

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

FIRST APPEAL NO. 384 OF 2004

Raosaheb s/o Govindrao Sanap,
Age : 45 years, Occupation : Business,
R/o Shastri Nagar, Nanded.

...APPELLANT

-VERSUS-

1 Ram s/o Bapurao Chorwadkar,
Age : 22 years, Occupation : Labourer,
R/o Limboti, Taluka Loha,
District Nanded.

2 The New India Assurance Company
Limited, through its Branch Manager,
Branch at Torasingh Market,
Nanded.

...RESPONDENTS

...
Advocate for Appellant : R R Mantri.
Advocate for Respondent 1 : Shri Afzal Hussain M. Vakil h/f Shri
R.R.Shaikh.
Advocate for Respondent 2 : Shri S G Chapalgaonkar.
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CORAM: V.K. JADHAV, J.

DATE :- 03rd April, 2017

Oral Judgment :

1 Being aggrieved by the judgment and award passed by the
Member of the Motor Accident Claims Tribunal, Nanded dated 06.10.2003
in MACP No.424/2000, the original Respondent No.1/ owner has

preferred this appeal.

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

(a) On 19.04.2000, the claimant was travelling in a Tipper Truck bearing registration No.MH-26-B-3780. At about 8:30 pm, when the said Tipper was proceeding to Limbota Camp, on account of rash and negligent driving of the driver of the said Tipper, the claimant and other persons travelling in the said tipper sustained the injuries. The claimant had incurred huge expenses for medical treatment and also suffered amputation of his left leg below knee. Thus, the injuries sustained by the claimant resulted into permanent disability. The claimant has approached the Tribunal by filing MACP No.424/2000 for grant of compensation under the various heads.

(b) The Appellant/ owner has filed his Written Statement. It has been contended that the claimant was working as a labourer on the tipper on daily wages of Rs.60/- per day. He was engaged for loading and unloading the sand on the date of the accident. The said vehicle was insured with the Respondent No.2 and as such, the Respondent No.2/ Insurer is liable to satisfy the award under the insurance policy, if passed against the Appellant/ owner.

(c) The Respondent No.2/ Insurer resisted the claim petition mainly on the ground that the claimant was travelling in the tipper as a

fare paying passenger and as such, there has been breach of the specified condition of the insurance policy. Thus, the Respondent No.2/ Insurer is not liable to pay any compensation.

(d) On the basis of the evidence adduced by the parties, the learned Member of the Tribunal has directed the Appellant/ owner to pay the compensation of Rs.2,67,000/- with interest at the rate of 9% per annum from the date of the claim petition till realization of the entire amount and dismissed the claim petition as against the Respondent No.2/ Insurer. Thus, this appeal by the Appellant/ original owner.

3 The learned counsel for the Appellant/ owner submits that the Appellant/ owner has specifically pleaded in his Written Statement before the Tribunal that the claimant was the labourer employed by him for loading and unloading the sand in the tipper. The learned counsel submits that the Respondent No.2/ Insurer has taken the stand that the claimant was travelling in the tipper as a passenger and thus, it is for the Insurer to discharge the said burden. The Respondent No.2/ Insurer has not examined any witness.

4 The learned counsel for the Appellant/ owner submits that it appears from the impugned judgment and award that the Tribunal was influenced by the award passed in MACP No.576/2000 arising out of the

same accident wherein, the Respondent/ Insurer came to be exonerated and thus, the Tribunal held that the claimant is entitled for compensation from the Appellant/ owner alone. The learned counsel submits that in view of the provisions of Sections 40 to 43 of the Indian Evidence Act, the previous judgment can be relied upon as provided under the said provisions. The learned Member of the Tribunal has thus, erroneously considered the judgment and award passed in MACP No.576/2000 and accordingly, exonerated the Respondent/ Insurer from the liability to pay the compensation.

5 The learned counsel for the Respondent/ Insurer submits that the claimant has not pleaded in the claim petition that he was travelling in the tipper as a labourer employed by the owner for loading and unloading the sand. On the other hand, in column No.5 of the claim petition, the claimant has furnished the information about his employer as "NIL". The learned counsel submits that the Appellant/ owner has raised the plea about employment and engaging the claimant on the tipper as a labourer for loading and unloading the sand. The claimant has adduced evidence without any pleading to the effect that he was travelling in the said tipper as a labourer employed by the owner. The learned counsel submits that evidence without pleading is liable to be ignored. The learned counsel submits that the First Information Report Exhibit-27 and the statement of

the claimant recorded by the Police during the course of the investigation, unmistakably point out that the claimant was travelling in the said tipper as a fare paying passenger.

6 The learned counsel for the Respondent/ Insurer further submits that insofar as the provisions of Sections 40 to 43 of the Indian Evidence Act, 1872 are concerned, as is held in the judgment in *K.G.Premshanker vs. Inspector of Police* reported in **(2002) 8 SCC 87**, the order or decree passed in a civil proceeding, if relevant, as provided under Sections 40 and 42 or other provisions of the Evidence Act, in each case, the Court has to decide as to what extent it is binding or conclusive with regard to the matter decided there. The learned counsel submits that MACP No.576/2000 arises out of the one and same accident and after appreciating the evidence and relying upon the same documentary evidence, the Tribunal in the said claim petition exonerated the Respondent/ Insurer. The learned Member of the Tribunal has, therefore, rightly placed reliance on the said judgment. However, the Tribunal has not exonerated the Respondent/ Insurer on that ground alone, but also considered the other evidence. There is no merit in the appeal.

7 I have also heard the learned counsel for the claimant.

8 On careful perusal of the pleadings, evidence and the judgment and award passed by the Tribunal, it appears that the claimant has not pleaded in his claim petition that he was travelling in the said tipper as a labourer employed by the owner for loading and unloading the sand. The complaint Exhibit-27 came to be lodged in the concerned Police Station on the day of accident itself by one Namdeo Kale. He was also travelling in the said tipper as a passenger along with other persons. It has been specifically stated in the complaint that on 19.04.2000, he along with his wife and other labourers had been to village Loha from Limboti Camp for attending weekly bazaar at afternoon and after purchasing grocery, started returning to Limboti Camp and on way, boarded the said tipper with the consent of the driver. It has been specifically stated in the complaint that on seeing Namdeo Kale, his wife and other persons, the driver of the said tipper stopped his vehicle and accordingly, all of them sat on the sand loaded in the said tipper.

9 It further appears that during the course of investigation, the statement of the claimant came to be recorded by the Investigating Officer. The certified copy of the Police Statement placed by the claimant himself and thus, the same can be read in the evidence. The claimant has also given similar statement as is given by the Complainant Namdeo Kale. The claimant has come before the Tribunal with the evidence that he was

working as a labourer involved in the accident and he was getting Rs.200/- per month including Bhatta. The claimant has not only adduced the evidence without any pleading, but made contradictory statements in his oral evidence before the Tribunal. He was subjected to cross-examination at length. Though he was under the employment of the Appellant/ owner as deposed by him, he could not state the names of other labourers. According to him, after loading the sand in the said tipper, he was travelling in the said tipper towards Limboti Camp. However, in his police statement dated 19.04.2000, he has stated that on that day along with some other labourers, he had been to village Loha from Limboti Camp for weekly bazaar and started returning to Limboti Camp from the said bazaar. On the way, on seeing them, the driver of the said tipper stopped the vehicle and accordingly, he along with other persons accompanying him, boarded the said tipper. It is, thus, clear that the claimant has made the additions with some purpose and that too in the backdrop that the owner has filed his Written Statement before the Tribunal to the effect that the claimant was employed by him for loading and unloading the sand. It appears that the Appellant/ owner has raised that plea for the reason that liability to pay the compensation would ultimately shift on the Respondent/ Insurer under the insurance policy. Thus, evidence adduced by the claimant is liable to be ignored. Even if the evidence of the claimant is considered, the same is self contradictory and

as such, the Tribunal has rightly held that the claimant was travelling in the said tipper as a fare paying passenger. It is true that the burden is on the Respondent/ Insurer to prove its defence, however, the said burden can be discharged by adducing the evidence or by relying on the evidence adduced by the other side or relying on the documents placed before the Tribunal by other side. In the instant case, the Respondent/ Insurer has discharged the said burden by relying upon the aforesaid evidence and the Tribunal has, therefore, rightly exonerated the Respondent/ Insurer from the liability to pay the compensation.

10 So far as relying on the previous judgment for the decision of the second suit or trial in terms of the provisions of Sections 40 to 43 of the Indian Evidence Act is concerned, as held in the K.G.Premshanker (*supra*), it is for the Court to decide as to what extent the previous judgment is binding or conclusive with regard to the matter decided there. The learned Member of the Tribunal has made reference to the judgment and award passed in MACP No.576/2000 and observed that the Respondent/ Insurer came to be exonerated in the said claim petition which arises out of the one and same accident. The learned Member of the Tribunal, on the basis of the evidence adduced in the claim petition, held that the Respondent/ Insurer is not liable to pay the compensation jointly with the Appellant/ owner.

11 The learned counsel for the Appellant/ owner has not made any submission with regard to the quantum of the compensation.

12 In view of the above discussion, I do not find any merit in the Appeal. The Appeal is liable to be dismissed.

13 Hence, the following order:-

- (a) The First Appeal is hereby dismissed. In the circumstance, there shall be no order as to costs.
- (b) The First Appeal is, accordingly, disposed of.
- (c) Needless to state, if any amount is deposited in this Court, the Claimant is permitted to withdraw the same.

(V.K. JADHAV, J.)