

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

FIRST APPEAL NO. 623 OF 2010

Ravindra Bansilal Modi,
Age : 43 years, Occu. : Business,
R/o. Guruwar Peth,
Ambajogai, Dist. Beed

.. Appellant
(Orig. Claimant)

Vs.

1] The Divisional Manager,
Oriental Insurance Co. Ltd.,
Office at Chati Galli, Solapur,
Through : Branch Manager,
Annabhau Sathe Chowk, Beed

2] K. Kishtiah,
Age : Major, Occu : Business,
R/o 2-40, Turkaymjal, Rangareddy
(A.P.)

3] National Insurance Co. Ltd.,
Through : The Divisional Manager,
Hazari Chambers, Station Road,
Aurangabad

.. Respondents
(Orig. Respondents)

Mr. S.G. Chapalgaonkar, Advocate for the appellant
None present for respondent no.1 though served
Respondent no.2 served through paper publication - absent
Mr. A.D. Soman, Advocate h/f Mr. D.V. Soman, Advocate for the respondent no.3

CORAM : P. R. BORA, J.
DATE : 01/09/2016

ORAL JUDGMENT :

Heard.

2. **Admit.**

3. With consent of learned counsel for the parties, the appeal is heard finally.

4. The appellant has filed the present appeal against the judgment and order passed by the Motor Accident Claims Tribunal at Ambajogai in M.A.C.P. No.46 of 2010 (Old M.A.C.P. No.144 of 1996) decided on 10/10/2007.

5. The aforesaid Claim Petition was filed by the present appellant seeking compensation on account of the damages caused to the ambassador car bearing registration no. MH-23 / 8686 owned by him in a vehicular accident happened on 12/08/1995 having involvement of a truck bearing registration no. ATS 6235 insured with respondent no.3 – National Insurance Company Ltd. on the date of the accident. The appellant had claimed damages to the tune of Rs.4,00,000/-. The claim petition was resisted by respondent no.3 – National Insurance Company Ltd. on various grounds. In order to substantiate the contentions raised in the petition, the appellant had deposed before the Tribunal and also examined the witness (PW2 – Rajesh Lahoti), so as to bring on record the estimate of repairs. The witness, who was examined, was a garage owner and was thoroughly cross-examined by both the insurance companies, which were parties to the claim petition. The learned Tribunal, on its assessment of the oral as well as documentary evidence brought on record, dismissed the petition vide the impugned order. Aggrieved thereby, the appellant has filed the present appeal.

6. Shri Chapalgaonkar, learned counsel appearing for the appellant submitted that despite there being sufficient evidence brought on record by the

appellant, the Tribunal, on certain erroneous grounds, has rejected the petition so filed by the appellant. Learned counsel submitted that there are two major grounds on which the Tribunal has rejected the petition filed by the present appellant; first is that the appellant/claimant has failed in proving the negligence on part of the driver of the offending truck insured with the National Insurance Company Ltd. and second that the appellant did not bring on record sufficient material so as to assess the damages.

7. Learned counsel submitted that during the course of hearing of the claim petition, a copy of the judgment delivered by the Motor Accident Claims Tribunal at Beed in MACP No. 220 of 1995 was placed on record. Learned counsel submitted that the same was the claim petition arising out of the same accident in which the car of the appellant got damaged. Learned counsel submitted that in the aforesaid claim petition, the learned Tribunal has recorded a clear finding that in occurrence of the said accident, the driver of the offending truck bearing registration no. ATS 6235 was solely responsible. Learned counsel further submitted that the judgment delivered in M.A.C.P. No. 220 of 1995 has not been challenged by the National Insurance Company. On the contrary, the said insurance company has satisfied the award passed in the aforesaid claim petition. Learned counsel submitted that in the judgment delivered in M.A.C.P. No.220 of 1995, all the policy papers pertaining to the alleged accident, which were in Tamil, were got translated and the translated copies were placed on record of the said matter and the same were considered by the Tribunal while delivering the judgment in the aforesaid claim petition. Learned counsel submitted that once having

accepted the responsibility of paying compensation to the claimant in the aforesaid claim petition, it was not open for the respondent – Insurance Company to take a different stand. Learned counsel further submitted that the Tribunal also would not have discarded the aforesaid fact, which was specifically brought on record by the appellant and no contrary finding could have been recorded by the Tribunal in so far as negligence on part of the truck driver is concerned. Learned counsel therefore prayed for setting aside the finding so recorded by the Tribunal in the judgment and award, which is impugned in the present appeal.

8. In so far as the aspect of damages is concerned, learned counsel took me through the evidence of the appellant as well as PW2 – Shri Lahoti and also brought to my notice the documents at Exhibit 46, 47 and 48. Learned counsel submitted that the documents so placed on record were sufficient for drawing an inference that the ambassador car was heavily damaged. Learned counsel submitted that merely because the survey was conducted and the report was forwarded to the Oriental Insurance Company, the same could not have been discarded for the said reason. Learned counsel submitted that the Surveyor is an independent person and cannot be treated as an employee of any Insurance Company. Learned counsel invited my attention to the observations made by the Tribunal in paragraph no.12 of the judgment and submitted that at one point of time, the Tribunal appears to have convinced that the damage was certainly caused to the Ambassador car, however, in spite of that, it refused to grant any relief on that count for the reason that the appellant/claimant did not prove the negligence on part of the driver of the truck. Learned counsel submitted that from the

documents on record, an irresistible inference emerges that the total loss was caused to the Ambassador car. Learned counsel further submitted that the insurance policy of the said car placed on record evinces that at the time of last purchase of insurance policy of the said car, the value of the said car has been shown at Rs.1,87,000/-. Learned counsel submitted that considering the available evidence on record, the damages as are specified and the estimate of which was duly proved by the appellant/claimant, to that extent, the Tribunal must have accepted the claim of the appellant/claimant and must have awarded the compensation to that extent. Learned counsel therefore prayed for setting aside the impugned judgment and order and to award adequate compensation considering the evidence on record adduced by the appellant/claimant.

9. Shri Soman, learned counsel appearing for the respondent no.3 i.e. National Insurance Company strongly opposed the submissions advanced on behalf of the appellant/claimant. Learned counsel submitted that the claimant was supposed to independently prove the negligence of the truck driver before the Tribunal in the Claim Petition filed by him and since he has failed in establishing the said fact, no fault can be found with the findings recorded by the Tribunal. Learned counsel further submitted that from the material on record, it is clearly revealed that the ambassador car was having a comprehensive insurance with the Oriental Insurance Company and as such the appellant/claimant could have conveniently preferred claim with the said insurance company and there was no hurdle for him for getting compensation from his insurance company. Learned counsel submitted that the material on record further reveal that atleast on three

occasions, such attempt was made by the appellant/claimant, however, since he failed in obtaining any favourable response from his own insurance company, has ultimately, by amending the claim petition, added the National Insurance Company, as respondent in the claim petition. Learned counsel submitted that mere presentation of the estimate cannot be said to be a proof of the damages caused to the vehicle. Learned counsel further submitted that cogent and sufficient evidence ought to have been adduced by the appellant/claimant to prove the damages caused to his vehicle. Learned counsel further submitted that whatever documents are submitted by the appellant/claimant on record, are pertaining to the claim made by the appellant/claimant with the Oriental Insurance Company and as such, the Tribunal has rightly declined to accept the said documents and has rightly rejected the claim of the appellant/claimant. Learned counsel, therefore, prayed for dismissal of the appeal submitting that no interference is warranted in the impugned judgment.

10. I have carefully considered the submissions made on behalf of the parties. In so far as the first ground on which the Tribunal seems to have rejected the petition of the present appellant, observing that the claimant has failed in proving the negligence on part of the driver of the offending truck is concerned, it is apparent that the Tribunal has grossly erred in recording such a finding. In premise of the fact that the copy of the judgment in M.A.C.P. No.220 of 1995, arising out of the same accident was placed on record and further it was brought to the notice of the Court that no appeal has been preferred against the judgment and award passed in the said petition, on the contrary, the Insurance Company has satisfied the award

passed in the said matter, wherein finding was recorded that the accident in question had occurred because of the sole negligence on part of the driver of the truck, no contrary finding could have been recorded by the Tribunal in the impugned award. The Tribunal has not recorded any reason for not accepting the said finding recorded earlier on the said point which was not challenged by the National Insurance Company. The finding so recorded would operate as *res-judicata*. In absence of any contrary evidence on record, the Tribunal must have held that the alleged accident had happened because of the sole negligence of the truck driver. It is further the matter of record that the driver of the truck was only prosecuted in connection with the alleged accident and that was the primary evidence brought on record by the appellant/claimant. So also, no contrary finding could have been recorded by the Tribunal. The finding so recorded, thus requires to be quashed and set aside and it is to be held that the alleged accident was caused due to the sole negligence on the part of the driver of the offending truck, thereby making the owner and insurer of the said truck liable to pay the amount of compensation to the appellant.

11. In so far as the other finding recorded by the Tribunal that no sufficient evidence has been adduced by the appellant/claimant in order to prove the damages caused to his vehicle, the evidence of the claimant and of the witness examined by him, as well as the documents placed on record at exhibit 46, 47 and 48 would be material.

12. I see no reason to disagree with the submission made by Shri Chapalgaonkar, learned counsel appearing for the appellant/claimant that the

survey report so placed on record could not have been discarded by the Tribunal stating that the same was for Oriental Insurance Company. The argument made by learned counsel for respondent no.3 – Insurance Company on the similar lines also cannot be accepted, since the Surveyor, who has submitted the report, is admittedly not an employee of the Insurance Company but possesses his own identity.

13. As I noted earlier, the documents at exhibit 46, 47 and 48 are material documents, on the basis of which, the amount of damages can be ascertained.

14. During the course of his arguments, it was submitted by Shri Soman, learned counsel appearing for the National Insurance Company that the endorsement which is there on the aforesaid documents, to the effect that “documents admitted hence exhibited” is incorrect and the National Insurance Company has never admitted the aforesaid documents. It was also brought to my notice by Shri Soman that the aforesaid documents were admitted by the Oriental Insurance Company with which the Ambassador car of the present appellant was insured. The submission so made by Shri Soman is, however, difficult to be accepted for the reason that no such objection was raised by the National Insurance Company before the Tribunal that the aforesaid documents cannot be exhibited since they are not admitted by the National Insurance Company.

15. Perusal of the aforesaid documents clearly establishes that the Ambassador car had suffered a total loss. The joint survey report at exhibit 46 reveals that the Ambassador car had sustained heavy damages. Its entire body shell was smashed, entire roof top was ripped off and folded, both side doors were

smashed, flooring was torn, front suspension was smashed/twisted, radiator assembly was badly pressed, wirings were cut, steering assembly was twisted, dashboard with meter was smashed, front tyres and discs were cut, engine assembly was found missing. Taking into consideration the observations recorded as about the condition of the Ambassador car in the joint survey, there remains no doubt that the car had suffered a total loss. For repair of the said car, the estimate was given for Rs.3,00,145/-.

16. During the course of his arguments, Shri Chapalgaonkar, learned counsel for the appellant, on instructions, has made a statement that after having fought for more than 15-16 years, the appellant/claimant will be satisfied, if the amount, as has been assessed by the surveyor, presuming the total loss of the vehicle that is to the tune of Rs.69,000/- with interest thereon, is awarded, and the appellant will accept the same towards the full and final settlement.

17. The document at Exhibit 47 discloses that the assessment on cash loss basis was for Rs.69,000/-. It was made by Shri Sanjay Kurnurkar, Authorised Surveyor and Assessor. The document at exhibit 48 reveals that the licensed surveyor, namely Shri A.T. Kulkarni, has given an opinion to the Oriental Insurance Company vide his letter dated 6/9/1996, that considering the nature and extent of the loss, he was of the opinion that the loss should be settled for Rs.69,000/- as calculated by the surveyor. Shri Kulkarni had also communicated to the Insurance Company that he was of the opinion that the claim should be settled on cash loss basis for Rs.69,000/- and it will be a most fair and reasonable settlement.

18. After having gone through the documents as aforesaid, I have no hesitation in recording a finding that the appellant/claimant has duly established that his Ambassador car had suffered a total loss, which has been assessed to the tune of Rs.69,000/- by the licensed Surveyor.

19. As has been submitted by learned counsel appearing for the appellant, the appellant/claimant is now ready to accept the aforesaid amount with interest thereon by way of full and final settlement. In the circumstances, it appears to me that the claim to that extent needs to be awarded. In view of the fact that the appellant/claimant has established that the accident in question had occurred because of the sole negligence on part of the driver of the truck and has further established that the Ambassador car owned by him suffered total damages in the said accident, I hold the appellant/claimant entitled for the compensation of Rs.69,000/- with interest thereon, jointly and severally from driver, owner and insurer of the offending truck.

20. The Tribunal has grossly erred in dismissing the claim petition on erroneous grounds. The order so passed by the Tribunal, therefore, needs to be quashed and set aside. For the reasons stated hereinabove, the following order is passed :-

ORDER

I) The Appeal is partly allowed with proportionate costs.

II) The impugned judgment and order dated 10/10/2007 passed in M.A.C.P. No. 46 of 2000 is quashed and set aside.

III) The appellant/claimant is held entitled to receive compensation by way of damages, to the tune of Rs.69,000/- jointly and severally from respondent nos.2 and 3 with interest thereon at the rate of 6% per annum from the date of filing of the petition till the actual payment.

IV) The award be drawn accordingly.

[P.R. BORA]
JUDGE

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