**(2009) 03 BOM CK 0110**

**In the Bombay High Court**

**Case No :** F.A. No. 480 of 1993

New India Assurance Co. Ltd. APPELLANT

Vs

Mangala and Others RESPONDENT

**Date of Decision :** 21-03-2009

**Acts Referred:**

**Citation :** (2010) ACJ 2041

**Hon'ble Judges :** K.U. Chandiwal, J

**Bench :** Single Bench

**Advocate :** S.L. Kulkarni, for the Appellant; K.S. Naik, for the Respondent

**Final Decision :** Dismissed

## Judgement

K.U. Chandiwal, J.—Heard the learned Counsel extensively.

2. The compensation to the legal heirs of the deceased driver by award dated 22.7.1993 declared by Motor Accidents Claims Tribunal, Aurangabad, (for short, ''the Tribunal'') is subject of challenge by original respondent No. 3 (hereinafter referred to ''the insurance company'').

3. It was canvassed by learned Counsel for the appellant insurance company that the learned Member of the Tribunal erred in the eyes of law in declaring the award against the appellant, as the driver''s licence was not produced by claimants or owner of vehicle.

4. On hearing both the sides, following points arise for my determination:

(i) Whether the award of compensation to the claimants is excessive?

(ii) Whether the deceased driver was negligent in driving the vehicle?

(iii) Whether the insurance company (appellant) owe no liability to the claimants?

(iv) What order?

5. My findings to the above points are:

 

(i) The award of compensation is not excessive.

(ii) The deceased driver was not negligent.

(iii) The insurance company is liable to meet the claim.

(iv) The appeal is dismissed with costs.

6. Devidas Mukundrao Pophale, the deceased, was driving the vehicle which met with an accident, in which the deceased and two passengers expired. The accident was due to an impact of unknown vehicle, smashing of vehicle. Respondent No. 1 accepted that the deceased was a driver by profession and on remuneration. Respondent No. 2 disputed about permanency of the driver. According to him, he was a casual driver.

7. The respondent No. 3, the insurance company (appellant) shirked its liability, as stated above, on the ground that there was breach of terms of the insurance cover/ policy as the driver was without licence. In spite of due diligence from the insurance company, the driving licence is not tendered.

8. The law on the point of burden of establishing possession of the driving licence or its issuance has been put at rest by three-Judges'' judgment of the Hon''ble Supreme Court in the matter of National Insurance Co. Ltd. Vs. Swaran Singh and Others, . The Hon''ble Lordships, while interpreting several provisions of Motor Vehicles Act, ultimately carved out the guidelines. It was also observed, penal provisions vis-a-vis provision beneficent to third party must be interpreted differently. It was observed in para 82 of the said judgment as under:

(82) ...If on facts, it is found that accident was caused solely because of some other unforeseen or intervening causes like mechanical failures and similar other causes having no nexus with driver not possessing requisite type of licence, the insurer will not be allowed to avoid its liability...

9. The facts in the present case illustrate the vehicle met with an accident of dash/ impact by unknown vehicle and it was smashed taking toll of 3 persons including the driver. So even if the parameters referred in Swaran Singh''s judgment (supra) are applied, it is apparent, the fault could not be led to the shoulders of the driver of the taxi as to he was negligent or as to he did not possess the requisite type of licence.

10. Learned Counsel for the appellant has relied on the judgment in the matter of National Insurance Co. Ltd. Vs. Vidhyadhar Mahariwala and Others, . In that case the Hon''ble Lordships observed, since driving licence of the driver of vehicle was not in force on the date of the accident, insurance company held exonerated from its liability. In the said judgment, the Hon''ble Lordships of the Apex Court have even taken recourse to the observations in the matter of National Insurance Co. Ltd. Vs. Swaran Singh and Others, , in particular para 82 thereof. On facts, the appellant cannot coin the judgment in the matter of Vidhyadhar''s case (supra).

 

11. The learned Counsel for the appellant relied on the judgment in the matter of Sardari and Others Vs. Sushil Kumar and Others, . In that case, the driver was not holding the driving licence at all. Consequently, the Lordships observed that the insurance company gets exonerated. However, liability was fixed on the driver and the owner of the vehicle.

12. In the matter of National Insurance Co. Ltd. Vs. Gonti Eliza David and others, , the Division Bench observed about burden of proof. However, the law is well settled in the light of the observations in National Insurance Co. Ltd. Vs. Swaran Singh and Others, , hence said case is of little consequence to be referred.

13. The claimant/widow of the driver stepped in witness-box. In reply to specific question about her husband possessing licence, she was positively assertive that her husband passed matriculation examination from Jalna. He was having a driving licence, which is not with her. She was unaware and rightly to tell the place of drawing the licence. In this scenario of the matter, it was legitimately expected of the insurance company, even in the eyes of law, to discharge its responsibility/burden by getting proper certification either from R.T.O., Jalna or R.T.O. Aurangabad, or Head Office of the Transport Department at Mumbai seeking such details. The area of operation of the deceased in the light of his residence was perfectly known, which provided a clue to ascertain as to place of issuance of the licence. No such exercise having been done and accelerated by the insurance company, it cannot be allowed to bank upon issuance of notice to produce licence. Issuing of notice by itself to the claimant would not exonerate the insurance company. The presumption of absence of driving licence would have been available, only in the event driver was alive. Since the driver in this case had succumbed to the accident, no such presumption could be drawn. Owner of the vehicle in the pleadings, in unequivocal terms, has accepted the status of the driver. Consequently, the insurance company cannot shirk from its responsibility. The observations of the learned Member of the Tribunal in para 7 of the judgment in this backdrop, run in tune with the legal position and cannot be castigated.

14. The income of the driver has been put by his wife and award of compensation was within the bracket of the statutory arrangement. The learned Member gave thought to the age of the driver, the dependency and liability of the driver. One of the sons of the driver was a minor at the material time, who was required to be maintained by his widow, Mangala. The deceased was regular driver of respondent No. 2.

15. The driver of the taxi was not negligent in his driving. Hence, point Nos. 1 to 3 above are answered accordingly.

16. Appeal is dismissed with costs, including civil application. Rule discharged.

 