IN THE HIGH COURT OF MADHYA PRADESH
AT JABALPUR

BEFORE

HON'BLE SHRI JUSTICE HIRDESH

ON THE 29th OF NOVEMBER, 2023

MISC. APPEAL No. 1373 of 2021

BETWEEN:-

THE NEW INDIA ASSURANCE COMPANY LIMITED THR. ITS DIVISIONAL MANAGER DIVISIONAL OFFICE DIVISION OFFICE (450500), 290, NAPIER TOWN JABALPUR -482 001 (MADHYA PRADESH)

.....PETITIONER

(BY SHRI PRANAY GUPTA - ADVOCATE)

AND

1. **SHRI PUNAM CHANDRA KESHWARWANI @ BABLU S/O LATE KISHORI LAL KESHARWANI, AGED ABOUT 36 YEARS, R/O WARD NO.12, RIWA SHAHDOL ROAD JAISINGH NAGAR THANA AND TAH. JAISINGH NAGAR DISTT. SHAHDOL (MP) (OWNER & DRIVER OF MOTOR CYCLE NO.MP-18 MC-8862)**

2. **SHRI ARJUN YADAV S/O SHRI BODHELAL YADAV @ BUDHHSEN YADAV R/O VILLAGE KUDRI THANA SIDHI TEH. JAISINGH NAGAR DISTT. SHAHDOL (MP) (OWNER & DRIVER OF MOTOR CYCLE NO.MP-18 MH-0442)**

3. **M/S BAJAJ ALLIANCE GENERAL INSURANCE COMPANY LIMITED REGISTERED OFFICE G.E PLAZA AIRPORT ROAD YARVADA PUNE-411006 (MAHARASHTRA) (INSURER OF MOTOR CYCLE NO.-MP-18 MC-8862)**

.....RESPONDENTS

(BY SHRI R.P. MISHRA - ADVOCATE FOR RESPONDENT No. 1)

This appeal coming on for admission this day, the court passed the following:

ORDER

1. Though this matter was listed for admission, however, with the consent of learned counsel for the parties it is heard finally.

2. This appeal has been filed by the appellant/Insurance Company under Section 173 of Motor Vehicles Act, being aggrieved by the award dated 16.03.2021 passed by the Additional Member of District Motor Accident Claims Tribunal, Jaisingh Nagar, District Shahdol in MACC No.32/2016 on account of reduction/exoneration from the liability.

3. Brief facts of the case are that on 25.07.2015 at 6:20 pm respondent No. 1 (Punran Chandra Kesharwani @ Bablu) was driving motor cycle bearing registration No. MP-18 MC-8862. The respondent No. 2 (Arjun Yadav) came from opposite side, driving his Motor Cycle No. MP-18 MH-0442, in a rash and negligent manner and dashed against the claimant's motor cycle, causing him serious injury on his thigh. The left femur bone of claimant got fractured and the disability of permanent nature has been caused. The claimant filed the claim petition for compensation under Section 166 of Motor Vehicles Act before the Tribunal and prayed for grant of compensation to the tune of Rs.45,70,000/-.

4. Police registered the case against respondent No.2 for causing grievous hurt by rash driving as well as for driving vehicle at public place without having licence to drive the same under Section 3/181 of Motor Vehicles Act.

5. Owner and driver of the offending vehicle, after filing a written statement was proceeded *ex-parte*. He denied all allegations and submitted that driver of the offending vehicle had valid and effective driving licence at the time of the accident and the vehicle was insured with the Insurance Company, so he is not liable for payment of any compensation.

6. Driver of the offending vehicle filed a separate written statement and also denied all allegations and submitted that he had a valid and effective driving licence.

7. Insurance Company, namely, the New India Assurance Company Limited filed its reply and denied the allegations and submitted that at the time of the accident, respondent No. 2 (Arjun Yadav) driver of the offending vehicle had no valid and effective driving licence and further submitted that accident has been caused on account of front on collusion on wide road and in this manner negligence of the claimant has been claimed.

8. It is also claimed that both the drivers are having motor cycles i.e. claimant as well as respondent No. 2 who were driving their motor cycles without having driving licence. Hence, there is violation of the condition of the insurance policy by the insured respondent No. 2 has been pleaded. He further pleaded that respondent No. 2 had no driving licence, so Insurance Company is not liable to pay compensation.

9. The Tribunal framed issues, recorded the evidence and thereafter, Tribunal accepted the petition filed by the claimant and awarded amount of compensation of Rs.3,76,136/- with interest @ 9 % per annum

from the filing of the petition till realization against Insurance Company.

10. Being aggrieved by the aforesaid award, Insurance Company filed this Misc. Appeal and submitted that Tribunal has failed to consider and scrutinized the contents of FIR, in light of circumstances and pieces of evidence, oral and documentary. Tribunal has failed to consider that accident has been occurred due to front on collusion on a wide road. Hence, this is a case of contributory negligence of both the drivers, therefore, the claimant has also contributed equally to the accident. He further submitted that Tribunal has failed to consider that no evidence can be produced for proving the fact which is not in existence, hence, non-examination of any officer of RTO office is not fatal for the appellant/insurer in order to prove that insured (respondent No. 2) had no licence to drive insured vehicle.

11. So, Tribunal has failed to consider that driving of insured vehicle without obtaining driving licence from appropriate authority is clear violation of contract of insurance and hence, no liability of indemnification of insured could be saddled upon the appellant and therefore, he prays for exoneration of the liability, alternatively reduction of amount of compensation on the ground of contributory negligence.

12. On the other hand, learned counsel for the respondent No.1 contended that Claims Tribunal has rightly awarded the compensation and argued in support of finding recorded by the Tribunal.

13. Learned counsel for appellant submitted that first ground of appeal is that accident has occurred due to front on collusion on the wide road hence, it is a case of contributory negligence of both the drivers and

claimant has also contributed equally in the accident.

14. On perusal of the record, it was found that Insurance Company has not cross-examined claimant on this point that accident was front on collusion and it is a case of contributory negligence and claimant had equally contributed into the accident and there is no evidence laid by the Insurance Company that accident had occurred due to front on collusion and claimant is also equally liable.

15. So lack of cross-examination and direct evidence, it was not proved that claimant has also contributed equally to the accident. So ground of contributory negligence of claimant has no substance and hence, not tenable to challenge award.

16. Leaned counsel for the appellant further argued that driver of the offending vehicle did not have a driving licence and police filed Challan under Section 3/181 of the Motor Vehicles Act, hence, he submitted that appellant/Insurance Company would not be liable to pay compensation. The Tribunal did not accept the said contention of the appellant/Insurance Company and held in para 24 of the award that Insurance Company had not produced any evidence from RTO that driver of the offending vehicle had no valid and effective driving licence at the time of the accident.

17. It is true that it is the duty of Insurance Company to prove that owner and driver have breached the terms and conditions of the insurance policy. In present case, witness of Insurance Company, namely, E. Minj has filed affidavit by way of evidence, where he has pointed out that the driver/owner of the offending vehicle have no valid and effective

licence at the time of the accident. He further stated that in criminal charge sheet, police registered a charge under Section 3/181 of Motor Vehicles Act for not having driving licence.

18. In present case owner/driver of the offending vehicle present before the Tribunal and filed written statement and on perusal of the Seizure Memo (Ex. P/6) police did not seize the driving licence of the driver of the offending vehicle.

19. Where the assured chooses to the run away from the battle i.e. fails to defend the allegation of having breach the terms of insurance policy by opting not to defend the proceedings. A presumption could be drawn that he has done so because of the fact that he has no case to defend. It is trite that a party in possession of best evidence, if he withholds the same, an adverse inference can be drawn against him that had the evidence been produced, the same would have been against said person. As knowledge is personal to person possessed of the knowledge, his absence at the trial would entitle the Insurance Company to a presumption against the owner/driver.

Section 106 of Evidence Act read thus :

> *"106.* ***Burden of proving fact especially within knowledge*** *- When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.*

20. In the present case, respondent No. 2 owner /driver of the offending vehicle who was present before the trial Court and filed his

written statement, after that he proceed *ex-parte*, it means he ran away from the trial. Driver of the offending vehicle is best man, who had knowledge that he had a valid and effective driving licence at the time of the accident, but he withholds himself, so adverse inference can be drawn against him.

21. Charge sheet has been filed against the driver of offending vehicle under Section 3/181 of Motor Vehicles Act and according to the Seizure Memo Ex. P/6, no driving licence has been seized by the police from driver of the offending vehicle. So negative liability cannot be imposed upon the Insurance Company to prove that driver did not have a valid and effective licence. According to Section 106 of Evidence Act, it is the duty of driver to produce driving licence before the Tribunal when he is present before the Tribunal and file a written statement, but he did not produce driving licence, if he had. So an adverse inference shall be drawn against him because it is the fact which is within his personal knowledge, therefore, it was for him to disclose the fact that he has a driving licence.

22. So as per aforesaid evidence, perusal of the charge sheet which has been filed by the police against the driver of the offending vehicle under Section 3/181 of Motor Vehicles Act and driver was present before the Tribunal, but he did not produce his driving licence before the Tribunal, so adverse inference can be drawn against the driver/owner that he had not possessed driving licence at the time of the accident.

23. So as per aforesaid discussion, the appellant, therefore, proved that there is a willful and conscious breach of terms and conditions

of insurance policy. Although in view of the judgment of the Supreme Court in case of **Sohan Lal Passi vs. Sesh Reddy (1996) Vol. 5 SCC 21; National Insurance Company Limited. vs. Swaran Singh and ors. (2004) Vol. 3 SCC 297** and **United Insurance Company v. Lehru and ors. (2003) Vol. 3 SCC 338**, the appellant was under obligation to satisfy third party liability but the appellant is entitled to recovery right from the owner /driver of the offending vehicle i.e. respondent No. 2.

24. Hence appeal is consequently allowed. It is directed that appellant will be entitled to recover the amount of compensation paid along with the interest from the respondent no. 2/owner. Respondent No. 2 shall deposit the compensation paid by the appellant before the Claims Tribunal with the notice to the appellant within eight weeks, failing which the appellant shall be entitled to pay interest at the rate of 9 per cent per annum from the date of deposit of payment made by the appellant. Appellant shall be entitled to recover amount in execution by its judgment without any recourse to independent civil proceeding.

25. So this appeal is allowed in above terms. Statutory amount, if any deposited, shall be refunded to the appellant/Insurance Company.

(HIRDESH)
JUDGE

vkv /-