

Manohar Jamatmal Sindhi and anr. Vs. Ranguba and ors.

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Court : Gujarat

Decided On : Dec-10-1992

Reported in : 1994ACJ1280; (1993)1GLR865

Judge : B.S. Kapadia and; C.V. Jani, JJ.

Appeal No. : F.A. No. 212 of 1983

Appellant : Manohar Jamatmal Sindhi and anr.

Respondent : Ranguba and ors.

Advocate for Def. : S.V. Raju,; C.M. Prajapati,; P.V. Nanavati and;

Advocate for Pet/Ap. : S.B. Vakil, Adv.

Disposition : Appeal dismissed

Judgement :

B.S. Kapadia, J.

1. The present appeal is filed by the appellants who are the original opponent Nos. 1 and 3 in as much as the Motor Accidents Claims Tribunal-3 (Main), Ahmedabad, held them liable to pay to the original petitioners a sum of Rs. 55,000/- with interest thereon at the rate of 6 per cent per annum from 27.3.1980 till the payment and for depositing the said amount of award within eight weeks and that

the petition against original opponent No. 4, namely, United India Insurance Co. Ltd., who was the insurer of the vehicle involved in the accident, was dismissed with no order as to costs. The aforesaid award and order was passed by the Motor Accidents Claims Tribunal on 31.3.1982 in Motor Accidents Claim Petition No. 154 of 1980.

2. Short facts of the appeal can be stated as under:

The appellant No. 1 herein was the original opponent No. 1 and was the driver of the vehicle involved in the accident while the appellant No. 2 herein and the original opponent No. 3 is the owner of the said vehicle bearing No. GRS 5811. Original opponent No. 4, who is respondent No. 7 herein, was the insurer of the said motor vehicle. On 5.11.1979 when one Rajpuji, the husband of the original petitioner No. 1, Ranguba, widow of Rajpuji Pabaji Vihol, was plying his cycle slowly, correctly and on the right side of Chamunda Road, original opponent No. 1 negligently driving the aforesaid vehicle of original opponent No. 3 from the opposite direction collided with the cycle of Rajpuji as a result of which Rajpuji fell down and sustained injuries and eventually he died. Hence the legal representatives of the deceased, original petitioner Nos. 1 to 6, filed the aforesaid claim petition claiming compensation of Rs. 70,000/- but subsequently during the pendency of the petition, by filing purshis at Exh. 34, they reduced their claim to Rs. 55,000/- only. Here, it may be mentioned that opponent No. 2 has been deleted pending the petition by filing purshis at Exh. 64. The original opponent No. 1, the driver of the vehicle involved in the accident, filed his written statement at Exh. 37 while original opponent No. 3, owner of the vehicle involved in the accident, adopted the written statement filed by opponent No. 1 vide Purshis at Exh. 65. The insurance company, that is, original opponent No. 4, has filed his written statement at Exh. 36.

2-A. The original opponent No. 1 has admitted in his written statement that the motor vehicle GRS 5811 was driven by him and that it is in the ownership of opponent No. 3. He denied that the said vehicle was involved in the alleged accident. The original opponent No. 3 has adopted the written statement filed by opponent No. 1, that is to say, he has admitted the ownership of the vehicle

involved in the accident and that the opponent No. 1 was driving his vehicle and that opponent No. 1 was his driver. The insurance company, that is, the original opponent No. 4 and respondent No. 7 herein has filed written statement at Exh. 36 wherein, inter alia, it was denied that the vehicle involved in accident was driven by opponent No. 1 and/or anyone else who was authorised to drive the same and that the said driver had valid licence to drive the same.

In view of the aforesaid written statement, necessary issues were framed by the Tribunal at Exh. 29.

It may be noted that the original opponent, Nos. 1 and 3, who are the appellants herein, have not led any oral evidence before the Tribunal.

3. After carefully examining the evidence on record, the Tribunal has held that on 5.11.1979, collision took place between motor vehicle bearing No. GRS 5811 and the bicycle of Rajpuji on account of negligence on the part of the driver of the said motor vehicle bearing No. GRS 5811 and not on account of the cyclist Rajpuji. It was also negatived that it was on account of negligence of both the driver of the motor vehicle and the cyclist Rajpuji. The issue on the point of injury sustained by Rajpuji on account of the accident and that consequently he died was also answered in the affirmative in favour of the petitioners. It was held that the original opponent No. 1, that is, appellant No. 1, herein, was driving the said vehicle and, therefore, he was liable to pay the compensation. It was further held that the original opponent No. 3, that is, the appellant No. 2 herein, was vicariously liable to pay the compensation. With regard to issue No. 7, it was held that the insurance company as the insurer of the offending motor vehicle is not liable to make good the award against opponent Nos. 1 and 3.

4. In this case, it is evident that Rajpuji died almost immediately after the incident and the post-mortem note is at Exh. 44 opining that because of injury of vital organs he died. It is also in evidence that Rajpuji was a watchman in Forge & Blower Co. and was earning wages of Rs. 450/- p.m. and had no other pocket expenses; that before the death he was quite hale and hearty and that his married life was extremely happy; that he was 32 years of age when he died and had studied upto 2 to 3 standards. In postmortem note, he is shown to be of 35 years

of age when he died and it corroborates the evidence of the original petitioners that Rajpuji was about 32 years old when he died. For the purpose of finding out the future economic average, future progressive development of Rajpuji was also taken into consideration and his income was treated as Rs. 450/- p.m., which annually comes to Rs. 5,400/- and the units to be maintained being 10, the consumption of the deceased himself would be of Rs. 90/- p.m. and deducting the consumption for himself, the dependency benefit comes to Rs. 4,320/-and, to that, multiplier of 15 was applied which comes to Rs. 64,800/-, to which an amount of Rs. 200/- was added for funeral and other expenses and conventional amount of Rs. 5,000/- for the loss of expectation of life. The total comes to Rs. 70,000/- but since the petitioner's claim was restricted to Rs. 55,000/- that claim was allowed by the Tribunal.

5. At the outset, we may say that in this appeal, Mr. Vakil has argued the case fully and in detail but he has fairly not disputed the aspect of negligence as well as the quantum of the amount awarded to the petitioners. The main dispute which he has raised in the present appeal is that the Tribunal has wrongly allowed the defence of the original opponent No. 4, insurance company, that is, respondent No. 7 herein, that the appellant No. 1, original opponent No. 1, was not duly licensed and had no valid and effective licence for driving the vehicle.

6. For the purpose of considering this question, it would be necessary to see the relevant provisions of the Motor Vehicles Act applicable on the date of the accident. Section 96 of the Motor Vehicles Act, 1939, contains the provisions with regard to the duty of the insurer to satisfy the judgment against the persons insured in respect of the third party risks. Sub-section (1) provides for the liability of the insurance company where the insurance is taken to the effect that the insured shall, subject to the provisions of Section 96, pay to the persons entitled to benefit of decree in such sum not exceeding the sum payable thereunder as if he were the judgment-debtor in respect of the liability together with any amount payable in respect of costs. However, Sub-section (2) provides that the following defences as mentioned in Clauses (a) to (e) would be available to the insurance company. Clause (b) prescribes the defence with regard to the breach of the specific conditions of the policy as enumerated in that clause and Sub-clause (ii) of

Clause (b) of said Sub-section (2) of Section 96 prescribes the condition excluding driving by a new person or any person who is not duly licensed. It is the defence of the insurance company that the original opponent No. 1 was not duly licensed for driving the motor vehicles. For that purpose, it would be necessary to consider that in the present case, it is in the evidence that the licence of opponent No. 1 for driving the vehicle is at Exh. 55 and the insurance policy in respect of the vehicle is at Exh. 66. Said policy was for a period from 1.1.1979 to 31.12.1979 while the accident in question took place on 5.11.1979, that is, within the period during which the policy was in operation. It is also in the evidence of this case that the vehicle involved in the accident is Tempo bearing No. GRS 5811. It is a four-wheeler vehicle and the registration record brought by the witness, Balbhadra Vaishnav, shows that it was registered as goods carrier on 1.1.1979. It was registered as light motor vehicle. It was a public carrier.

7. Now so far as the driving licence is concerned, it is Exh. 55. On perusal of it, it is clear that it is issued by the Regional Transport Authority at Bombay in the name of the present appellant No. 1 some time in the year 1975. It was up to 17.8.1978. At page 5 of it, there is endorsement as under:

He is also authorised to drive as paid employee a transport vehicle with effect from 20.1.1982.

8. Photograph of the original opponent No. 1, driver, is at page 10. It is, therefore, clear from Exh. 55 that the present appellant No. 1 had a licence to drive light motor vehicle but there was no endorsement on the date of accident, that is, on 5.11.1979, when the accident took place, to the effect that he was also authorised to drive as a paid employee a transport vehicle because the endorsement which is made on his licence is to the effect that he is authorised to drive as paid employee a transport vehicle with effect from 20.1.1982.

9. In this view of the matter, Mr. S.B. Vakil, learned advocate appearing for the appellant No. 1, submits that though there was no endorsement, he had right to drive light motor vehicle and, therefore, he was duly licensed. Therefore, he had a valid and effective licence to drive the vehicle. As against that, Mr. Dalal, learned advocate for the insurance company, has very strongly objected to this argument

advanced by Mr. Vakil and submitted that there is a clause in the insurance policy which is produced at Exh. 66. That clause is in respect of the driver, which would cover the insured, as well as other person, provided he is in the insured's employment and is driving on his order or with his permission, provided that the person driving has a licence to drive the motor vehicle or has held and is not disqualified for holding or obtaining such a licence. Mr. Dalal, relying on the evidence of Mr. Vaishnav, has further submitted that the opponent No. 1 should have a driving licence to drive the vehicle, namely, public carrier Tempo bearing No. GRS 5811 registered as public carrier. It is, therefore, submitted by Mr. Dalal that the original opponent No. 1 was not duly licensed to drive the vehicle which was a public carrier.

10. On this count, from both the sides, several authorities have been cited and the Tribunal has also considered the various provisions of law while deciding the claim petition on the point.

11. Before we proceed to examine the various authorities, we would like to point out that in view of the admission purshis adopting the written statement filed by opponent No. 1, by opponent No. 3, there is no dispute on the point that the present appellant No. 1 was driving the said vehicle on the date of the accident and that he was driving the same as his driver, that is, driver of opponent No. 3. This admission made by the original opponent Nos. 1 and 3 clearly discloses that there was relationship of employer and employee between them and normally nobody would serve as a driver without remuneration. Therefore, the legitimate inference would be that he was working as a paid employee-driver of the opponent No. 3, that is, appellant No. 2 herein.

12. When that is so, we have to consider the necessary provisions for obtaining the driving licence. Section 3 of the Motor Vehicles Act, 1939, speaks about the necessity for driving licence and it, inter alia, specifically provides that no person shall drive a motor vehicle in any public place unless he holds an effective driving licence issued to him authorising him to drive the vehicle; and no person shall so drive a motor vehicle as a paid employee or employee or shall so drive a transport vehicle unless his driving licence specially entitles him so to do. Therefore,

ordinary licence to drive is different from a licence to be issued to a paid employee. Sub-section (3) of Section 7 clearly provides about the compulsory accompaniment of the medical certificate in form No. 3 as set forth in schedule, signed by registered medical practitioner, to the application for a driving licence to drive as a paid employee or to drive the transport vehicle. However, second proviso to Sub-section (6) of Section 7 provides for an application for driving licence to drive motor vehicle not being transport vehicle otherwise than as a paid employee, licensing authority may exempt the applicant from the test as specified in the third schedule if the applicant possesses driving licence issued by the automobile association recognised in this behalf by the State Government under the provisions of this Act. It is, therefore, clear that if the applicant who has applied for driving licence as a paid driver is suffering from any disease or disability specified in the second schedule or any other disease or disability which is likely to cause driving by him of a motor vehicle to be a source of danger to the public or to the passengers, the licensing authority shall refuse to issue such licence. It appears that an applicant for driving licence to drive as a paid employee or to drive a transport vehicle has to undergo a severer test than that of driving licence for other motor vehicles; such applicant will have to produce a medical certificate along with his photographs and to satisfy the licensing authority that he is not suffering from any disease or disability mentioned in the second schedule to the Act, otherwise, the driving licence would be refused. In light of these provisions of the Act, we have to consider as to whether the appellant No. 1 was having valid and effective licence which complied with the requirements of the provisions of the Act and is issued in pursuance of Section 7(3) and (5) of the Act.

13. There are also the Rules framed under the Motor Vehicles Act. They are Bombay Motor Vehicles Rules. Rule 4 provides for granting authorisation to drive transport vehicle and it is also, inter alia, provided in Sub-rule (4) that no authorisation to drive a transport vehicle which is a goods vehicle shall be granted unless the applicant satisfies the licensing authority that he has adequate knowledge of the provisions of the Act and Rules made thereunder relating to duties, functions and conduct of drivers of goods vehicles and that he possesses a good moral character. Similar provision is made for transport vehicle which is public service vehicle wherein added condition is that he should have at least two

years' experience in driving any motor vehicle other than motor cycle, tractor or three-wheeler light motor vehicles. The aforesaid Rule for granting of the authorisation to drive goods vehicles requires further qualifications as stated therein.

14. In view of the above provisions and particularly in view of the endorsement which is made on the licence of the original opponent No. 1 and which is effective from 20.1.1982, it is clear that the opponent No. 1 was not authorised to drive the public vehicle in question before that date. Therefore, on the date of the incident in question, he did not hold valid and effective licence for driving authorising him to drive as a paid employee a transport vehicle.

15. At this juncture, it is also necessary to see that so far as the defence of insurance company is concerned, Section 96 refers to the conditions of the policy. The said condition has been reproduced earlier. The condition of policy referred to in policy Exh. 66 also speaks that he should have licence to drive the motor vehicle as per the condition. The word 'the' has its own importance because in earlier part of the policy, the registration mark of the motor vehicle, Matador, has been already referred to and even on the date when this policy was taken on 1.1.1979, this very vehicle was registered as goods carrier, that is, as a public carrier. It is so clear from the evidence of Mr. Vaishnav at Exh. 58. When that is so, it was clear that the Matador was to be used as a goods carrier that is a public carrier and, therefore, opponent No. 2 was required to drive the vehicle which is a public carrier. But he had not got such a licence. He obtained such a licence only on 20.1.1982. On the date of the incident, he did not hold such a licence. Therefore also, on the date of the accident he did not hold valid and effective licence to drive the motor vehicle.

16. Referring to the authorities cited by the respective parties, it may be stated that several authorities are cited and we have considered almost all of them. First is the case of National Insurance Co. Ltd. v. Mahadevayya AIR 1982 Mad 151. In the said case, the driver had licence to drive light motor vehicle and it was held that though the auto-rickshaw is light motor vehicle, the licence will not enable the licensee to drive the auto-rickshaw as public carrier without further authorisation to

that effect. It is observed as under:

We have already noted the definition of a transport vehicle which includes a public service vehicle or a goods vehicle. Admittedly, in this case, the vehicle has been used as a public service vehicle. As a matter of fact, at the time of the accident, the vehicle was found carrying passengers. Therefore, in addition to the usual licence for driving a motor vehicle in a public place, there should be a further authorisation to the driver to drive the auto-rickshaw which falls admittedly under the definition of light motor vehicle as a public service vehicle or a passenger vehicle. The Tribunal has not referred to the definition of the transport vehicle though it refers to the definition of the light motor vehicle as also the special requirements under Section 3 for getting authorisation to drive the auto-rickshaw as a public service vehicle. If we read the definition of transport vehicle in Section 2(33) into Section 3, it will clearly indicate that the mere licence to drive the light motor vehicle, which includes an auto-rickshaw, will not enable the holder of that licence to drive an auto-rickshaw as a public carrier, for that requires a special authorisation under the later, half of Section 3. Therefore, we are not inclined to agree with the contention of the learned counsel for the petitioner that the decision rendered in 1980 (2) Mad LJ 572 requires consideration. In our view, therefore, the Tribunal in this case is not right in holding that the driver of the auto-rickshaw can drive the auto-rickshaw as a public carrier without special authorisation as contemplated by Section 3 of the Act. In this case, the evidence of PW 2, who was examined by the claimant, itself clearly indicates that the driver of the auto-rickshaw was prosecuted under section of the Motor Vehicles Act for having driven the auto-rickshaw as a public carrier without a valid licence. From this also it is possible to conclude that the driver of the auto-rickshaw did not have the requisite licence to drive the auto-rickshaw as a public carrier.

In para 12 of the said judgment, it is also observed:

Having regard to the terms of the policy, the learned counsel for the claimants would say that the strict interpretation of the proviso contained in the policy under the head 'driver' the driver of the auto-rickshaw in this case should be taken to have a licence as he had a licence to drive a light motor vehicle which includes

auto-rickshaw. But we are of the view that the expression 'the motor vehicle' can only be construed as the motor vehicle which is used as a passenger vehicle. As a matter of fact, the policy itself contemplates user of the vehicle as a contract carriage. Therefore, the expression 'the motor vehicle' should have reference only to the vehicle which is expected to be used as a contract carrier. Unless the driver of the auto-rickshaw is shown to have had a licence to drive a contract carriage, he cannot be taken to have a valid licence to drive the vehicle which is insured as a contract carriage.

17. The aforesaid judgment applies on all fours to the present case, on facts. As stated earlier, opponent No. 1 was working as paid driver of opponent No. 3, while he had licence to drive the light motor vehicle from July, 1975 to 17.8.1978 and subsequent endorsement is of 20.1.1982 authorising him to drive as a paid employee and it bears photograph. Therefore, it is clear that on the date of accident, the driver was not having licence to drive the vehicle as a paid employee. Of course, he was not disqualified to hold the licence but during the period from 18.8.1975 to 17.8.1978, he was only authorised to drive the light motor vehicle and he had no licence or authorisation to drive the transport vehicle which he was not authorised on the date of the accident but he was only authorised from 20.1.1982. It is also clear from the evidence of Mr. Vaishnav from the R.T.O. that the said vehicle was registered as goods carrier, that is, as public carrier, before the R.T.O. The business of the opponent No. 3 was transport. In that view of the matter, the appellant No. 1 should have licence to drive the motor vehicle, that is, transport vehicle, as public carrier and as paid employee. Therefore, in that view of the matter, he was not duly licensed.

18. Similar view is also taken subsequently by the same High Court in the case of E. Enjanadevi v. Arumugham 1983 ACJ 625 (Madras). In the said case, the vehicle involved in accident was tourist taxi. The driver was having licence but not having special endorsement to drive such vehicle. It was held that the licence being not valid in view of Section 3 read with Section 3(2) and (25), the insurance company was held not liable to pay any compensation. In the said case, the insurance policy was produced on record and the said policy clearly showed that the vehicle had been registered as tourist taxi and it can be used only in

connection with the insured's business of running a tourist taxi. Under the head 'driver', it says that the vehicle could be driven by the insured or by any other person in his employment holding a licence to drive the vehicle. Having regard to the fact that the vehicle has been registered as a tourist taxi, as per the terms of the policy, it should be driven by a person who held a licence to drive a tourist taxi.

19. It was also held that, as already stated, Section 3 contemplates a driver of a tourist taxi having a special endorsement in his licence to drive such a vehicle. Since there was no proof to that effect, he cannot be taken to have a valid licence to drive a tourist taxi. In that view of the matter, it has been held that the Tribunal was right in holding that the insurance company is not liable to meet any portion of the claim in that case. Accordingly, the appeal was dismissed.

20. The facts of the present case are similar to that case. In this case, there is the additional evidence of Mr. Vaishnav from the R.T.O. who says that the vehicle involved in the accident was registered as a public carrier on the said date on which the insurance was taken. Therefore, it was to be used for the purpose of carrying as goods vehicle. Ratio of the aforesaid judgment clearly applies to the facts of the present case. However, Mr. Vakil also cited before us a decision in the case of *Dhanraj v. Rubia* 1992 ACJ 84 (Madras). In that case, the accident was caused by a tourist car. Its driver was having licence to drive a car but there was no endorsement on it enabling the driver to drive a tourist car. Policy in that case was containing the condition that 'the person driving holds a valid licence at the time of the accident'. In the above judgment, decision of *E. Enjanadevi v. Arumugham* (supra) was cited. The said decision was distinguished in the aforesaid decision of *Dhanraj v. Rubia* (supra), on the facts of that case, on the ground that this is a vital point of difference between the judgment in *E. Enjanadevi v. Arumugham* 1983 ACJ 625 (Madras), because in that case, it is seen from the judgment that the insured's business was running of a tourist taxi. Secondly, as against the word 'driver' in present case it is stated as follows:

(a) the insured;

(b) any other person provided he is in the insured's employ and is driving on his order or with his permission: Provided that the person driving holds a valid driving

licence at the time of the accident or had held a permanent driving licence (other than a learner's licence) and is not disqualified from holding or obtaining such a licence.

21. Pointing out these two distinguishing features of the matter, the learned Judges in the said case held that so far as the very case was concerned, the business was not shown in the policy and that the condition that the driver 'holds a driving licence at the time of the accident' was also satisfied, and on these facts, they distinguished the judgment in the case of *E. Enjanadevi v. Arumugham* (supra).

22. In the present case, the facts are more similar to the case of *E. Enjanadevi* (supra). In this case, the policy clause is similar to that in the case of *E. Enjanadevi v. Arumugham* (supra) and so far as the word 'Business' is concerned, there is specific evidence of the witness, Mr. Vaishnav, from the R.T.O. on the point that it was a public carrier and, therefore, it was registered as public carrier, and, therefore, it is clear that the insured was to carry on the business of transport-public carrier. In that view of the matter, the aforesaid judgment is not applicable to the present case on facts.

23. Mr. Vakil has also relied on the case of *National Insurance Co. Ltd. v. Sugantha Kunthalambal* 1981 ACJ 302 (Madras) and submitted that the onus of proving that the driver did not possess valid licence lies on the insurance company. There cannot be any dispute on the point, because it is the insurance company which takes such defence. It is settled that the person who raises a particular defence has to prove the same. In the present case, the insurance company has already produced on record policy of insurance and the licence of the driver of the vehicle in question also was there on the record. The insurance company has taken defence under Section 96(2) of the Act that the driver was not holding valid and effective licence and, therefore, there was breach of condition of the policy and thus, the insurance company has discharged its duty. So, this judgment is in no way useful to the appellants inasmuch as the ratio laid down in the present case has already been fulfilled by the insurance company by discharging burden of proof that there was no valid endorsement in the licence

and, therefore, the driver was not holding valid and effective licence.

24. On the contrary, this decision is useful to the respondents inasmuch as in that regard, the allegation of the insurance company was that the driver had no valid licence, and in that regard, in para 5 of the said judgment after quoting Section 3(1) of the Act, it is observed that the transport vehicle which is referred to in Section 3 of the Act has been defined in Section 2(33) and there cannot be any dispute in this case that the auto-rickshaw was used as a public service vehicle or even at the time of accident, the vehicle was carrying passengers. Having regard to Section 2(33) of the Act, there cannot be any difficulty in accepting the submission of the learned advocate for the appellant that regarding the person driving vehicle as public service vehicle or as a goods vehicle, there should be special endorsement in the licence authorising the licensee to drive it who was in the instant case also the appellant No. 1, driver. The vehicle in question was a public carrier, that means goods vehicle, that is transport vehicle, and the appellant No. 1 has not complied with the provisions of Section 3(1) of the Act, particularly when he was a paid driver. Therefore, the aforesaid judgment also supports the view and it can safely be held in the instant case that the appellant No. 1 was not holding valid and effective licence as a paid driver to drive the vehicle which met with an accident, was a public carrier and which was used as transport vehicle.

25. Another decision cited by Mr. Vakil is the decision in the case of Chanchalben v. Shaileshkumar Pandurao Thakore 1974 ACJ 393 (Gujarat) and other decision in the case of Maganbhai Sampatbhai Mali v. Narkali 1987 ACJ 599 (Gujarat). In the said case of Chanchalben, the person had learner's licence and prior to the date of accident, he had no licence at the time of accident and was not disqualified from holding such a licence and, therefore, it was held that the insurance company was liable to make good risk arising out of the accident committed by such a driver.

26. The facts in the said case are different from the facts of the present case inasmuch as in the said case, the opponent No. 1 was driving the scooter in the city of Ahmedabad and opponent No. 2 was the owner of the scooter and opponent No. 3 was its insurer. It was a Lambretta. Opponent No. 1 was described

as driver of the scooter who was having learner's licence before the date of the accident. These are not the facts in the instant case. Therefore, the said judgment is not applicable to the facts of the present case.

27. Similarly, the decision in the case of Maganbhai Sampatbhai Mali, 1987 ACJ 599 (Gujarat), also would not be applicable to the facts of the present case for the reasons stated above while considering the decision in the case of Chanchalben, 1974 ACJ 393 (Gujarat). Similarly, for the reasons as aforesaid, the decision in New India Assurance Co. Ltd. v. Mandar Madhav Tambe 1986 ACJ 874 (Bombay), also would not apply to the present case, on facts.

28. Another decision relied upon by Mr. Vakil in the case of Babu v. Kamla Devi 1990 ACJ 182 (Rajasthan), also would not be applicable, as in that case the driver was minor and had no licence to drive the vehicle. The contention was raised on behalf of the insurance company that the insured committed breach of the insurance policy and, therefore, it is absolved from the liability. In that case, owner of the vehicle had contended that the driver who drove the vehicle was driving the vehicle without his permission. In the facts of that case, it was held that the insured had not committed any breach of the condition of the policy. While in the instant case, these are not the facts. It is not the case of the owner of the vehicle involved in the accident in the instant case that it was driven without his permission. On the contrary, vide Exh. 65, opponent No. 3 has adopted written statement of the driver, opponent No. 1. Thus, it was not his case before the Tribunal that the driver was not employed by him and that the vehicle was driven by him without his permission. Therefore, the aforesaid decision is also not useful to the appellants in any manner as the facts of the present case are quite different.

29. The other decision relied upon by Mr. Vakil is the decision in the case of Canara Motor and General Insurance Co. Ltd. v. Abdul Hamid Khan Saheb 1984 ACJ 467 (Bombay). In that case, the driver possessed driving licence. Section 96(2)(b)(ii) of the Motor Vehicles Act contains a condition excluding driving by any person 'who is not duly licensed'. The vehicle in question was Fiat car which was light motor vehicle. On the facts of that case when he had valid licence for driving, looking to the clause, it was held that the defence of the insurance company

cannot be allowed and the insurance company cannot be absolved from the liability. In this case, as stated above, the policy containing condition for driver is different from that of the case referred to above. Hence the said ruling is not applicable to the facts of the present case.

30. Another decision is also cited. It is in the case of Skandia Insurance Co. Ltd. v. Kokilaben Chandravadan 1987 ACJ 411 (SC). In the said decision, the driver left the truck with engine in motion after handing over control of the truck to the cleaner who was not duly licensed person and the cleaner drove the truck and caused the accident. It was contended that the accident occurred when an unlicensed person was at the wheel and insurance company would be exonerated from the liability. The Supreme Court in the aforesaid decision examined the question and held that the exclusion clause does not exonerate the insurer as the insured had done everything in his power to keep, honour and fulfil the promise and is not guilty of a deliberate breach.

31. In view of the facts of the present case, the aforesaid decision is not helpful to the appellants because in the present case, right from the beginning, employer had employed opponent No. 1, driver, who was not duly licensed and authorised. Accordingly, said judgment is not applicable to the facts of the present case.

32. In the result, we come to the conclusion that the Tribunal was right in holding that the original opponent No. 1, appellant No. 1 herein, was not holding an effective licence authorising him to drive the vehicle as a paid employee and accordingly, the insurance company was rightly absolved from the liability to pay the compensation to the petitioners. We broadly agree with the reasons given by the Tribunal on the point.

33. Before parting with the matter, we may mention that Mr. Dalal, the learned advocate for the insurance company, has made a statement before us that insurance company will pay Rs. 25,000/- ex gratia though they are not held liable. Accordingly, though the appeal fails and is dismissed, as per the above statement of Mr. Dalal, the learned advocate appearing for the insurance company, who makes a statement after obtaining specific instructions from the respondent No. 7, insurance company, they are directed to pay Rs. 25,000/- to the petitioners, that is,

respondent Nos. 1 to 6 herein, and the remaining liability along with costs and interest will be borne by the appellants herein. In case the amount is already deposited by the appellants and distributed amongst the petitioners-original claimants, the amount to be deposited by the insurance company will be paid to the appellants. The insurance company, that is, respondent No. 7 is directed to deposit the said amount of Rs. 25,000/- (Rupees twenty-five thousand) only within four weeks from today.

The appeal fails and accordingly, it stands dismissed with no order as to costs.

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