IN THE HIGH COURT OF JUDICATURE AT BOMBAY BENCH AT AURANGABAD

FIRST APPEAL NO. 1063 OF 2016
WITH
CA/2229/2015 IN FA/1063/2016

NASIR KHAN NAWAB KHAN
VERSUS
VIDHYABAI UTTAMCHAND KUNWAR AND OTHERS
...
Advocate for Appellant : Mr Yadkikar Amit A.
Advocate for Respondents : Mr V.B. Patil For R/1 To 5,
Mr S.R Bodade For R/6
...
CORAM : V.K. JADHAV, J.
Dated: March 20, 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, Jalgaon dated 7.11.2013 in MACP No.465/2008, respondent no.1 original owner had preferred this appeal to the extent that the Tribunal has exonerated the respondent-insurer from the liability to pay the compensation jointly and severally alongwith the owner.

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

a] On 14.10.2008 at about 07.00 am deceased Uttam was passing along road in front of Hotel Trimurti at Jalgaon. At that time one truck bearing registration No.MH-19/Z-2092 came from Aurangabad side and gave dash to deceased Uttam from his back side. In consequence of which, deceased Uttam fell down on the ground and sustained severe injuries. He was immediately taken to the Civil Hospital, Jalgaon where he succumbed to the injuries while under treatment.

b] The claimants who are the legal representatives approached the Tribunal by filing MACP No.465/2008 for grant of compensation under various heads. It has been contended in the claim petition that deceased Uttam was the employee of Government Ashram Shala on monthly salary of Rs.7873/- and the claimants were entirely depending on his income.

c] The appellant has resisted the claim petition by filing written statement.

d] The respondent no.2 insurer has also resisted the claim petition by filing written statement. It has been contended in the written statement that the driver of the truck was not holding valid and effective driving licence at the time of accident.

e] The claimants have adduced oral and documentary evidence in support of their contentions. The respondent insurer has examined one witness from RTO office, Jalgaon to substantiate its defence.

4. The learned Member of the Motor accident Claims Tribunal, Jalgaon partly allowed the petition with costs and thereby directed the present appellant to pay compensation of Rs.12,55,000/- to the petitioners alongwith interest @ 7.5% p.a. from the date of petition till realization of the entire amount. Being aggrieved to the extent of exoneration of the respondent-insurer from the liability to pay the compensation, the appellant-owner preferred this appeal.

5. The learned counsel for the appellant submits that, driving licence issued in favour of the driver Riyaz Shaikh was valid up to 8.9.2008 and said licence was renewed subsequently. It was renewed from time to time and last date of validity was 8.9.2008. Thereafter, driving licence was renewed from 16.1.2009 to 15.1.2012. Learned counsel submits that, the appellant-owner got satisfied about driving licence possessed by the driver Riyaz Shaikh. It could not be expected from the appellant-owner to go on checking validity of licence of driver and as such the appellant owner was not

guilty of willful breach of conditions of the policy or contract of insurance. The learned Member of the Tribunal ought to have held the respondent-insurer liable to pay the compensation jointly and severally alongwith the appellant. The learned counsel in the alternate submits that, since third party is involved in the accident, in terms of policy conditions the respondent-insurer is liable to pay the entire compensation and then recover the same form the appellant-owner. Learned counsel submits that, so far as recovery of compensation from the appellant-owner is concerned, the same should not be in the proceedings before the Tribunal itself, but, in a separate proceeding where it would be incumbent upon the respondent-insurer to prove the willful breach on the part of the appellant-owner of the vehicle involved in the accident. Learned counsel for the appellant owner has not made any submission on the point of quantum.

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

i] Vasant V Bugde Vs. Vasant Raghunath Joshi in FA No.93/2010 reported in 2016 (3) ALL MR 286.

ii] National Insurance Company Ltd., Vs. Swaran Singh and ors reported in AIR 2004 SC 1531.

iii] Pepsu Road Transport Corporation Vs. National Insurance Company reported in AIR 2014 SC 305.

iv] Bajaj Alianz General Insurance Co. Ltd., Vs. Ashwita Arvind Poll reported in 2015 (2) BomCR 359.

7. Learned counsel for respondent-insurer submits that, the respondent-insurer has examined the clerk of the RTO office, Jalgaon and brought on record the extract of the driving licence possessed by the driver Riyaz Shaikh at the time of accident. On perusal of Exh.55 and 56 respectively, it is clear that driver Riyaz Shaikh was not holding valid and effective driving licence as on the date of accident and his driving licence was renewed much after happening of the accident. Learned counsel submits that, accident had taken place on 14.10.2008 and as per the record of the RTO Office, Jalgaon, said driving licence of driver Riyaz Shaikh was valid up to 8.9.2008. It was renewed on 16.1.2009 and the same was valid up to 15.1.2012. Learned counsel submits that the insurer is not liable to pay the compensation first and recover the same from the owner in each and every case. Though, the appellant-owner has filed his written statement no point is raised about the willful breach of the conditions

of the policy. The appellant-owner has not examined himself nor his driver. Learned counsel submits that the Tribunal has therefore rightly exonerated the respondent-insurer from liability to pay the compensation.

8. Learned counsel appearing for respondent-insurer to substantiate his contentions places reliance on following judgments :-

i] National Insurance Company Limited Vs. Vidhyadhar Mahariwala reported in AIR 2008 SCW 7145.

Ii] Ishwar Chandra Vs. Oriental Insurance Company Limited reported in 2007 ACJ 1067.

9. On perusal of the record of the RTO and most particularly record in the form of Exh.55 and 56 respectively, placed before the Tribunal, it is clear that, the driver Riyaz Shaikh was not holding valid and effective driving licence at the time of accident and respondent insurer is succeeded in proving that the driver of the vehicle involved in the accident was not holding valid and effective driving licence at the time of accident.

10. In Pepsu Road Transport Corporation Vs. National Insurance Company (supra), relied upon by learned counsel for appellant the Supreme Court dealt with the question

about liability of the insurance company of the driver of the offending vehicle possessing fake licence. Facts of the case are somewhat peculiar to the effect that the employer owner had employed the driver in the year 1994 and in the process of employment, he had put him to driving test and also he had imparted to training. The accident had taken place only after six years of his service. In those circumstances, the Supreme Court held that, the insured/employer cannot be said to be at fault in having employed person whose licence proved to be fake by the insurance company and thus held insurance company liable to pay indemnify/liable. The above case cannot be made applicable to the facts and circumstances of the present case.

11. In a case Vasant V Bugde Vs. Vasant Raghunath Joshi (supra) relied upon by learned counsel for appellant, this Court by relying upon case National Insurance Company Vs. Swaran Singh and others , S. Iyyapan Vs. United India Insurance Company Ltd., and other cases including Pepsu Road Transport Corporation (referred supra) in paragraph no.23 of the judgment, held that even if insurer succeeded in proving a breach of driving licence, that by itself is not sufficient to avoid liability. The insurer alongwith breach of the insurance policy has to establish such breach of licence

or conditions of the licence were fundamental to the cause of the accident. In the process of scanning evidence of licensing authority before Tribunal, it cannot also be held that licence to driver had not been issued by licensing authority and that licence was fake. This court has observed that there is no evidence on record to prove that respondent no.2 owner was guilty of willful breach of the conditions of the insurance policy or the contract of the insurance. Even though, S.Iyyapan's case is referred, the insurer is not exonerated from liability and this Court has not directed the insurer to pay compensation and recover the same from the owner.

12. In case of S.Iyyapan Vs.United India Insurance Company Ltd., and another in paragraph No.17 of the judgment the Supreme Court has made following observations :-

> *“17. 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."

13. In the instant case, it is statutory right of third party to recover the amount of compensation so awarded from the insurer and it is for the insurer to proceed against insured for recovery of the amount in the event there has been any violation of the condition of the insurance policy. In view of the facts of the present case and the ratio laid down in S.Iyyapan's case, the respondent-insurer has to pay the compensation first and then to proceed against appellant/owner-insured for recovery of the amount. Hence, I proceed to pass the following order.

O R D E R

i] First Appeal is hereby partly allowed. No costs.

Ii] The judgment and Award dated 7.11.2013 passed by the Member, Motor accident Claims Tribunal, Jalgaon in MACP No.456/2008 is hereby modified in the following manner :-

a] Respondent No.1-Nasir Khan Nawab Khan is directed to pay the compensation of Rs.12,55,000/- (Rs. Twelve Lacs Fifty Five Thousands) to the petitioners alongwith interest @ 7.5.% p.a. from the date of petition till realization of the amount. However, the respondent No.2-Insurer shall pay the said amount of Rs.12,55,000/- (Rs. Twelve Lacs Fifty Five Thousands) to the petitioners alongwith interest 7.5.% p.a from the date of application till the amount is paid to the claimants and the respondent-Insurer is entitled to recover the said amount from respondent no.1-owner without filing any independent proceeding.

ii] Award be drawn up accordingly.

iv] First Appeal accordingly disposed of. In view of disposal of first appeal, pending civil application, if any, also stands disposed of.

(V.K. JADHAV, J.)

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