IN THE HIGH COURT OF JUDICATURE AT BOMBAY

BENCH AT AURANGABAD

FIRST APPEAL NO. 250 OF 2015

HARUN KHAN AZIZ KHAN
VERSUS
MASTANKHAN SUPDUKHA PATHAN AND OTHERS
...
Advocate for Appellant : Mr. Deshmukh Mohit R.
Advocate for Respondents 1 and 2: Mr. S. V. Kulkarni
Advocate for Respondent 3 : Mr Rahul Karpe
...

CORAM : S. V. GANGAPURWALA, J.

DATE : 27th August, 2015

PER COURT :

1. Mr. Deshmukh, the learned counsel submits that the appellant had filed petition under section 166 of the Motor Vehicles Act seeking compensation on account of the disability sustained by him. The tribunal exonerated the insurance company and directed only the owner and the driver of the vehicle to pay compensation amount. According to the learned counsel, as far as the third party insurance is concerned, the insurance company should not have been exonerated. The third party insurance was in force, the vehicle was validly insured with respondent no.3 insurance company and only on the ground that driver of the vehicle did not have valid licence, the insurance company cannot absolve itself of its liability to pay compensation to third party. It may recover the amount from the insured. The learned counsel relies on the judgment of **National Insurance Company Vs. Swaran Singh and others,** reported in **AIR 2004 Supreme Court 1531** so also the judgment of the Apex court in case

of **S. Iyyapan A Vs. United India Insurance Company Ltd. and another** reported in **AIR 2013 SC 2262.**

2. Mr. S.V.Kulkarni, the learned counsel for the insurance company submits that the owner was aware of the fact that the vehicle was driven by a person not holding any licence. In such cases, the insurance company cannot be directed to pay first and then recover from the owner. Liability of the insurance company does not arise as it a case of breach of policy. According to learned counsel, it is only in exceptional cases, the courts can adhere to the principles of first pay and then recover. Here it is not a death claim but only injury claim. The claimant can sustain and earn for himself. In such cases, the Court would not direct the insurance company to pay first and then recover from the owner. Learned counsel relies on the judgment of learned Single Judges of this Court 1)National Insurance Co. Ltd. Versus Zanak s/o Jaypal Morasiya and others reported in 2014 AC 38 [(Bom) (NB)], 2) National Insurance Co. Ltd. Vs. Maruti & ors., reported in [2012 AC 863 (Bom)], 3) Manager, United India Insurance Co. Ltd.Vs.Kamalabai Mukunda Kumare & ors, reported in 2010(5)Mh.L.J.147.

3. Mr. Karpe, the learned counsel for vehicle owner submits that the vehicle was insured, the due care and caution was taken by the owner of the vehicle. It was represented by the driver, that he has valid licence.

4. With the assistance of the learned counsel, I have gone through the order.

5. Factum of accident is held to be proved by the tribunal. The said finding is not challenged by any party. In the light of the fact that the factum of accident is proved, this Court need not go into the said aspect. Even quantum of compensation is not disputed by any party. The only dispute raised by the appellant is that insurance company ought not have been exonerated. As far as the appellant is concerned, it can be directed to recover the amount from the owner after satisfying the liability of appellant.

6. According to the leaned counsel for the appellant 17 % disability has been incurred and the appellant is unemployed, these aspect also will be required to be considered. The Apex Court, in case of **Iyyapan** referred supra has observed in para 17 and 18 as under:

> *"17. The heading "Insurance of Motor Vehicles against Third Party Risks" given in Chapter XI of the Motor Vehicles Act, 1988 (Chapter VIII of 1939 Act) itself shows the intention of the legislature to make third party insurance compulsory and to ensure that the victims of accident arising out of use of motor vehicles would be able to get compensation for the death or injuries suffered. The provision has been inserted in order to protect the persons travelling in vehicles or using the road from the risk attendant upon the user of the motor vehicles on the road. To overcome this ugly situation, the legislature has made it obligatory that no motor vehicle shall be used unless a third party insurance is in force.*
>
> 18. Reading the provisions of Sections 146 and 147 of

> the Motor Vehicles Act, it is evidently clear that in certain circumstances the insurer's right is safeguarded but in any event the insurer has to pay compensation when a valid certificate of insurance is issued notwithstanding the fact that the insurer may proceed against the insured for recovery of the amount. Under Section 149 of the Motor Vehicles Act, the insurer can defend the action inter alia on the grounds, namely, (i) the vehicle was not driven by a named person, (ii) it was being driven by a person who was not having a duly granted licence, and (iii) person driving the vehicle was disqualified to hold and obtain a driving licence. Hence, in our considered opinion, the insurer cannot disown its liability on the ground that although the driver was holding a licence to drive a light motor vehicle but before driving light motor vehicle used as commercial vehicle, no endorsement to drive commercial vehicle was obtained in the driving licence. In any case, it is the statutory right of a third party to recover the amount of compensation so awarded from the insurer. It is for the insurer to proceed against the insured for recovery of the amount in the event there has been violation of any condition of the insurance policy."

7. Considering the fact that the present appellant is unemployed and it would not be possible for him to maintain himself so also he is married having wife and children and he actually was working as driver, I think the exceptional circumstance are carved out. Relying on the judgment of the of Apex Court in the Case of **S. Iyyapan supra** and the facts of the present case, the insurance company can be directed to pay compensation amount to the claimant and recover it from the owner.

8. In the judgments relied by the Mr. S. V. Kulkarni, learned counsel for respondent No.3 Insurance Company, it has been held that it is only in exceptional cases, the directions can be given to pay first and recover later. In the said cases, the judgment of S. Iyyapan has not been referred. Whereas one of judgment is under Workmen's Compensation Act. In the light of above, I pass following order:a

<u>O R D E R</u>

i. The Insurance Company Respondent no.3 is jointly and severally liable alongwith respondents 1 and 2 to pay compensation of Rs.2,65,000/- with interest @ 9% per annum to the appellant claimant from the date of institution of the claim petition, to the appellant claimant.

ii. Respondent No.3 insurance may recover the said amount from the owner of the vehicle.

iii. Clause (5) of the operative order of the impugned judgment stands set aside.

iv. Rest of the order is upheld.

v. In case of the tempo i.e. vehicle involved in the incident is still owned by the respondents owner, then the same shall stand attached.

vi. First Appeal accordingly disposed of. No costs. Civil application also stand disposed of.

(S. V. GANGAPURWALA, J.)

JPC