gitaram Bidwe proprietor of Gururaj Mens Parlour and earning Rs.15,000/- per month. The claimants consequently, lodged claim seeking compensation of Rs. 30 Lakh under provisions of Section 166 of the Motor Vehicle Act. The claim petition was contested by respondent no. 1 by filing written statement at exhibit 26. He denied theory of claimant.

4. Respondent no. 2 / Insurance Company filed written statement at exhibit 14 and denied entire claim, denying involvement of insured motor cycle. In alternative, they pleaded that driver of insured motor cycle was not holding valid and effective driving license. Further attributed sole negligence against deceased himself.

5. The tribunal framed issues based on pleadings of the parties. Claimant no. 2, Chaya recorded her own evidence and also relied on evidence of Gitaram on the point of income of the deceased. Respondent no. 2 insurer relied upon evidence of Baban Udhar / owner of the vehicle and the certified copy of the chargesheet exhibit 50. The tribunal after assessment of the material on record allowed the claim petition only against respondent no. 1 / owner of the vehicle and exonerated the respondent no. 2 / Insurance Company, and directed owner to pay the compensation of Rs. 14,70,800/- to the claimants along with interest at the rate of 9% per annum from the date of award.

4. Mr. Shirse, learned Advocate appearing for the appellant / original claimants assails the award on two grounds. According to him, the assessment of compensation is inadequate. The tribunal failed to award just compensation. Secondly, exoneration of the Insurance Company is inconsistent with the legal position. According to him, assuming the breach of conditions of the policy as held by tribunal award in nature of pay or recovery ought to have been passed.

5. Per contra, Mr. Deshmukh, learned Advocate appearing for respondent no. 2 supports award contending that evidence on record clearly suggests that driver was not holding valid license, as such insurer has right to avoid liability in terms of Section 149 (2) of the Motor Vehicle Act, citing breach of policy condition. The tribunal has applied the legal position in tune with the law laid down by this Court and Supreme Court in various judgments. According to him, assessment of compensation does not require interference in appeal.

6. Learned Advocate appearing for respondent no. 1 / owner of the vehicle submits that the tribunal erroneously recorded finding of breach of policy and saddled entire liability on shoulder of the owner of vehicle.

7. Having considered submissions advanced, it is evident that insurer has been exonerated by the Tribunal accepting the defence under Section 149 (2) of the Motor Vehicle Act. The perusal of the pleading of the parties, suggest

that the insurer put into service only defence of the driving license. It is trite law that even in case of the availability of defence as regards to the breach of policy in terms of Section 149 (2) of the Motor Vehicle Act, insurer can be directed to satisfy the award and then recover compensation from the owner of the vehicle. Aforesaid principle of law has been espoused by Supreme Court of India in case of *National Insurance Co. Ltd.Versus Pranay Sethi*, **(2017) 16 SCC 680** and same has been reiterated in various judgments till the date. In case of *S. Iyyapan Versus M/s. United India Insurance Co. Ltd. And another,* **(2013) 7 SCC 62. A**gain the similar issue has been dealt by Supreme Court and the principle of pay and recovery in case of breach of policy has been restated. Recently, in case of *Pappu and others Versus Vinod Kumar Lamba and another*, reported in **2018 (3) SCC 208,** after taking stock of legal position Supreme Court again reiterated that the principle of pay and recovery holds field and even, when insurer is able to the prove breach on the part of insurer concerning the policy condition regarding holding of valid license by the driver or its qualification to drive during relevant period, the insurer would not be allowed to avoid its liability towards claimants, unless such breach or breaches of condition of driving license is so fundamental and found to have contributed to cause of accident.

8. The perusal of the evidence on record nowhere suggests that absence of driving license with rider of offending vehicle was contributory factor in the cause of accident. There is nothing to suggest that the breach of policy as alleged was the

main or fundamental cause for the accident. In absence of such material on record, tribunal had no reason to exonerate insurer from its liability to satisfy award after holding the breach of policy. Even in the factual matrix of the present case, the tribunal ought to have taken a pragmatic view of the matter and issued directions to the insurer to satisfy award at first instance and recover compensation amount from owner of the vehicle.

9. So far as the contention of Mr. Shirse, that assessment of compensation is not proper, only ground put forth by him is that income of the deceased ought to have considered Rs. 15,000/- per month in tune with the evidence of PW2 i.e. the proprietor of barbar shop with whom the deceased was working as an employee. The tribunal dealt with the evidence of Gitaram in paragraph no. 27 of the judgment and observed that except bare words of Gitaram as regards to payment of salary of Rs. 15,000/- per month, there is no material to show actual income of the deceased. The lack of positive evidence regarding income of the deceased led tribunal to consider notional earning of Rs. 9000/- per month. If deceased was working as a labour in barber shop, notional income as assessed by the tribunal at the rate of Rs. 9,000/- per month cannot be faulted. The tribunal has rightly added 40 % amount towards future prospects and deducted 50% amount of income towards personal and living expenses of the deceased bachlor as claimants are his parents. The award of compensation on non pecuniary head appears to be just and proper.

10. Therefore, I do not find any reason to interfere assessment of compensation. In that view of the matter, the award needs to be modified only to the extent of issuing direction to the insurer to pay the compensation at first instance and recover same from owner of vehicle. Pertinently, owner of the vehicle has not challenged award as passed by tribunal. Therefore, contentions raised on behalf of respondent no. 1 needs no consideration in present appeal filed by claimants. In that view of the matter, following order :

ORDER

i. First Appeal is partly allowed.

ii. The judgment and award passed by tribunal is modified as under :

a. The claimant nos. 1 and 2 are entitled to receive the compensation of Rs. 14,17,800/- inclusive of NFL along with interest @ 9 % per annum from respondent nos. 1 and 2.

b. In case of failure to deposit compensation amount by respondent nos. 1/ owner of the vehicle, the insurer shall deposit the awarded amount within a period of 60 days from the date of this order along with interest accrued thereon and proceed to recover the same from respondent no. 1.

c. The rest of directions under order passed by the Tribunal are confirmed.

d. Appeal stands disposed of in above terms.

(S. G. CHAPALGAONKAR)
JUDGE

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