

**HIGH COURT OF TRIPURA
AGARTALA
MAC App. No.81 of 2024**

1. Smt. Smriti Deb

W/O Shri Badal Deb,
Of Ranjit Nagar,
P.O-Ram Nagar, P.S.-West Agartala,
Agartala, West Tripura District.

2. Shri Badal Deb,

S/O Lt. Bhanu Deb,
Of Ranjit Nagar,
P.O-Ram Nagar, P.S.-West Agartala,
Agartala, West Tripura District.

----- Appellants

Versus

1. Sri Sagar Das

S/O Shri Subal Das,
Of Capital Complex,
Qtr. No.II/A, P.O. Kunjaban,
P.S.-N.C.C., Agartala, Tripura(W).
M-9862580100.
(Owner of vehicle No.TR01-U-5504,
(Motorcycle, Hunk).

2. The Branch Manager,

National Insurance Company Ltd.,
Agartala, Division, Akhaura Road,
Agartala, Tripura (W), 799001.
(Insurer of vehicle No.TR01-U-5504),
(Motorcycle, Hunk).

3. Shri Sujan Das,

S/O Shri Subal Das,
Of Capital Complex,
Qtr. No.II/A, P.O. Kunjaban,
P.S.-N.C.C., Agartala, Tripura (W)
(Rider of vehicle No.TR01-U-5504, (Motorcycle, Hunk)

----- Respondents

along with
MAC App. No.82 of 2024

National Insurance Company Ltd.

Represented by its Divisional Manager (In Charge),
Agartala Division, 42-Akhaura Road,
P.O: H.P.O. Agartala, P.S: West Agartala,
Dist: West Tripura, Pin: 799001.

(Insurer of the motor cycle Bearing Registration No.TR-01-U-5504)

----- Appellant

Versus

1. Smt. Smriti Deb

W/O Shri Badal Deb,
Of Ranjitnagar,
P.S.-West Agartala,
Dist: West Tripura. Pin: 799001.

----- Claimant/Respondent No.1.

2. Shri Badal Deb,

S/O Lt. Bhanu Deb,
Of Ranjitnagar,
P.S.-West Tripura,
Dist: West Tripura. Pin: 799001.

----- Claimant/Respondent No.2.

3. Sri Sagar Das,

S/O Sri Subal Das
Of Capital Complex, Quarter No: II/A, P.O: Kunjaban,
P.S: NCC, Dist: West Tripura, Pin: 799006.

----- Owner of motor cycle No.TR-01-U-5504).

4. Sri Sujan Das,

S/O Sri Subal Das
Of Capital Complex, Quarter No:II/A, P.O: Kunjaban,
P.S: NCC, Dist: West Tripura, Pin: 799006.

----- (Rider of motor cycle No.TR-01-U-5504).

In MAC App. No.81 of 2024

For Appellant(s) : Mr. Samar Das, Adv.
For Respondent(s) : Mr. H. K. Bhowmik, Adv.

In MAC App. No.82 of 2024

For Appellant(s) : Mr. N. Debnath, Adv,
Mr. E. L. Darlong, Adv.
For Respondent(s) : Mr. H. K. Bhowmik, Adv.

Date of hearing &
delivery of
Judgment & Order : 30.11.2024

Whether fit for
reporting : YES

HON'BLE MR. JUSTICE BISWAJIT PALIT

Judgment & Order

Both the appeals have filed under Section 173 of M.V.
Act challenging the judgment and award dated 18.01.2024

delivered by Learned Member, MAC Tribunal No.4, West Tripura in connection with case No.TS(MAC) No.46 of 2022. Since both the appeals have arisen out of a common judgment, so by this common judgment both the appeals are disposed of for the sake of convenience.

2. Heard Learned Counsel Mr. Samar Das for the claimant petitioners also heard Learned Counsel, Mr. H.K. Bhowmik for the owner and rider of the alleged offending motor bike and also heard Learned Counsel for the Insurance Company, Mr. N. Debnath along with Learned Counsel Mr. E. L. Darlong in both the cases.

3. In MAC App. No.81 of 2024, the appeal has been preferred by the claimant-petitioners for enhancement of the award of compensation and in MAC App. No.82 of 2024, the Insurance Company has preferred the appeal for setting aside/quashing the impugned award dated 18.01.2024.

4. Learned Counsel, Mr. Samar Das for the claimant-petitioners in course of hearing of argument submitted that the Learned Tribunal below rightly and reasonably allowed the claim petition filed by the appellant-claimant petitioners but at the time of determination of compensation, Learned Tribunal below failed to determine the amount of compensation properly for which the claimant-petitioners have preferred this appeal for enhancement of the amount of compensation.

5. Learned Counsel, Mr. H. K. Bhowmik representing the owner-cum-rider of the alleged offending motor bike first of all

submitted that before the Learned Tribunal below, the claimant-petitioners did not submit the relevant prosecution papers like FIR, C/S for marking exhibits but the Learned Tribunal below on the basis of documents available with the connected Misc case(AIR) decided the case without marking of any exhibits of the documents and delivered the judgment/award. Learned Counsel further submitted that although the Learned Tribunal below came to the observation that for deciding a motor accident claim case, it is not necessary for the Learned Tribunal below to rely upon the evidence recorded in Criminal case that where the accident took place rather the MAC Tribunal on the basis of evidence on record can decide any claim case in merit. Learned Counsel, Mr. Bhowmik further submitted that before the Tribunal, the O.P.-owner and rider of the motor bike never admitted the fact of accident and they totally denied the involvement of the alleged offending motor bike with the alleged accident and furthermore, the claimant petitioners i.e. the appellants totally failed to establish that the offending motor bike of the alleged O.P. owner was involved with the accident because in this regard, no independent witness was produced by the petitioners before the Learned Tribunal below. Furthermore, he also referred the evidence of the petitioners recorded before the Learned Tribunal below before delivering the judgment and referring the same, specifically the cross-examination part, he drawn the attention of the Court that the claimant-petitioners failed to discredit the evidence of the O.P.-owner regarding his

defence. Even during cross-examination by the Insurance-Company before the Learned Tribunal below, it was clearly established that the alleged offending bike of the O.P.-owner was not involved with the accident. Finally Learned Counsel, Mr. H. K. Bhowmik fairly submitted that the Learned Tribunal below rightly ignored the principle of 'Pay and Recovery' and fastened the liability of payment of compensation upon the Insurance Company.

6. On the other hand, Learned Counsel for the appellant-Insurance Company in MAC App. No.82 of 2024 submitted that the judgment and award of the Learned Tribunal below suffers from various infirmities for which the interference of the Court is required and he urged for setting aside the award delivered by the Learned Tribunal below. Learned Counsel further submitted that Learned Tribunal below came to the observation that at the time of accident, the rider of the bike had no driving licence as he was minor and furthermore, the Learned Tribunal below at the time of delivery of judgment wrongly fastened the liability of payment compensation upon the Insurance Company without applying the principle of 'Pay and Recovery'. In support of his contention, Learned Counsel referred few citations which will be discussed later on and in summing up, Learned Counsel for the appellant-Insurance Company submitted that in absence of cogent evidence on record as observed by Learned Tribunal below that the rider had driven the bike beyond the knowledge of the owner of the bike was not correct and in view of the

principle of law laid down by the Hon'bel Apex Court, the owner cannot escape from the liability of payment of compensation of the alleged accident to the claimant-petitioners. So, Learned Counsel urged for allowing the appeal and also for setting aside the judgment and award of the Learned Tribunal below.

7. I have heard detailed argument of Learned Counsels of the rival parties and perused the judgment of the Learned Tribunal below.

Admittedly, the claimant-petitioners Smt. Smriti Deb and Shri Badal Deb filed one claim petition before the Learned Tribunal below under Section 166 of M.V. Act seeking compensation due to the death of their son Bipratik Deb and accordingly the case was registered as T.S.(MAC) No.46 of 2022.

8. The gist of the claim petition of the claimant petitioners, in short, is that on 08.12.2020, the victim Bipratik Deb (since dead) as pillion rider of the motor bike bearing No.TR-01-U-5504 which was being driven by his friend Sujan Das were proceeding towards his maternal uncle's home at Gurkhabasti and on reaching near Shani Temple at Bholagiri Tri Junction, suddenly the rider had lost control over the bike and dashed against an electrical pole resulting which the victim fell down on the road and sustained multiple injuries on his person. Immediately he was taken to G.B.P. Hospital where the attending doctor declared him as dead.

It was also the plea of the claimant-petitioners that the accident occurred due to rash and negligent driving of the rider

of the motor bike and according to them, the deceased was 16 years old at the time of death and a student of Class X of Sri Krishna Mission School who used to earn Rs.15,000/- per month by doing private tuition.

9. The case was contested by the owner of the alleged offending motor bike as well as by the Insurance Company. The owner Shri Sagar Das and the alleged rider of the vehicle, Shri Sujan Das, filed joint written statement totally denied the fact of accident and also denied the fact of riding of bike by Shri Sujan Das along with Bipratik(since dead) on 08.12.2020 with motor bike bearing No.TR-01-U-5504 and finally prayed for dismissal of the claim petition.

The Insurance Company also appeared and denied the assertions of the claimant-petitioners and also took the plea that the claim petition was subjected to strict proof by the claimants.

10. Upon the pleadings of the parties, Learned Tribunal below framed the following issues:

1. Whether Bipratik Deb died in a vehicular accident occurred on 08.12.2020 at about 6.30 a.m. at Bholagiri Tri Junction area under NCC P.S. West Tripura District due to rash and negligent driving of vehicle bearing No.TR-01-U-5504 (motor bike) by its rider?

2. Whether the claimant petitioners being the legal heirs of the deceased, are entitled to get compensation, if so, upto what extent and who shall be liable to pay the same?

To determine the points, the claimant side examined five witnesses and relied upon some documents which were marked as Exhibits.

On the other hand, the O.P.-owner examined himself and also exhibited some documents.

11. For the sake of convenience, the name of the witnesses of the claimant-petitioners and their exhibits and the witness of the OP and exhibits are mentioned hereinbelow:

Petitioner witnesses:

1. Smt. Pinki Deb (PW1)
2. Sri Badal Deb (PW2)
3. Sri Biswajit Das (PW3)
4. Sri Amlan Biswas (PW4)
5. Sri Sudip Biswas (PW5)

Petitioner exhibits:

- 1) Death certificate of deceased – Exbt.1;
- 2) Birth certificate of deceased – Exbt.2;
- 3) Report card of school of deceased – Exbt.3 to 3/1;
- 4) Certificates of co-curriculum of deceased – Exbt.4 to 4/4;
- 5) Ration card – Exbt.5.

Opposite Party witness:

Sri Sagar Das (OPW1)

Opposite party exhibits:

1. Registration certificate of the offending vehicle – Ext.A;
2. Insurance policy of the vehicle – Exbt.B;
3. Driving licence of the owner – Exbt.C;
4. Tax token of the vehicle – Ext.D;
5. Pollution certificate of the vehicle – Ext.E.

12. Finally on conclusion of evidence on record, Learned Tribunal below delivered the judgment on 18.01.2024. The operative portion of the judgment/Award runs as follows:

11. In the result, claim is awarded in following terms:-

- (i) Claimant petitioners are entitled to get the award of Rs. 7,40,000/- (Rupees seven lakhs fourty thousand) only along with 9% simple interest per annum in equal share from the date of the petition i.e. w.e.f. 15.02.2022 till the date of realization thereof from the O.P. No.2 the National Insurance Co. Ltd.

(ii) 40% of the awarded amount be invested by purchasing separate Fixed Deposit Certificates from Nationalised Bank for a period of five years with auto renewal facility and the claimant petitioners shall open savings account in the same bank. No loan or advance or pre-mature withdrawal shall be allowed without prior sanction of this Tribunal. The interest accrued on the fixed deposit certificates shall be directly transmitted to the individual savings accounts by the concerned bank. The concerned bank shall retain the original fixed deposit certificates and the copies of the certificates to be handed to all the claimant petitioners. The claimant petitioners are directed to submit photocopies of their bank pass book.

(iii) The O.P. No.2 the National Insurance Co. Ltd. shall deposit the amount so ordered along with interest thereon within one month to this Tribunal from the date of the order.

(iv) Copy of this order so awarded to be served upon the parties not later than 15 days from the date of this award.

(v) The case stands disposed on contest.

(vi) Enter the result.

13. In course of hearing of argument, Learned Counsel for the alleged owner and the rider of the bike submitted that before the Learned Tribunal below the claimant petitioners have failed to prove the involvement of the alleged offending motor bike with the alleged accident and also failed to prove that the rider of the bike was responsible for the alleged accident on that day. Learned Counsel referring the evidence on record tried to draw the attention of the Court that the Learned Tribunal below without appreciating the evidence on record properly delivered the judgment/Award.

14. Now for the sake of convenience, I would like to discuss hereinbelow the synopsis of the evidence on record. As already stated the claimant petitioners have adduced five witnesses.

15. PW-1, Smt. Smriti Deb deposed that her son met with an accident on 08.12.2020 at about 6:30 am near Bholagiri Tri Junction area under NCC P.S. due to rash and negligent driving of the bike bearing No.TR-01-U-5504 and after the accident, her husband lodged a complaint to O/C, NCC P.S. and accordingly, N.C.C. P.S. case No.179 of 2020 under Section 279/304(A) of IPC was registered. She further stated that at the time of accident, her son was a student of Class-X in Sri Krishna Mission School and was aged about 16 years and he used to earn Rs.15,000/- per month and also stated that the deceased Bipratik was their only son and they were dependent upon the income of their son and relied upon the exhibited documents.

During cross-examination by the Insurance Company, she stated that her husband is a Government employee serving as a Pump Operator under the P.W.D Department. During cross-examination by the alleged owner and rider of the bike, she stated that she did not witness the accident and her husband also did not witness the accident. She did not submit any income proof of her deceased son and admitted that her son was a student.

16. PW-2, Badal Deb is the husband of PW-1 and the father of the deceased Bipratik Deb. He also in his examination-in-chief in affidavit asserted the same submissions made by his wife.

During cross-examination by Insurance Company, he stated that he is a Government employee serving as a Pump Operator under PWD Department. During cross-examination by

the alleged owner and rider of the bike, he stated that he did not witness the accident and also stated that he has not submitted any income proof of his deceased son and his son was a student. Nothing more came out relevant.

17. PW-3, Biswajit Das only deposed that Bipratik Deb expired on 08.12.2020 due to a bike accident and he was a student of Sri Krishna Mission School and the deceased used to render private tuition to his daughter and for that he used to pay Rs.3000/- per month to him.

During cross-examination by O.P.No.2 i.e. the Insurance Company, he stated that his daughter Priyanka was a student of Maharani Tulsibati School at the time of accident and he was earning Rs.15,000/- to Rs.20,000/- per month. He further stated that his daughter was aged about 16 years and the deceased was also 16 years. During cross-examination by the alleged owner and rider of the bike, he stated that he has not witnessed the occurrence of accident nor submitted any school certificate of his daughter being a student of Class VIII and he know the father of the deceased.

18. PW-4, Amlan Biswas was also deposed in the same manner like PW-3 and also stated that his son Auyosh Biswas undergone private tuition to said Bipratik Deb (deceased) and for that he used to pay Rs.3000/- per month.

During cross-examination by the Insurance Company, he stated that he is earning Rs.15,000-Rs.20,000/- per month and also stated that the deceased was 16 years old. During cross-

examination by the alleged owner and rider of the bike, he stated that he did not witness the occurrence of accident nor submitted any school certificate of his son Auyosh Biswas being a student of Class IV and he knew the father of deceased Bipratik Deb namely Badal Deb.

19. PW-5, Sudip Biswas also deposed in the same manner like PW-4 and stated that his daughter Priyanka Biswas, a student of Class-VIII took private tuition from said deceased Bipratik Deb and for that he used to pay Rs.3000/- per month to him as honorarium.

During cross-examination by the Insurance Company, he stated that he was earning Rs.15,000/- to Rs.20,000/- per month and deceased was 16years old. During cross-examination by OP Nos.1 and 3, he did not witness the occurrence of the accident and he did not submit any school certificate of his daughter being a student of Class-IV and he knew Badal Deb, the father of deceased Bipratik Deb.

20. As already stated, the O.P.-owner examined himself as OPW-1/DW-1. In his examination-in-chief by way of affidavit, he stated that he is the registered owner of the vehicle/bike bearing No.TR-01-U-5504(Hunk). OP No.3 is his younger brother and he has been falsely implicated in the case without any cause of action and he was not the rider of the motor bike (Hunk) on the alleged day of accident i.e. on 08.12.2020 at about 6:30 am near Bholagiri Tri Junction area under N.C.C. P.S. He further stated that he himself and O.P. No.3 i.e. the rider filed joint

written statement before the Learned Tribunal below and totally denied the allegation that his brother Sujan Das was the rider of the offending bike on the day of accident. He further stated that on the alleged day of accident on 08.12.2020 at about 6:30 am his motor cycle bearing No.TR-01-U-5504 was not driven to any road nor it was involved in any road traffic accident and also no road traffic accident occurred due to rash and negligent driving of the motor bike either by him or by his younger brother. But he stated that on the basis of *Suo Moto* complaint lodged by police of GB Top under N.C.C. P.S. a case was registered on 11.12.2020 vide N.C.C. P.S. case No.179 of 2020 under Section 279/304(A) of IPC against his brother Sujan Das and later on police submitted charge-sheet against his brother vide N.C.C. P.S. case No.49 of 2021 dated 12.07.2021 and further stated that at the time of alleged accident, his brother was minor and he was prosecuted before the Juvenile Justice Board in connection with Juvenile case No.5 of 2021 and by order dated 19.05.2022 passed by the Board, his brother was acquitted from the charge. Also stated that at the time of accident, his vehicle was duly insured with the O.P. No.2 and he had valid driving licence and also mentioned the policy number of the alleged offending motor bike and also mentioned his driving licence bearing No.TR-01-20130086227 which was valid w.e.f 18.11.2013 to 26.12.2034 and denied the allegation of the petitioners. He also relied upon some documents which were marked as Exhibits A to E.

During cross-examination by the claimants, he totally denied the suggestions made by the claimants but during cross-examination by the Insurance Company, he stated that on 08.12.2020 i.e. on the date of accident his brother was minor and also admitted that his brother being a minor had no driving licence. Further admitted that his brother on receiving summons appeared before the Juvenile Justice Board but he do not know deceased Bipratik Deb and also stated that he never heard the fact that his brother Sujan Das had driven his motor bike and the pillion rider was Bipratik Deb and volunteered that the keys of the motor bike remained under his custody. Again stated that his brother never took the keys and the motor bike without his consent. He also heard the fact from anyone that his minor brother in his absence had took away the motor bike.

These are the synopsis of the evidence on record.

21. Learned Tribunal below at the time of determination of issue No.1 came to the observation that on the alleged day, the bike was driven by Sujan Das when he was minor but the offending motor bike had valid Insurance Policy (Ext.-B) and the driving licence of Sagar Das i.e. the owner of the motor bike was marked as Ext.-C. But the Learned Tribunal below came to the observation that there was no breach of conditions of the policy by the owner. So, 'Pay and Recovery' principle would not be applicable in this case. So, Learned Tribunal below at the time of delivery of judgment/award fastened the liability of payment of compensation upon the Insurance Company.

22. As already stated, in course of hearing of argument, Learned Counsel for the Insurance Company relied upon few citations.

Hon'ble the Supreme Court of India in **Jawahar Singh v. Bala Jain & Ors.** dated 09.05.2011 reported in **(2011) 6 SCC 425** wherein in para Nos.5, 7, 8, 10, 11, 12, 14, 15 and 16 observed as under:

"5. The Delhi High Court held that Jatin was a minor on the date of the accident and was riding the motorcycle in violation of the provisions of the Motor Vehicles Act, 1988, and the Rules framed thereunder. The High Court also relied on the evidence of PW 8, who has deposed in clear and in no uncertain terms that the accident had occurred due to the rash and negligent driving of the motorcycle by Jatin. No suggestion was given to the said witness (PW 8) that the accident did not take place on account of rash and negligent driving on the part of Jatin. Such deposition went unchallenged and became final. It is against the said order of the learned Single Judge of the Delhi High Court and the order dated 26-9-2008 dismissing Review Application No.333 of 2008, that the present special leave petition has been filed.

7. Mr. Tyagi submitted that the Petitioner, Jawahar Singh, had no liability in regard to the incident, as would be evident from his deposition as R1W4, in which he admitted that he was the owner of the motorcycle in question and that on 18-7-2004 at 1.00 p.m., while he was at his residence, he received a telephonic message indicating that his nephew, Jatin, had met with an accident. In his deposition, he stated that the key of the motorcycle was on the dining table of his house and without his knowledge and consent, Jatin took the keys of the motorcycle and was, thereafter, involved in the accident. It was submitted that despite the same, the Motor Accident Claims Tribunal also held him to be responsible for the death of the victim in the accident and while a sum of Rs.8,35,067/- with interest @7% from the date of institution of the petition till the date of realization was awarded in favour of the claimants, the Insurance Company, which was directed to pay the said amount in the first instance, was given the right to recover the same from the Petitioner. He submitted that it was in view of such wrong approach to the problem that the judgment and order of the High Court impugned in the special leave petition was liable to be set aside.

8. On the other hand, it was urged by the learned counsel for the respondents, that the orders of the Tribunal and the High Court did not call for any interference, since the factum of rash and negligent driving by Jatin had been duly proved from the evidence of PW 8 and there was nothing at all to

show that the deceased had in any way contributed to the accident by his negligence or that the petitioner had taken sufficient precaution to see that his motorcycle was not misused by any third party.

10. On behalf of Respondent No.6, National Insurance Company Ltd., it was sought to be urged that at the time of the accident, the motorcycle was being driven in breach of the terms and conditions of the Insurance Policy and, accordingly, the Insurance Company could not be held liable for making payment of the compensation awarded by the Motor Accident Claims Tribunal. Apart from the fact that Jatin, who was riding the motorcycle, did not have a valid driving licence, it had also been established that he was a minor at the time of the accident and consequently the Insurance Company had been rightly relieved of the liability of payment of compensation to the claimants and such liability had been correctly fixed on the owner of the motorcycle, Jawahar Singh.

11. It has been well settled that if it is not possible for an awardee to recover the compensation awarded against the driver of the vehicle, the liability to make payment of the compensation awarded fell on the owner of the vehicle. It was submitted that in this case since the person riding the motorcycle at the time of accident was a minor, the responsibility for paying the compensation awarded fell on the owner of the motorcycle. In fact, in *Ishwar Chandra v. Oriental Insurance Co. Ltd.* : (2007) 3 AD (SC) 753, it was held by this Court that in case the driver of the vehicle did not have a licence at all, the liability to make payment of compensation fell on the owner since it was his obligation to take adequate care to see that the driver had an appropriate licence to drive the vehicle.

12. Before the Tribunal reliance was also placed on the decision in *National Insurance Co. Ltd. Vs. Gh. Mohd. Wani* : 2004 ACJ 1424 (J&K) and *National Insurance Co. Ltd. v. Gadigewwa* : 2005 ACJ 40 (Kant), wherein it was held that if the driver of the offending bike did not have a valid driving licence, then the Insurance Company after paying the compensation amount would be entitled to recover the same from the owner of the vehicle. It was submitted that no interference was called for with the judgment and order of the High Court impugned in the special leave petition.

14. We cannot shut our eyes to the fact that it was Jatin, who came from behind on the motorcycle and hit the scooter of the deceased from behind. The responsibility in causing the accident was, therefore, found to be solely that of Jatin. However, since Jatin was a minor and it was the responsibility of the petitioner to ensure that his motorcycle was not misused and that too by a minor who had no licence to drive the same, the Motor Accident Claims Tribunal quite rightly saddled the liability for payment of compensation on the petitioner and, accordingly, directed the Insurance Company to pay the awarded amount to the awardees and, thereafter, to recover the same from the petitioner. The said question has been duly considered by the Tribunal and was correctly decided. The High Court rightly chose not to interfere with the same.

15. Without going into the merits of the case, we are of the view that the story of Jatin, who was a minor, walking into the house of the Petitioner and taking the keys of the motorcycle without any intimation to the petitioner, appears to be highly improbable and far-fetched. It is difficult to accept the defence of the petitioner that the keys of the motorcycle were taken by Jatin without his knowledge. Having regard to the aforesaid facts, we are not inclined to accept the case of contributory negligence on the part of the deceased, attempted to be made out on behalf of the petitioner.

16. Accordingly, since the notice on the special leave petition was confined to the question of contributory negligence, if any, on the part of the deceased, we see no reason to interfere with the award of the Motor Accident Claims Tribunal, as confirmed by the High Court. The special leave petitions are, accordingly, dismissed, but without any order as to costs."

Referring the aforesaid citation and also referring the evidence on record of the present case, Learned Counsel for the Insurance Company has drawn the attention of the Court that from the evidence on record, it is clear that there was breach of condition of the policy by the owner. So, the observation of Learned Tribunal that he (owner) had no knowledge about the taking of keys by his brother without his consent cannot be accepted rather from the facts and circumstances of the case, the 'Pay and Recovery' principle should be applied in the given case which the Learned Tribunal below failed to consider at the time of delivery of judgment/award.

23. Learned Counsel for the Insurance Company further relied upon two more citations.

In **Sri Pramod Kumar Agrawal & Anr v. Mushtari Begum & Ors.** dated 18.08.2004 reported in **(2004) 8 SCC 667** wherein in para No.12, Hon'ble the Apex Court observed as under:

"12. Therefore, while upholding the judgment of the High Court we direct in terms of what has been stated in Baljit Kaur case :(2004) 2 SCC 1 that the insurer shall pay the quantum of compensation fixed by the Tribunal, about which there was no dispute raised, to the respondents-claimants within three months from today. For the purpose of recovering the same from the owner the insurer shall not be required to file a suit. It may initiate a proceeding before the Executing Court concerned as if the dispute between the insurer and the owner was the subject matter of determination before the Tribunal and the issue is decided against the owner and in favour of the insurer. Before release of the amount to the claimants, owner of the vehicle i.e. Appellant 1 shall furnish security for the entire amount which the insurer will pay to the claimants. The offending vehicle shall be attached, as a part of the security. If necessity arises, the Executing Court shall take assistance of the Regional Transport Authority concerned. The Executing Court shall pass appropriate orders in accordance with law as to the manner in which the owner of the vehicle i.e. Appellant 1 shall make payment to the insurer. In case there is any default, it shall be open to the Executing Court to direct realization by disposal of the securities to be furnished or from any other property or properties of the owner of the vehicle, the insured (Appellant 1)."

Further, the Bombay High Court in **Bajaj Allianz General Insurance Co. Ltd. v. Sangita wd/o Bhagwan Raut and Ors.** dated 21.07.2014 reported in **2015 (1) Mh.L.J.** wherein in para No.15 also observed as under:

"15. However, some modification is required in the impugned directions as the learned Member in F.A. No. 1043/11 has not categorically made it clear that the Insurance Company need not file a separate execution proceeding against the owner and that the learned Members in both cases have not taken into account the directions issued in the case of Pramod Kumar Agrawal and Others vs. Mushtari Begum and Others reported in III (2005 ACC 357 (SC) wherein the Hon'ble Apex Court has issued several directions, one of which is that before release of the amount to the claimants, the owner of the vehicle shall furnish security for the entire amount which the insurer will pay to the claimants. Said directions should have been issued in both the cases and, therefore, to this extent only, there is a need to modify the impugned orders."

Referring the said citations, Learned Counsel drawn the attention of the Court that the mode of recovery of amount by the Insurance Company in the event of 'Pay and Recovery' policy

and drawn the attention of the Court that the Learned Tribunal below ought to have consider that there was clear violation of the terms and conditions of the policy by the O.P.-owner of the alleged offending motor bike. But the Learned Tribunal below without appreciating the evidence on record came to the observation that principle of 'Pay and Recovery' would not be applied in the given case which is misconceived and cannot be accepted in the eye of law and urged for taking notes of the aforesaid citations in deciding the case.

24. In this regard, Hon'ble the Supreme Court of India in **Shamanna & Anr. V. Divisional Manager, Oriental Insurance Company Limited & Ors.** dated 08.08.2018 reported in **(2018) 9 SCC 650** wherein in para Nos.5, 6, 7 and 8 have been framed the modalities to be followed in case of 'Pay and Recovery':

"5. In the case of third-party risks, as per the decision in **National Insurance Co. Ltd. v. Swaran Singh:(2004) 3 SCC 297**, the insurer had to indemnify the compensation amount payable to the third-party and the insurance company may recover the same from the insured. Doctrine of "pay and recover" was considered by the Supreme Court in **Swaran Singh case(supra)** wherein the Supreme Court examined the liability of the insurance company in cases of breach of policy condition due to disqualifications of the driver or invalid driving licence of the driver and held that in case of third-party risks, the insurer has to indemnify the compensation amount to the third-party and the insurance company may recover the same from the insured. Elaborately considering the insurer's contractual liability as well as statutory liability vis-à-vis the claims of third parties, the Supreme Court issued detailed guidelines as to how and in what circumstances, "pay and recover" can be ordered. In para 110, the Supreme Court summarised its conclusions as under: (SCC pp. 341-42)

"110. The summary of our findings to the various issues as raised in these petitions is as follows:

(1) 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) An 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 the driver or invalid driving licence of the driver, as contained in sub-section (2)(a)(ii) of Section 149, has 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 the 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 a duly licensed driver or one who was not disqualified to drive at the relevant time.

(iv) Insurance companies, 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 the said burden would be discharged, inasmuch as the same would depend upon the facts and circumstances 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 the 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 insurer 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 the 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 a claim by the Tribunal will be enforceable and the money found due to the insurer from the insured will be recoverable on a certificate issue 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 date of announcement of the award by the Tribunal.

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

6. As per the decision in Swaran Singh case (supra), onus is always upon the insurance company to prove that the driver had no valid driving licence and that there was breach of policy conditions. Where the

driver did not possess the valid driving licence and there are breach of policy conditions, "pay and recover" can be ordered in case of third-party risks. The Tribunal is required to consider "as to whether the owner has taken reasonable care to find out as to whether the driving licence produced by the driver... does not fulfil the requirements of law or not will have to be determined in each case".

7. The Supreme Court considered the decision in Swaran Singh case (supra) in subsequent decision in National Insurance Co. Ltd. v. Laxmi Narain Dhut :(2007) 3 SCC 700, wherein this Court held that: (SCC p. 705, para 5)

"5. The decision in Swaran Singh case(supra) has no application to cases other than third-party risks and in case of third-party risks the insurer has to indemnify the amount and if so advised, to recover the same from the insured."

8. The same principle was reiterated in Premkumari v. Prahlad Dev:(2008) 3 SCC 193."

25. Here in the case at hand, there is no dispute on record in respect of the death of the deceased Bipratik Deb on the alleged day. The O.P.-owner although totally denied the fact of involvement of his vehicle with the alleged accident and also denied the fact of involvement of his younger brother being a rider of the bike, but admitted that his brother had no valid licence as he was minor. At the same time, the OP-owner also admitted that a police case was registered and police laid charge-sheet against his brother and since he was minor i.e. children in conflict with law so he was enquired by the Juvenile Justice Board, Agartala although he was acquitted on benefit of doubt from the said case.

26. Regarding filing of charge-sheet and also regarding facing of enquiry, Learned Counsel Mr. Bhowmik in course of hearing of argument failed to show any cogent grounds to disbelieve the said fact. On the other hand, to substantiate the claim petition, as already stated, the respondent-claimant

petitioners have adduced oral/documentary evidence on record but by the evidence, they could not specifically say as to how and when the accident took place and who was the actual rider of the vehicle and also they failed to explain clearly as to rash and negligent driving of the bike by the rider for which the accident occurred. Even no relevant prosecution papers were exhibited by the claimant petitioners. Although the Learned Tribunal below relied upon the papers of the connected Misc. case i.e. the detailed accident report and came to the observation that the offending motor bike was driven by the rider Shri Sujan Das due to his negligent driving, the accident occurred but also came to the observation that the rider was minor on that relevant point of time and he had no driving licence. Although the owner of the bike has exhibited his driving licence which was marked as Ext.-C. It is also the settled position of law that the strict principles of evidences recorded in criminal trial are inapplicable in MACT claim cases. Since the fact of police case and filing of charge-sheet by the investigating officer against the rider of the motor bike has not been rebutted by the owner of the motor bike. So, the plea taken by the owner of the motor bike that his bike was not involved with the accident on the alleged day and his brother was not the rider of the offending motor bike and he did not ply the motor bike on that relevant point of time cannot be accepted in limini. But from the evidence on record as discussed above, it appears that the Learned Tribunal below at the time of delivery of judgment failed

to appreciate the principles of law laid down by the Hon'ble Apex Court in different cases and also failed to appreciate the evidence on record properly and ignoring the principles of law laid down by the Hon'ble Apex court decided the claim petition in favour of the claim peititoners. More so, the documents of the connected accident information case were also not marked as Exhibits in this case although it cannot be said that in absence of marking of those documents, no judgment can be delivered.

Now, from the facts and circumstances of the case and the evidence on record and in view of the aforesaid principles of law laid down by the Hon'ble Apex Court in the aforenoted cases, it appears to this Court that the entire case needs to be reexamined by the Learned Tribunal below for which the judgment delivered by Learned Tribunal below at this stage cannot be sustained in the eye of law.

27. In the result, the judgment and award dated 18.01.2024 delivered by Learned Tribunal below in connection with case No. TS(MAC) No.46 of 2022 is hereby set aside and both the appeals are disposed of accordingly with the observation that the matter be remanded back to the Learned Tribunal below with a direction to afford opportunity to the contesting Opposite parties to file their additional written statements, if any, and thereafter, to frame issues afresh, if required, and after taking fresh both oral and documentary evidences on record of both the sides, the Learned Tribunal below shall deliver a fresh judgment in accordance with law in view of the principles of law laid down by

the Hon'ble Apex Court without being biased by the observation of this Court and shall complete the entire exercise within a period of 6(six) months from the date of receipt of the copy of this judgment. It is expected that for early disposal of the case, the contesting parties shall cooperate with the Learned Tribunal below time to time and Learned Tribunal below after appreciating the evidence on record afresh shall pass a detail and comprehensive judgment. Both the parties are accordingly asked to appear before the Learned Tribunal below on 16.12.2024.

Send down the LCR along with a copy of this judgment.

Pending applications(s), if any, also stands disposed of.

JUDGE



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SABYASACHI
BHATTACHARJEE

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Date: 2024.12.02 16:00:31
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Deepshikha