IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

FIRST APPEAL NO. 329 OF 2007
WITH
CA/3454/2009 IN FA/329/2007

Rajendra s/o Rupchand Malpani,
age 47 yrs, Occ. Business,
R/o Shriniketan Colony,
Near S.T. Depot, Latur. ..Appellant..

VERSUS

1. National Insurance Co. Ltd.,
Shivaji Chowk, Latur.

2. Oriental Insurance Co. Ltd.,
Division Office, 442 West
Mangalwar Peth, Solapur.

3. Sharnnya Parmeshwar Swami,
age 32 yrs, Occ. Private Service,
R/o Kothali, Tq. Omerga, Dist.
Osmanabad.

4. Shamrao s/o Baburao Dikale,
age 55 yrs, Occ. Agri and Business,
R/o Tandulwadi, Tq. Kallam
Dist. Osmanabad. ..Respondents...
orig petitioners.

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Advocate for Appellants : Smt A B Dube
Advocate for Respondents : Mr Rupesh Bora h/f P P Bafna for respondent no.1, Mr Sapkal V.D. For R/4
None present for respondent nos.2,3

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CORAM : V.K. JADHAV, J
Dated: July 18, 2017

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ORAL JUDGMENT :

1. Being aggrieved by the judgment and award passed by the learned Chairman of the Motor Accident Claims Tribunal, Osmanabad dated 27th December, 2006 in MACP No.130 of 1996, original Respondent No.1/owner of the tractor has preferred this appeal.

2. Brief facts giving rise to the first appeal are as follows:

a) Respondent No.1/original Claimant claims to be the owner of Taxi Car No.MH-25/9030. On 4th June, 1995, he was driving the said car on Osmanabad to Kallam road in slow speed from correct left side of the road. At the relevant time, one tractor bearing registration No.MHZ-8754 coming from the opposite direction, gave dash to the said car. In consequence of which, the occupants of the car as well as Respondent No.1/Claimant sustained the injuries and also the said car was totally damaged in the accident. The said car is insured with the Oriental Insurance Co. Ltd. Respondent/original Claimant has approached to the

Tribunal by filing MACP No.130 of 1996 for grant of compensation for the damage caused to the car. It has been contended in the claim petition that Respondent/ original Claimant had purchased the said car in the year 1994 for Rs.3,00,000/- and it was comprehensively insured with the present Appellant. Respondent No.1/ /original Claimant has also sustained loss of earning because of total damage to the car. The loss of income is about Rs.1,00,000/-. Thus, Respondent/original Claimant is entitled to the damage of Rs.4,00,000/- including the price of the car. According to the Respondent /original Claimant all the Respondents including the present Appellant are liable to pay the compensation jointly and severally.

b) Original Respondent No.1/owner of the tractor failed to appear and contest the claim petition. Respondent No.2/driver of the tractor also failed to contest the claim petition.

c) Original Respondent No.3/Insurer of the tractor has strongly resisted the claim petition by filing written statement. It has been contended that the driver of the car is solely responsible for the accident and the driver of the tractor is not responsible for the accident. It has also been contended that the tractor attached to the trolley was used for commercial purpose and as such, there has been breach of the specified conditions of the policy.

d) The Oriental Insurance Company Ltd has also strongly resisted the claim petition by filing written statement. It has been contented that the driver of the car was not having valid and effective driving licence to drive the car and as such, there has been breach of policy conditions. It has been contended that the accident occurred because of the fault of the car driver and as such, the Claimant is not entitled to claim the damages.

e) Original Claimant has adduced the evidence in support of his contentions. The Respondents including the present Appellant have not adduced any evidence. The learned Chairman of the Motor Accident Claims Tribunal, Osmanabad vide its impugned judgment and award dated 27th December, 2006 in MACP No.130 of 1996 partly allowed the claim petition and thereby directed the original Respondent Nos.1 to 3 to pay half of the amount of damages whereas the Oriental Insurance Co Ltd., is directed to pay remaining half of the amount of damages. Respondent No.3/Insurer of the tractor further held to be entitled to recover from original Respondent No.1 the amount required to be paid to the Claimant/Petitioner. Hence, this appeal.

3. The learned counsel for the appellant submits that, the Tribunal has erroneously recorded the finding to issue no.2 and held that there is breach of the policy conditions in respect of the tractor by its owner. Learned counsel submits that, the respondent-insurer has raised a specific plea that vehicle tractor involved in the accident was being used for the commercial purpose at the relevant time and as such, there has been breach

of the specified conditions of the policy, however, respondent National Insurance Company Ltd., has not adduced any evidence to discharge the said burden.

4. This Court in FA No.476/2004 with FA 700/2004 arises out of one and the same accident, held that respondent National Insurance Company-insurer has failed to prove the said defence by adducing cogent and sufficient evidence and accordingly saddled the liability on the respondent-insurer alongwith the owner of the tractor jointly and severally to pay compensation by setting aside the order passed by the Tribunal to the extent of directing the National Insurance Company Ltd., to pay the compensation and recover the same from the owner of the tractor.

5. Learned counsel for respondent-insurer submits that the appellant-owner has specifically pleaded in his written statement that on the date of accident, the tractor was being used for the purpose of carrying out material used for construction of bridge undertaken by

the appellant-tractor owner. Learned counsel submits that, the respondent-insurer can discharge the burden of proving its defence either on the basis of evidence adduced by the insurer or on the basis of the evidence adduced by other parties.

In the instant case, the appellant-owner since taken a specific plea in his written statement about the commercial use of the vehicle tractor, the respondent-insurer has sufficiently discharged its burden of proving the defence. The learned Member of the Tribunal has therefore, rightly directed the respondent-insurer to pay the amount under award passed against the appellant-owner and recover the same from him. There is no substance in the appeal and the appeal is thus liable to be dismissed.

6. I have also heard the learned counsel for respondent no.4.

7. On perusal of the judgment and order passed in FA No.476/2004 with FA 700/2004, I find that this

Court has allowed the said appeal with the specific observations that respondent National Insurance Company has failed to substantiate its defence. This Court has further held that respondent-National Insurance Company has failed to discharge the burden of proving its defence and as such, respondent-insurer is liable to pay the compensation jointly and severally alongwith owner of the tractor. Respondent-insurer has not preferred any appeal against the judgment and award passed by the tribunal. Though, the appellant-owner has taken a plea in the written statement that the tractor was being used for certain purpose on that day, same is not sufficient for the respondent-insurer to discharge the burden of proving its defence. This court in the aforesaid group of appeals has recorded the finding that the burden was on the insurance company to prove the said defence by adducing cogent and positive evidence therefor. In view of the same, the impugned judgment and award passed by the tribunal requires modification by setting aside the order directing the respondent-National insurance company to pay the compensation and then recover from the appellant-owner of the tractor. Consequently, finding recorded by the tribunal to issue no.2 is also set aside to the extent that the Tribunal held that there is breach of the policy conditions in respect of the tractor involved in the accident. In view of the evidence lead by the parties before the Tribunal and in the light of the judgment delivered in the aforesaid First Appeal by this Court, I hold that the appellant/owner of the tractor and respondent National Insurance Company are jointly and severally liable to pay the compensation as determined by the Tribunal. It further appears from the evidence that it has only stated in the written statement that tractor was proceeding towards the construction site and it has not been specifically pleaded in the written statement that said tractor involved in the accident was being used for commercial purpose.

8. So far as quantum of the compensation is concerned, learned counsel for the appellant-owner has not made any submission in this regard. Hence,

following order.

O R D E R

1. Appeal is hereby partly allowed. No costs.

2. The judgment and award passed by the Chairman, Motor Accident Claims Tribunal, Osmanabad dated 27.12.2006 in MACP No.130/1996 is hereby quashed and set aside to the extent that respondent no.3 insurer "shall be entitled to recover the compensation amount from respondent no.1-insured, the amount required to be paid by it to the claimant/petitioner."

3. Award be drawn up as per the above modifications.

4. If any amount is deposited by the appellant-owner of the Tractor before this Court, the same shall be refunded to the appellant-owner of the tractor.

5. Appeal is accordingly disposed of. Pending civil application, if any, also stand disposed of.

(V.K. JADHAV, J.)

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