IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/FIRST APPEAL NO. 2552 of 2014

With

R/FIRST APPEAL NO. 2553 of 2014

With

R/FIRST APPEAL NO. 2554 of 2014

With

R/FIRST APPEAL NO. 2555 of 2014

With

R/FIRST APPEAL NO. 2557 of 2014

With

R/FIRST APPEAL NO. 2558 of 2014

With

R/FIRST APPEAL NO. 2559 of 2014

With

R/FIRST APPEAL NO. 2560 of 2014

With

R/FIRST APPEAL NO. 2564 of 2014

With

R/FIRST APPEAL NO. 2565 of 2014

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR.JUSTICE N.V.ANJARIA

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	Yes
2	To be referred to the Reporter or not ?	Yes
3	Whether their Lordships wish to see the fair copy of the judgment ?	No
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	No

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NATIONAL INSURANCE COMPANY LTD.

Versus

NARESHKUMAR JAVSING BAMANIYA & 2 other(s)

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Appearance:

MS LILU K BHAYA(1705) for the Appellant(s) No. 1

J M TALOTA(7443) for the Defendant(s) No. 2,3

MR.HIREN M MODI(3732) for the Defendant(s) No. 1

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CORAM: **HONOURABLE MR.JUSTICE N.V.ANJARIA**

Date : 30 /04/2020
CAV JUDGMENT

All these First Appeals preferred under Section 173 of the Motor Vehicles Act, 1988, by the appellant Insurance Company are directed against the judgment and awards all dated 29th June, 2013, delivered by the Motor Accident Claims Tribunal (Auxi.), Dahod, in the respective Motor Accident Claim Petitions.

2. Though different claim Petitions were filed by the claimants concerned, they all pertained to the same vehicular accident resulting. As the accident was one and the facts involved were similar and issues identical, all the Appeals therefore taken up for hearing together, and are being treated for disposal by this common judgment.

2.1 The first captioned First Appeal No. 2552 of 2014 arises out of judgment and award in Motor Accident Claim Petition No. 342 of 2010 dated 29th June, 2013. The claimants came to be awarded compensation of Rs. 85008/- with 6% interest from the date of claim petition till realisation of the amount.

2.2 All the cases were injury cases. The respective claimants in different claim petitions came to be awarded the compensation with 6% interest from the date of filling of claim

petition till realization, challenged in the respective Appeals as under,

(i) First Appeal No. 2553 of 2014 is referable to the judgment and award in Motor Accident Claim Petition No. 643 of 2007, in which the compensation of Rs. 8,13,000/- came to be awarded by the Tribunal.

(ii) First Appeal No. 2554 of 2014 is against the judgment and award in Motor Accident Claim Petition No. 644 of 2007. Therein, the compensation of Rs. 71,472/- came to be awarded.

(iii) First Appeal No. 2555 of 2014 pertains to the judgment and award in Motor Accident Claim Petition No. 645 of 2007, wherein the compensation of Rs. 64,272/- came to be awarded.

(iv) First Appeal No. 2557 of 2014 is directed against the judgment and award in Motor Accident Claim Petition No. 648 of 2007, in which the Tribunal awarded the compensation of Rs. 71,760/-.

(v) First Appeal No. 2558 of 2014 is addressed to the judgment and award in Motor Accident Claim Petition No. 649 of 2007. Therein, compensation of Rs. 91,448/-.

(vi) First Appeal No. 2559 of 2014 is preferred against

the judgment and award in Motor Accident Claim Petition No. 650 of 2007, in which the compensation of Rs. 81,788/- came to be awarded.

(vii) First Appeal No. 2560 of 2014 is against the judgment and award in Motor Accident Claim Petition No. 651 of 2007. The Tribunal awarded compensation of Rs. 82,988/-

(viii) First Appeal No. 2564 of 2014 is referable to the judgment and award in Motor Accident Claim Petition No. 682 of 2007, in which the compensation of Rs. 83, 480/- came to be awarded by the Tribunal.

(ix) First Appeal No. 2565 of 2014 is directed against the judgment and award in Motor Accident Claim Petition No. 683 of 2007 of the Tribunal, in which the compensation of Rs. 1,03,636/- came to be awarded.

3. The representative facts are taken from Motor Accident Claim Petition No. 342 of 2020, relatable to the first captioned First Appeal. The accident occurred on 19.6.2007 at about 2.30 a.m.. The claimant and other passengers had gone to a marriage ceremony. They all were returning from Rabdal and had been proceeding towards village Bordi, travelling in a tractor bearing No. GJ-20-B-884 attached with trolley bearing No. GJ-20-T-

8346. When the tractor reached near the Sim of village Movaliya, an Eicher truck bearing registration No. MP-9-GE-116 driven in rash and negligent manner came with excessive speed from behind and dashed with the trolley. The trolley alongwith the tractor turned turtle. As a result, the claimant of this claim petition as well the other travelers-claimants sustained serious injuries. The First Information Report was lodged. Different claim petitions were filed to result into the judgment and awards by the Motor Accident Claims Tribunal as aforesaid.

3.1 The Tribunal upon appreciation of relevant evidence came to conclusion that the driver of Eicher truck was rash and negligent who failed to take care. The Tribunal held that it was the negligence on part of driver of Eicher truck due to which the accident occurred and the claimants suffered injuries. On the aspect of quantum, as far this claimant is concerned, he was 24 years of age and doing labour work. The accident had taken place in the year 2007. The monthly income of the claimant was assessed at Rs. 2400/-. The Tribunal considered the injury certificate. By applying the relevant parameters, it awarded total Rs. 85,008/- towards compensation under different heads such as future loss of income, actual loss of income, pain, shock and suffering, transportation charges, attendants charges, diet charges and medical bills. In all other claim petitions, the compensation as indicated above came to be awarded.

3.2 Learned advocate for the appellant insurance company Ms. Lilu Bhaya at the outset stated that the appellant was not challenging the quantum part in judgment and award of the Tribunal in any of the cases. In that view, in none of the appeals, the court was required to go into the merits of the quantum aspect. The same remains as awarded by the Tribunal in the respective cases.

4. Heard learned advocate for the appellant National Insurance Co. Ltd. in all the appeals and learned advocate Mr. Hiren Modi for respondent No.1 and learned advocate Mr. J. M. Talota for the respondent Nos. 2 and 3, in all the appeals at length.

4.1 The only and main contention raised by learned advocate for the appellant was that on the date of the accident, the driver was not holding valid and effective driving license to drive the transport vehicle. It was submitted that there was a breach of terms and conditions of the policy. At the time of accident, the driver was driving the heavy vehicle, the unladen weight of which was 9500 kg., it was stated. It was next contended that the offending vehicle which was registered with the appellant insurance company, did not fell within the definition of light motor goods vehicle and that the insurance company could not have been held liable to pay the compensation. Learned

advocate for the appellant relied on the decision of the Supreme Court in **Pappu & Ors. Vs. Vinod Kumar Lamba and Another [(2018) 3 SCC 208]**. Also relied on was the decision also of the Supreme Court in **Oriental Insurance Co. Ltd. vs. Angad Kol & Ors. [(2009) 11 SCC 356]**. Another judgment in **National Insurance Co. Ltd. vs. Parvathneni [(2009) 8 SCC 785]** was relied on. On the basis of all these decisions, it was submitted that where the insurer had no liability to be discharged in eye of law.

4.2 On the other hand, on behalf of the respondent claimant it was submitted that licence was produced (Exh. 27) and the same was proved in proceedings Motor Accident Claim Petition 342 of 2010. It was submitted that the issue of driver not entitled to drive the vehicle in question and that there was a breach of policy conditions, was not raised and therefore, the same may not be allowed to be argued now in this appeal. It was further submitted that in any view the burden was on the insurance company to prove. Attempting to support and substantiate the last proposition, learned advocate for the claimants relied on the decision of the Supreme Court in **Oriental Insurance Co. Ltd. vs. Premlata Shukla [(2007) 13 SCC 476]** and pressed into served yet another decision of the Supreme Court in **Rakesh Kumar vs. United India Insurance Co. Ltd. [(2016) 3 GLH 421 (SC)]**.

5. Appreciating the above rival contentions firstly in light of the facts on record, it is to be noted that the accident took place on 19.6.2007. Copy of the registration certificate (Exh.28) and the copy of licence (Exh. 27) figure on record . The insurance policy of the offending vehicle Eicher Truck bearing No. MP-9-GE-0016 is also on record (Exh. 29). It indicated that the Gross Vehicle Weight of the vehicle in question was 9500 kg. being more than 7500 kg. prescribed for Light Motor Vehicle. From the record of Motor Accident Claim Petition No. 242 of 2010, the documents were seen and considered. The licence was for driving light motor vehicle, which was valid upto 2016. The endorsement to drive heavy vehicle was for the period from the year 2003 to 2006 only. There is nothing to show that there was such endorsement made for the subsequent period or that there was an extension in the said period. The endorsement was not shown to be renewed subsequently to cover the date of accident which was in the year 2007. It could not be disputed that the Motor Vehicles Rules provide that the endorsement cannot be made for the period more than three years. The fact was also not in dispute that the offending vehicle had unladen weight of 9500 kg..

5.1 The issue is required to be addressed in view of the above facts emerging from the record,. When it concerns the breach of terms of the policy, even if the same was not raised in its

exactitude, the issue of law could be allowed to be raised in the First Appeal stage and could be dealt with, with reference to the evidence available on record. The contention that the insurance company failed to discharge the burden could not be accepted inasmuch as the initial burden to prove the basic facts would lie on the other side.

5.2 In **National Insurance Co. Vs. Swaran Singh [(2004) 3 SCC 297]**, the Apex Court noticed the defences available to the insurance company under section 149 of the Motor Vehicled Act, 1988. It was observed that the insurance company is entitled to take a defence that the offending vehicle was driven by unauthorized person or the person driving the vehicle did not have valid licence. It was laid down that the owner of the offending vehicle has to plead and prove the basic facts within his knowledge that the driver of the offending vehicle was authorized by him to drive the motor vehicle and was having valid driving licence a the relevant time. The onus would shift on the insurance company only if and after the aforesaid initial burden is discharged by the other side. This proposition was reiterated by the Apex Court in **Pappu & Ors. Vs. Vinod Kumar Lamba [(2018) 3 SCC 208]**.

5.3 As held in **Vinod Kumar Lamba (supra)**, mere producing of valid insurance certificate, in respect of offending truck is not enough for the owner to make insurance company

liable to discharge liability arising from rash and negligent driving by the driver of the vehicle. The insurance company can be fastened with the liability on the basis of the valid insurance policy only after basic facts are pleaded and established that the vehicle was not only duly insured but also that it was driven by an authorized person having a valid driving license. The insurance company would become liable only after such foundational facts are pleaded and proved by the other side.

5.4 Mere fact that the insurance policy was in operation, is no answer and would be of no avail. In the present case, when the facts showed to establish that the licence to drive was for limited period and the period was not extended and the occurrence of the accident was beyond the said validity prior of licence, the driver was not entitled to drive the light motor vehicle of the weight prescribed at the time of accident. It amounted to breach of conditions of policy. It could not be said that the initial burden to prove these essentials facts was discharged, rather the appellant company could establish its defence discharging the onus of proof from the evidence on record.

5.5 On behalf of the respondents, decision of the Supreme Court in **Mukund Dewangan Vs. Oriental Insurance Co. Ltd. (2017) 14 SCC 663]** was unsuccessfully relied on. In that decision, the Supreme Court held that the light motor vehicle would include transport vehicle as per the weight prescribed in

section 2(21) read with section 2(15) and section 2(48) of the Motor Vehicles Act, 1988. It was held that a transport vehicle and omnibus, the gross vehicle weight of either of which does not exceed 7500 k.g. would be a light motor vehicle and also motor car or tractor or a roadroller, 'unladen weight' of which does not exceed 7500 k.g.. It was held that the holder of a driving license to drive class of light motor vehicle as provided in section 10(2)(d) is competent to drive a transport vehicle of omnibus, the gross vehicle weight of which does not exceed 7500 k.g. or a motor car or tractor or roadroller, the uladen weight of which does not exceed 7500 k.g.. It was held that if a driver is holding a license to drive light motor vehicle of the above class, he can drive transport vehicle of such class without any endorsement to that effect. The present case, however, does not fall in the said category as the offending vehicle had the prescribed weight of 9500 kg., which exceeded 7500 kg..

5.6 In view of the foregoing discussion and the position of law emerging, in the facts and circumstances of the present case, the appellant insurance company could not be fastened with the liability in law. The driver of the offending truck insured with the appellant was not authorized to drive the vehicle when the accident occurred and thus there was a breach of policy conditions. The appellant has to be absolved from liability to payment of compensation.

6. Thus, the appellant insurance company has been able to establish its defence. For the reasons recorded above, the appellant insurance company is absolved from liability to pay the compensation. The immediate question is however, whether in the facts situation obtained, the insurer is required to be directed to pay the claim amount with liberty to recover the same from owner of the vehicle.

6.1 It was submitted in this regard on behalf of the respondent that even if the appellant insurance company is held not liable, by applying the principles laid down in **Swaran Singh (Supra)**, the insurer may be directed to pay the claim amount awarded by the Tribunal to the claimants in the first instance and liberty may be reserved for the insurer to recover from the owner.

6.2 Now, in **Swaran Singh (supra)**, the supreme court summarized its findings as under to propound the principle of pay and recover.

> *"(i) Chapter XI of the Motor Vehicles Act, 1988 providing compulsory insurance of vehicles against third party risks is a social welfare legislation to extend relief by compensation to victims of accidents caused by use of motor vehicles. The provisions of compulsory insurance*

coverage of all vehicles are with this paramount object and the provisions of the Act have to be so interpreted as to effectuate the said object.

(ii) Insurer is entitled to raise a defence in a claim petition filed under Section 163 A or Section 166 of the Motor Vehicles Act, 1988 inter alia in terms of Section 149(2)(a)(ii) of the said Act.

(iii) The breach of policy condition e.g., disqualification of driver or invalid driving licence of the driver, as contained in sub-section (2)(a)(ii) of section 149, have to be proved to have been committed by the insured for avoiding liability by the insurer. Mere absence, fake or invalid driving licence or disqualification of the driver for driving at the relevant time, are not in themselves defences available to the insurer against either the insured or the third parties. To avoid its liability towards insured, the insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding

use of vehicles by duly licensed driver or one who was not disqualified to drive at the relevant time.

(iv) The insurance companies are, however, with a view to avoid their liability must not only establish the available defence(s) raised in the said proceedings but must also establish 'breach' on the part of the owner of the vehicle; the burden of proof wherefor would be on them.

(v) The court cannot lay down any criteria as to how said burden would be discharged, inasmuch as the same would depend upon the facts and circumstance of each case.

(vi) Even where the insurer is able to prove breach on the part of the insured concerning the policy condition regarding holding of a valid licence by the driver or his qualification to drive during the relevant period, the insurer would not be allowed to avoid its liability towards insured unless the said breach or breaches on the condition of driving licence is/ are so fundamental as are found to have contributed to the cause of the accident. The Tribunals in interpreting the policy conditions would

apply "the rule of main purpose" and the concept of "fundamental breach" to allow defences available to the insured under section 149(2) of the Act.

(vii) The question as to whether the owner has taken reasonable care to find out as to whether the driving licence produced by the driver, (a fake one or otherwise), does not fulfil the requirements of law or not will have to be determined in each case.

(viii) If a vehicle at the time of accident was driven by a person having a learner's licence, the insurance companies would be liable to satisfy the decree.

(ix) The claims tribunal constituted under Section 165 read with Section 168 is empowered to adjudicate all claims in respect of the accidents involving death or of bodily injury or damage to property of third party arising in use of motor vehicle. The said power of the tribunal is not restricted to decide the claims inter se between claimant or claimants on one side and insured, insurer and driver on the other. In the course of adjudicating the

claim for compensation and to decide the availability of defence or defences to the insurer, the Tribunal has necessarily the power and jurisdiction to decide disputes inter se between insurer and the insured. The decision rendered on the claims and disputes inter se between the insurer and insured in the course of adjudication of claim for compensation by the claimants and the award made thereon is enforceable and executable in the same manner as provided in Section 174 of the Act for enforcement and execution of the award in favour of the claimants.

(x) Where on adjudication of the claim under the Act the tribunal arrives at a conclusion that the insurer has satisfactorily proved its defence in accordance with the provisions of section 149(2) read with sub-section (7), as interpreted by this Court above, the Tribunal can direct that the insurer is liable to be reimbursed by the insured for the compensation and other amounts which it has been compelled to pay to the third party under the award of the tribunal. Such determination of claim by the Tribunal will

be enforceable and the money found due to the insurer from the insured will be recoverable on a certificate issued by the tribunal to the Collector in the same manner under Section 174 of the Act as arrears of land revenue. The certificate will be issued for the recovery as arrears of land revenue only if, as required by sub-section (3) of Section 168 of the Act the insured fails to deposit the amount awarded in favour of the insurer within thirty days from the date of announcement of the award by the tribunal.

(xi) The provisions contained in sub-section (4) with proviso thereunder and sub-section (5) which are intended to cover specified contingencies mentioned therein to enable the insurer to recover amount paid under the contract of insurance on behalf of the insured can be taken recourse of by the Tribunal and be extended to claims and defences of insurer against insured by relegating them to the remedy before regular court in cases where on given facts and circumstances adjudication of their claims inter

se might delay the adjudication of the claims of the victims."

6.3 In **Vinod Kumar Lamba (supra)**, by relying on **Swaran Singh (supra),** the Apex Court stated as under,

"In the present case, the owner of the vehicle (respondent No.1) had produced the insurance certificate indicating that vehicle No. DIL- 5955 was comprehensively insured by the respondent Pappuu And Others vs Vinod Kumar Lamba And Another on 19 January, 2018 Indian Kanoon - http://indiankanoon.org/doc/111032074/ 7 No.2 (Insurance Company) for unlimited liability. Applying the dictum in the case of National Insurance Company Ltd. (supra), to subserve the ends of justice, the insurer (respondent No.2) shall pay the claim amount awarded by the Tribunal to the appellants in the first instance, with liberty to recover the same from the owner of the vehicle (respondent No.1) in accordance with law."

(Para-19)

6.4 The Motor Vehicles Act, 1988, is a beneficial legislation. It has to work in its ultimate analysis to the help and benefit of those who have suffered in vehicular accident. Keeping in view the object of the legislation and the other attendant aspects of

this case, the dictum in **Swaran Singh (supra)** and **Vinod Kumar Lamba (supra)** could be properly applied. The reasonable course would be to follow the principle of pay and recover. Eventhough, the appellant insurance company is held entitled to be absolved from liability for compensation, it is required in the interest of justice that in the first instance, the appellant insurance company pays the amount of compensation to the claimants and thereafter, it may effect recovery from the owner in accordance with law.

7. Resultantly, the judgment and awards of the Motor Accident Claims Tribunal impugned in the respective appeals are set aside on the limited aspect insofar as the Tribunal therein held the appellant insurance company liable for compensation. The rest parts of the judgment and awards concerned shall stand to operate. It is, however, further provided and directed that the compensation amount awarded by the Accident Claims Tribunal in each of the Motor Accident Claim Petitions shall be satisfied and paid to the respective claimants by the appellant company in the first instance. The liberty is reserved for the appellant insurer to recover the amount thereafter from the owner of the vehicle in accordance with law. The respective judgment and awards shall stand modified to the extent and in terms as directed hereinabove. All the appeals are allowed to the aforesaid extent.

Record and proceedings in all cases shall be sent back immediately to the

Tribunal concerned.

(N.V.ANJARIA, J)

C.M. JOSHI