

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

FIRST APPEAL NO. 642 OF 2010

Cholamandalam MS General
Insurance Company Limited
Through its Manager
Kapil Tower, "C" Wing,
6th floor, Dr. Ambedkar Road,
Near R.T.O. Office, Pune

...Appellant

versus

1. Sanjay s/o Bhaguji Darkunde
Age 27years, Occ. Electrician,
R/o. Village Maka, Talauka Newasa
district Ahmednagar

2. Malhari s/o Arjun Phatangare
Age major, Occ. Driver & Business
R/o. Bhatkudgaon, Tq. Shevgaon
District Ahmednagar
(Owner of Minidoor Pick-up
No. MH-16-Q-1787).

...Respondents

...
Advocate for Appellants : Mr. Mohit Deshmukh h/f Mr. Chapalgaonka S.G.
Advocate for Respondents : Mr. D.R. Jayabhar

.....

CORAM : V. K. JADHAV, J.
DATED : 7th APRIL, 2016

ORAL JUDGMENT:-

1. Being aggrieved by the judgment and award dated 27.11.2009 passed by the learned Chairman, M.A.C.T. Ahmednagar in M.A.C. P. No. 234 of 2005, the original respondent No.2-insurer has preferred this appeal.

2. Brief facts, giving rise to the present appeal, are as follows:-

a) On 8.2.2005, at about 6.00 p.m. the claimant was returning from Shrirampur to his village Maka by Kukana Dedgaon road on his motorcycle bearing registration No. MH-17-R-9506. He was riding the motor cycle and one Subhash Kande was pillion rider. On the way, within the limits of village Jeur, one rickshaw bearing registration No. MH-16-Q-1787 came from the opposite direction in high speed and gave a dash to the motorcycle driven by the claimant. In consequence of which, the claimant fell down on the road and sustained injuries, causing fracture to his right hand and right leg. After the accident, he was admitted in the hospital at Kukana and thereafter shifted to another hospital at Ahmednagar. He was operated in the hospital and a steel rod was also fixed in his right leg. He had incurred medical expenses for his treatment. Furthermore, the injuries sustained by him on his right leg resulted into permanent disablement to the extent of 25%. Thus, the claimant had filed a petition for grant of compensation before the Chairman, M.A.C.T. Ahmednagar. The original respondent No.1 has strongly resisted the petition mainly on the ground that the accident had taken place due to the negligence on the part of claimant himself. The appellant insurer has resisted the claim by filing written statement. The appellant-insurer has raised defence that the driver of auto

rickshaw was not having valid and effective driving licence and thus there is breach of the specified condition of policy. The learned Chairman of the Tribunal, by impugned judgment and award dated 27.11.2009 partly allowed the claim petition with proportionate costs and thereby directed the respondents jointly and severally to pay Rs.1,05,741/- to the claimant with interest. Being aggrieved by the same, the original insurer has preferred this appeal.

3. Learned counsel for the appellant submits that the appellant insurer has examined one Arvind Sawant D.W. 1, a clerk from the R.T.O. Office and he has deposed before the Tribunal that respondent No.1 driver Malhari was not having valid and effective driving licence. He has further deposed that the driving licence produced by said respondent Malhari on record was fake driving licence. In fact, the said driving licence has been issued in the name of one Sethurajan. Learned counsel submits that even then the learned Chairman of the Tribunal has not considered the said evidence of D.W.1 Arvind Sawant and saddled the liability on the appellant-insurer. Learned counsel further submits that P.W.2 Dr. Mahesh Mulay, who has issued certificate showing 25% permanent disablement sustained by the claimant, has admitted in his cross examination that after the second operation, the rod, wiring and screws came to be removed for the reason that fracture were united.

He has further deposed that after removal of rod and screws, the disablement of claimant was not assessed. Learned counsel submits that in view of this evidence that the fracture is united, there is no permanent disablement sustained by the claimant. Learned counsel submits that even Tribunal has considered permanent disablement to the extent of 10% and accordingly calculated the compensation. Learned counsel submits that there is no evidence at all to show that in what way the said disablement has affected the earning capacity of the claimant. Learned counsel submits that the Tribunal has erroneously applied the multiplier and awarded the compensation of Rs.64,800/- as loss of future income.

4. Learned counsel for the respondent original claimant submits that the Tribunal has rightly saddled the liability on the appellant insurer to pay compensation alongwith respondent No.1 jointly and severally. Learned counsel submits that even though P.W.1 Dr. Mahesh Mulay has admitted in his cross examination about the fact that fracture are united, however, he has further clarified in the cross examination that there is no bifurcation so far as the permanent disablement sustained by the claimant as certified by him is concerned. Learned counsel submits that the claimant has deposed about the effect of permanent disablement sustained by him and the manner in which his earning capacity is affected. Learned counsel

submits that there is no positive evidence to show that respondent No.1 was not having valid and effective driving licence at the time of accident and the licence produced on record is fake licence. Learned counsel in the alternate submits that if it is accepted that the licence produced on recodes is fake licence, then in view of the authoritative pronouncement of Supreme Court in the case of ***S. Iyyapan vs. United India Insurance Company Limited, dated 01.07.2013 in Civil Appeal No. 4834 of 2013***, it is for the appellant insured to satisfy the judgment and award passed against the insurer and the amount then may be recovered from the insured. Learned counsel submits that there is no merit in the appeal and the appeal is liable to be dismissed.

5. It is not disputed that the accident had taken place on account of rash and negligent driving of auto rickshaw bearing registration No. MH-16-Q-1787 owned and driven by the insured and claimant is not responsible for the same.

6. So far as holding of valid and effective driving licence by respondent No.1 at the time of accident by the owner/driver is concerned, the Tribunal for no reason has discarded the evidence of D.W.1 Arvind Sawant, a clerk from R.T.O. Office. D.W.1 Arvind Sawant has deposed before the Tribunal on the basis of record

available with R.T.O. Office. It appears from his evidence that the licence produced on record marked at Exh.61 is issued in the name of Sethurajan having same registration number as shown in the licence at Exh. 54. It is to be mentioned that licence at Exh.54 is driving licence produced on record by the respondent owner/driver before the Tribunal to show that at the time of accident, he was having valid and effective driving licence.

7. In view of the judgment in the case of ***S. Iyyapan vs. United India Insurance Co. Ltd. (supra)***, relied upon by learned counsel for the respondent-claimant, the appellant insurer is to satisfy the judgment and award and may recover it from the insured in the given circumstances. The Hon'ble Supreme Court in the said case in para 12 made the following observations:-

“12. 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 that intention of the legislature to make third party insurance compulsory and to ensure that the victim 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.

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 a 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.”

8. So far as the quantum in the present case is concerned, it appears that the claimant has deposed that prior to the accident, he was doing motor winding work. He has further deposed that due to permanent injury sustained by him in the accident, which resulted in permanent disablement, he is not able to do any work because he

cannot bend his leg completely. He has further deposed that for motor winding work, weight is to be lifted and it is a standing job. He has further deposed that he constrained to discontinue the winding work. P.W.2 Dr. Mahesh Mulay has also deposed that due to disability, the claimant will not be able to do any hard work but he can do the light work. P.W.2 Dr. Mahesh Mulay admitted in his cross examination that after removal of rod and screws, the disability of the claimant is not assessed. In the same para, he clarified that there is no bifurcation so far as the permanent disablement sustained by the claimant is concerned. The learned Chairman of the Tribunal however, considered that the fracture is united, and also considered that there is stiffness to the right knee and movements are restricted to some extent. I do not find any fault in the impugned judgment and award passed by the Tribunal to treat the permanent disablement of the claimant to the extent of 10% and award the compensation by applying the multiplier method. In the light of above discussion, I proceed to pass the following order:-

O R D E R

- I. The appeal is hereby partly allowed.
- II. The judgment and award dated 27.11.2009 in M.A.C.P. No. 234 of 2005 passed by the Chairman, M.A.C.T.

Ahmednagar is modified to the following effect:-

The opponent No.1 Malhari Arjun Phatangare, shall pay the compensation of Rs.1,05,741/- to the claimant Sanjay Bhaguji Darkunde with interest at the rate of 7.5% p.a. from the date of application i.e. 27.4.2005 till realization of amount.

However, the appellant-opponent No.2 insurer shall pay the entire amount under award to the claimant and recover the same from the opponent No.1 Malhari Arjun Phatangare. Needless to say that for that purpose independent proceeding need not be initiated.

- III. Award be drawn up accordingly.
 - IV. In the circumstances, there shall be no order as to costs.
- Appeal is accordingly disposed of.

(V. K. JADHAV, J.)

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