IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

FIRST APPEAL NO. 103 OF 2015
WITH
CA/378/2015 IN FA/103/2015

THE RELIANCE GENERAL INSURANCE COMPANY
THROUGH ITS MANAGER/AUTHORIZED SIGNATORY
VERSUS
BALU KRISHNA CHAVAN AND OTHERS
...
Advocate for Appellant : Mr. Chapalgaonkar S.G.
Advocate for Respondent No.1 : Mr. S.D. Tawshikar
Advocate for Respondent No.6 : Mr. S.R. Bodade
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CORAM : V. K. JADHAV, J.
DATED : 15th FEBRUARY, 2017
...

PER COURT:-

1. Heard finally with consent at admission stage.

2. Being aggrieved by the judgment and Award passed by the Member, Motor Accident Claims Tribunal, Beed dated 11.11.2004 in MACP No.12/2009, the original respondent-insurer has preferred this appeal.

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

a] On 11.5.2008 the claimant was travelling in a truck bearing registration No.MH-12/CH-4001. On perusal of the pleadings in the claim petition and the contents of the FIR itself would show that the maternal brother of the claimant namely Shri Pralhad Machindra Shinde was employed as a cleaner on the said truck. The claimant had started his journey in the truck with said Pralhad Shinde two days before the accident. On 10.5.2008 said truck was loaded with goods at Bangalore and started proceeding towards Pune. On 11.5.2008 at about 05.30 a.m on Pune–Bangalore National High Way, said truck gave dash to a stationary truck bearing registration No.MH-12/7830. In consequence of which right leg of the applicant was fractured and he had also sustained injuries on his left leg, hand and head. Said Pralhad Shinde also sustained injuries in the accident. Further, injuries sustained by the claimant also resulted into amputation of his right leg below thigh level. The claimant has also incurred huge medical expenses. The claimant has therefore approached the Motor Accident Claims Tribunal Beed and filed MACP No.12/2009 for grant of compensation under various heads. It has contended that, the accident had occurred on account of the negligence of driver of both the vehicles. Both the drivers had contributed the negligence and accident. The claimant was working as a labour and earning Rs.150/- per day. It has also contended that, due to said amputation he is not able to earn in future.

b] Respondents no.1,2 and 4 though duly served remained absent and therefore, hearing of the claim petition ordered to proceed ex-parte against them.

c] The appellant-insurer of the truck in which the claimant was travelling has strongly resisted the claim by filing written statement Exh.23. It has contended that aforesaid truck bearing registration No.MH-12/CH-4001 was driven by a person not holding valid and effective driving licence at the time of accident. It has also contended that, said truck was not used as per the terms and conditions of the policy. It has also contended that another vehicle bearing registration No.MH-12/7830 was kept stationary on a road without following traffic rules and therefore, it is a case of contributory negligence.

d] Respondent No.6 Insurer of the aforesaid stationary vehicle has also strongly resisted the claim petition by filing written statement Exh.28. It has contended that there is no fault on the part of the driver of the said vehicle truck bearing registration No.MH-12/7830. It has contended that, the driver of the said stationary vehicle had kept it on kaccha road and driver of the offending truck gave dash to the said stationary truck from the backside. It has also contended that crime came to be registered against the driver of the said truck bearing registration No.MH-12/CH-4001 and after due investigation, charge sheet is also filed against him. It has also contended that driver of both the vehicles were not having valid and effective driving licence on the date of accident.

e] The claimant has adduced oral and documentary evidence in support of his contention. However, respondents have not adduced any oral evidence.

f] The learned Member of the Motor Accident Claims Tribunal, Beed, by its impugned judgment and award dated 11.11.2004 partly allowed the claim petition and thereby directed the respondents 1 to 3 (including the appellant-insurer) jointly and severally do pay an amount of Rs.6,21,829/- inclusive of 'No Fault Liability' amount alongwith the interest @8% p.a. from the date of petition till realization of the amount. Claim petition as against respondents no. 4 and 6 i.e. owner and insurer of the stationary vehicle truck was dismissed. Hence, this appeal.

4. The learned counsel for the appellant-insurer submits that, as per the pleadings in the claim petition and contents of the FIR, maternal brother of the claimant namely Pralhad Shinde was employed as a cleaner on a truck bearing registration No.MH-12/CH-4001. The claimant has specifically pleaded that, his maternal brother Pralhad was working as a cleaner on the said truck and the claimant had travelled with said Pralhad Shinde two days prior to the accident in the truck bearing registration No.MH-12/CH-4001. The claimant in his affidavit at Exh.41 has stated that, in order to learn the work of cleaning he had accompanied

his maternal brother Pralhad Shinde in the said truck. He had boarded the said truck for the said purpose two days prior to the accident and on the date of accident after loading the goods in the said truck, he was travelling alongwith his maternal brother on Bangalore-Pune road in the aforesaid truck. Learned counsel submits that, undoubtedly, vehicle in question is a goods carriage and as per the pleadings of the claimant, the documents placed on record and oral evidence unmistakenly point out that the claimant was travelling in the said vehicle truck as a gratuitous passenger. Learned counsel submits that risk of such occupant neither covered under section 147 of the Motor Vehicles Act nor such additional risk was undertaken by the appellant-insurer. Learned counsel submits that, the driver of the said stationary truck was at fault. The accident had taken place at about 05.30 a.m. It does not appear from the contents of the spot panchnama that the aforesaid stationary truck was kept with indicators and other safety measures.

5. Learned counsel further submits that, the entire

approach of the Tribunal is incorrect. Same is also evident from recording of the brief facts in paragraph no.2 of the Judgment that the Tribunal has observed that the claimant was proceeding in a vehicle bearing registration No.MH-12/CH-4001 as a cleaner. The learned Member of the Tribunal under the said presumption has awarded compensation against the owner of the said vehicle truck and appellant insurer directing them to pay compensation jointly and severally. The learned Member of the Tribunal ought to have exonerated the appellant insurer on the ground alone that the claimant was travelling in the said vehicle truck as a gratuitous passenger.

6. The learned counsel for the appellant-insurer in order to substantiate his contentions placed his reliance on following cases :-

1. United India Insurance Company Ltd., Vs. Suresh K.K. And another reported in AIR 2008 Supreme Court 2871.

2. New India Assurance Co. Ltd., Vs. Asha Rani reported in 2003 (2) SCC 223.

3. National National Insurance Co. Ltd., Vs. Cholleti Bharatamma and Others reported in 2007 AIR SCW 7337.

4. Oriental Insurance Company Ltd., Vs. Devireddy Konde Reddy and others, Oriental Insurance Company Ltd., Vs. Jogi Subbamma and others reported in AIR 2003 SUPREME COURT 1009.

5. Ramesh Kumar Vs. National Insurance Co. Ltd., and others reported in 2002 (1) Mh.L.J. 269.

7. Learned counsel for respondents original claimants submits that the appellant-insurer has not raised a specific plea about breach of the policy and while framing issues the appellant insurer did not press the contention. Consequently, a specific issue about the travelling of a claimant in the said truck as a gratuitous passengers was not framed before the Tribunal. In other words, the appellant-insurer gave up that contention. It is not permissible for the appellant-insurer to raise such contention for the first time in the appeal. The learned counsel submits that, the driver of the said stationary vehicle has not kept indicators on or undertaken any safety measures. Further, a vehicle like truck kept stationary on a National High way which is not permissible. It is thus a case of composite negligence. However, the Tribunal has erroneously dismissed the claim against the owner and insurer of

the said stationary vehicle. Learned counsel submits that the claimant is a poor labour and on account of the injuries sustained in the accident, his right leg was amputed below thigh level. The appellant-insurer has deposited the entire amount before this Court as directed. Learned counsel submits that the claimant has not received amount yet and he had to struggle further for recovery of the amount in case, this Court accepts the contention raised by the appellant-insurer. The appellant-insurer has already deposited the entire awarded amount pursuant to the order passed by this Court. Thus, the claimant may be permitted to withdraw the amount deposited by the appellant insurer and the appellant thereafter may recover said amount from the owner of the vehicle. Learned counsel submits that, the Supreme Court in a case of Manager National Insurance Company Limited Vs. Saju P. Paul and another reported in (2013) ACC 46 (SC) in the similar set of facts permitted the claimant to withdraw the amount deposited by the Insurance Company with the observations that, the Insurance Company may recover the amount so paid from the owner.

8. The learned counsel in order to substantiate his contentions placed his reliance on following cases :-

1. T.O.Anthony Vs. Karvarnan Vs. Karvarnan and others reported in 2008 (5) Mh.L.J. 7

2. Khenyl Vs. New India Assurance Company Ltd., reported in [2016 (2) Mh.L.J. 514.

3. New India Insurance Company Ltd., Vs. Rukmbai LAWS (Bom)-2009-6-60

4. Manager National Insurance Company Limited Vs. Saju P. Paul and another reported in (2013) ACC 46 (SC)

9. The learned counsel for respondent no.6 insurer of the Stationary Vehicle submits that said truck bearing registration No.MH-12/7830 was kept on kaccha road and the same is also reflected from the contents of the spot panchnama exh.45. The claimant has also relied on the contents of the spot panchnama Exh.45. The learned Member of the Tribunal has, therefore, rightly held that the accident had taken place on account of rash and negligent driving of the truck MH-12/CH-4001 alone and that driver of the stationary truck has not contributed the negligence.

10. On careful perusal of the pleadings, oral and

documentary evidence and the judgment and award passed by the Tribunal, it appears that, the claimant himself has approached the Tribunal with a specific pleading and also stated so in his affidavit of evidence that, he was travelling in the truck bearing registration no. MH-12/CH-4001 to learn the cleaner's work from his maternal brother Pralhad Shinde. Admittedly, said Pralhad Shinde was working as a cleaner on the aforesaid truck. Appellant-insurer has also raised a plea that, there is breach of the terms and conditions of the policy on two grounds. Firstly the vehicle alleged to be involved in the accident was not used as per the terms and conditions of the policy and that said vehicle was driven by a person not holding valid and effective driving licence on the alleged date and time of the accident. The burden is on the appellant-insurer to prove the said defence and the burden can be discharged either by adducing oral or documentary evidence to substantiate the defence as raised or the insurer may be discharged the said burden on the basis of the pleadings, evidence and documents placed on record by the claimants or other contesting respondents.

In the instant case, it is rather an admitted position that the claimant was travelling in the said vehicle bearing registration no. MH-12/CH-4001 as a gratuitous passenger and the said vehicle truck is a goods carriage vehicle. The learned Member of the Tribunal has not considered the same and on the other hand, incorrectly recorded the brief facts of the case to the effect that the claimant was travelling in the said truck as a cleaner. Under these assumptions, the Tribunal has fastened the liability on the appellant-insurer alongwith the owner of the said truck jointly and severally to pay the compensation.

11. Thus, the risk and liability of such a gratuitous passenger is not covered under the policy in terms of provisions of section 147 of the Motor Vehicles Act, 1988 and further the appellant-insurer has not undertaken such an additional risk by accepting any extra premium.

12. In a case Oriental Insurance Company Vs. Devireddy Konda Reddy (supra) relied upon by the learned counsel for the appellant-insurer in paragraph

No.10,11 and 12 the Supreme Court has made following observations :-

"10. The difference in the language of "goods vehicle" as appearing in the old Act and "goods carriage" in the Act is of significance. A bare reading of the provisions makes it clear that the legislative intent was to prohibit goods vehicle from carrying any passenger. This is clear from the expression "in addition to passengers" as contained in definition of "goods vehicle" in the old Act. The position becomes further clear because the expression used is "goods carriage" is solely for the carriage of goods". Carrying of passengers in a goods carriage is not contemplated in the Act. There is no provision similar to clause (ii) of the proviso appended to Section 95 of the old Act prescribing requirement of insurance policy. Even Section 147 of the Act mandates compulsory coverage against death of or bodily injury to any passenger of "public service vehicle". The proviso makes it further clear that compulsory coverage in respect of drivers and conductors of public service vehicle and employees carried in goods vehicle would be limited to liability under the Workmen's Compensation Act, 1923 There is no reference to any passenger in "goods carriage'.

11. The inevitable conclusion, therefore, is that provisions of the Act do not enjoin any statutory liability on the owner of a vehicle to get his vehicle insured for any passenger traveling in a goods carriage and the insurer would have no liability therefor.

12. Our view gets support from a recent decision of a three-judge Bench of this Court in New India Assurance Company Limited vs. Asha Rani & Ors. [2002 (8) Supreme 594] in which it has been held that Satpal

> Singh's case (supra) was not correctly decided. That being the position the Tribunal and the High Court were not justified in holding that the insurer had the liability to satisfy the award."

13. In all the cases cited and relied upon by the learned counsel for the appellant, there is a consistent view that carrying of a passenger in a goods carriage vehicle is not contemplated and the provisions of section 147 of the Act mandates compulsory coverage in respect of drivers and conductors of public service vehicles and employees carried in goods vehicle would be limited to liability under the Workmen's Compensation Act, 1923. There is no reference to any passenger in "good carriage". The expression include owner of the goods or authorized representative carrying in a vehicle clearly demonstrates that legislature wanted to bring within the provisions of section 147 and making it compulsory for the insurer to insure even in a case of goods vehicle, the owner of the goods or his authorized representative being carried in a goods vehicle. Thus, the insurer would not liable to pay any compensation to such a passenger if he is sustained any injury in the accident.

The policy would not cover risk of such gratuitous passenger travelling in a goods carriage. Consequently, the appellant-insurer is not liable to pay any compensation.

14. On careful perusal of the contents of the spot panchnama exh.45, and the map at exh.46, it appears that, said vehicle bearing registration No.MH-12/7830 was kept stationary at the extreme left side Kaccha road. It further appears from the perusal of the map exh.46 that, the vehicle truck bearing registration No.MH-12/CH-4001 left the tar road, entered on a kaccha road and gave dash to the backside portion of the said stationary truck. I do not think that, it is a case of composite negligence or contributory negligence. Learned Member of the Tribunal has therefore rightly concluded that the accident had taken place on account of rash and negligent driving of the truck bearing registration No.MH-12/CH-4001 alone.

15. In a case of National Insurance Company Ltd., Vs. Parvathneni and another SLP (C) 10993/2009) though

question is referred to the larger Bench for consideration where if an insurance company can prove that it does not have any liability to pay any amount in law to the claimants under the motor vehicles Act or any other enactment, can the court compel it to pay amount in question giving it liberty to later on recover the same from the owner of the vehicle. In the given set of facts, when the claimant himself has approached the Tribunal with the pleadings and lead evidence to the effect that he was travelling in the vehicle truck involved in the accident as a gratuitous passenger, I am not inclined to direct the appellant-insurer to pay the amount or to permit the claimants to withdraw the amount deposited by the appellant-insurer and further the appellant-insurer may recover the said amount from the owner.

16. In view of the above discussion, I proceed to pass the following order.

O R D E R

I] First Appeal is hereby partly allowed with proportionate costs.

Ii] The judgment and award passed by the learned Member, M.A.C.T. Beed, dated 11.11.2014 in M.A.C.P. No. 12 of 2009, is hereby quashed and set aside to the extent of holding the appellant-insurer liable jointly and severally to pay the compensation alongwith respondents no.1 and 2 and the same is modified in the following manner:-

a) Respondent Nos. 1 and 2 do pay jointly and severally an amount of Rs.6,21,829/- (Rupees six lacs twenty one thousand eight hundred twenty nine only) inclusive of 'no fault liability' alongwith interest @ 8% p.a. from the date of petition till realization of amount.

b) The original respondent Nos. 1 and 2 shall jointly and severally pay proportionate costs to the claimant and shall bear their own costs.

c) The claim against original respondent Nos. 3, 4 and 6 stands dismissed.

III. If appellant-respondent No.3 (insurer) has deposited the amount in this court, the same shall be refunded to the appellant-insurer.

IV. Award be drawn up in view of the above modifications.

V. First appeal is disposed of.

Vi. Pending civil application No. 378 of 2015 is also disposed of.

Vii. At this stage, learned counsel for respondent No.1-claimant prays for stay to the effect of this order for a period of 8 (eight) weeks from today, as the claimant intends to challenge this order in the Apex Court. Learned counsel for the appellant-insurer has no objection if the effect of this order is stayed for a period of 6 (six) weeks. In view of above, the effect, implementation and operation of this order is hereby stayed for a period of eight weeks from today.

sd/-

(V. K. JADHAV, J.)

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aaa/-