IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

FIRST APPEAL NO. 3125 OF 2016
WITH
CIVIL APPLICATION NO. 11125 OF 2016

The New India Assurance Company Limited ...Appellant

versus

Pandurang Dadarao Doijad and others ...Respondents

WITH
FIRST APPEAL NO. 3135 OF 2016
WITH
CIVIL APPLICATION NO. 11131 OF 2016
AND
CIVIL APPLICATION NO. 11132 OF 2016

The New India Assurance Company Limited ...Appellant

versus

Kashinath Bapurao Badade and others ...Respondents

.....
Mr. A.B. Gatne, advocate for the appellant
Mr. P.C. Mayure, advocate for respondent No.1
Mr. A.G. Deshmukh, advocate for respondent No. 2
Mr. N.S. Kardale, advocate for respondent No.3
.....

CORAM : V. K. JADHAV, J.

Date of Reserving the Order : 17.03.2017

Date of pronouncing the Order: 30.03.2017

PER COURT :-

1. By consent of learned counsel for the respective parties,

heard finally at admission stage.

2. The appellant-insurer, being aggrieved by the judgment and award dated 07.11.2015, passed in M.A.C.P. No. 5 of 2013 and judgment and award dated 16.11.2015, passed in M.A.C.P. No. 18 of 2012, by the learned Member, M.A.C.T. Majalgaon, has preferred first appeal Nos. 3125 of 2016 and 3135 of 2016, respectively, to the extent of quantum. Since both these appeals arise out of same accident, they are being decided by this common order.

3. The claimants-respondent No.1 in both the appeals, had filed aforesaid two separate claim petitions for grant of compensation on account of permanent disablement sustained by them in the accident took place on 27.10.2011. It has been contended in the claim petitions that the accident took place due to rash and negligent driving of auto rickshaw, bearing registration No. MH-23-X-498, which was insured with the appellant herein at the relevant time and driven by respondent No.4 herein. The said accident took place as the auto rickshaw turned turtle near Phule Pimpalgaon on Georai-Majalgaon road. In the claim petition No. 18 of 2012, the learned Member of the Tribunal has directed the original respondent Nos. 2 to 4 to pay to the claimants an amount of Rs.6,28,200/- inclusive of NFL amount with interest @ 9% p.a. from the date of filing of petition

till realization whereas in claim petition No. 5 of 2013, the learned Member has directed the original respondent Nos. 2 to 4 therein to pay an amount of Rs.1,35,872/- inclusive of NFL amount with interest @ 9% p.a. from the date of petition till realization of amount. Hence, these appeals.

4. Learned counsel for the appellant-insurer in both the appeals submits that happening of the accident as alleged and involvement of the auto rickshaw, insured with the appellant, is not proved by the claimants, since no crime was registered against the driver of the auto rickshaw. After a period of five months, a private complaint filed on 6.3.2012, registered as Summary Case No. 568 of 2012, resulted in acquittal of the accused. Thus, the claimants have failed to prove the involvement of auto rickshaw as well as negligence on the part of the driver thereof. The auto rickshaw in question was insured as “private vehicle” i.e. for use of “private purpose” and not for hire and rewards i.e. commercial purpose. There is no permit to said auto rickshaw to carry passengers for hire and reward and thus, the appellant is not liable to indemnify the insured. The driver of the auto rickshaw, at the relevant time, was not holding valid and effective driving licence to drive the auto rickshaw (three wheeler) as he was holding the licence to drive the tractor and motorcycle with gear only. Considering the age of the claimants, the multiplier applied by the

Tribunal is on higher side. There was no contract of Insurance between the transferee of auto rickshaw and the appellant i.e. privity of contract, hence, the appellant is not liable to pay the compensation to the claimants. In absence of proof of income by the claimant, the income for the purpose of calculation of compensation payable ought to have been taken at Rs.3,000/- and not Rs.4,500/- by way of assumption and presumption. Learned counsel for the appellant therefore submits that the findings given by the Tribunal are not sustainable in law.

Learned counsel for the appellant, in order to substantiate his submissions, placed reliance on the judgments in the following cases:-

I) New India Assurance Company Ltd. vs. Roshanben Rehemansha Fakir and another, reported in (2008) 8 SCC 253,

ii) Mukund Dewangan vs. Oriental Insurance Company Ltd. and others, reported in (2016) 4 SCC 298

6. Learned counsel for respondent No.1-claimants submits that due to the said accident, the claimants have sustained permanent disablement to the extent of 100%. The said disablement affects on

their earning capacity. They have also incurred heavy expenditure for their medical treatment. The tribunal has awarded just and reasonable compensation and no interference is required. Learned counsel has placed reliance on the judgments in the following cases:-

i) Ravi vs. Badrinarayan and others, reported in 2011 (4) Mh.L.J. 514,

ii) Kulwant Singh and others, vs. Oriental Insurance Company ltd., reported in 2015 (4) Mh.L.J. 61,

iii) Judgment dated 11.8.2011 passed by this Court in first appeal No. 2057 of 2010.

iv) Shaikh Parvej Qamar s/o Kamruzama Azmi vs. M/s. Bajaj Auto Ltd. and others, reported in 2006 (6) ALL MR 292,

v) National Insurance Co. Ltd. vs. Anjana Shyam and others, reported in (2007) 7 SCC 445,

vi) Shaikh Farooq Mohammad Gaouse vs. Transport Manager, Thane Municipal Transport Undertaking, reported in 2013 (3) ALL MR 509.

7. Learned counsel for respondent No.2 submits that there was no negligence on the part of the driver. The offending vehicle was insured with the appellant and thus, the appellant is liable to pay the compensation amount as has been directed by the Tribunal.

8. Learned counsel for respondent No.3 adopted the arguments advanced by learned counsel for other respondents. Learned counsel in order to substantiate his submissions, placed reliance on the judgment ***dated 11.09.2002 rendered in first appeal No. 1784 of 1985 by Gujarat High Court in the case of Bhailalbhai Garbabhai Vasava vs. Munikhan Ismailkhan Sayed.*** Learned counsel submits that there is no substance in the appeal and the same is liable to be dismissed.

9. I have gone through the pleadings, evidence led by the parties and the judgments and award passed by the Tribunal.

10. The claimant Pandurang has filed his affidavit of evidence at Exh.28 in M.A.C.P. No. 5 of 2013. It has been contended that after the accident, he was immediately shifted to Rural hospital, Majalgaon and from there to Aurangabad for further treatment. He was admitted in Apex Hospital, Aurangabad and was treated and operated there. Even after discharge, he had to attend said apex hospital as outdoor patient for follow up treatment. It has also been contended that after the accident, son of another injured (claimant in first appeal No. 3135 of 2016) has informed to the police station Majalgaon city about the accident and on 9.11.2011 the concerned

police station has registered the crime No. 4 of 2011 and also drawn spot panchnama. After discharge from the Apex Hospital, claimant Pandurang had inquired about the aforesaid crime, however, it was revealed that concerned police station has not taken any action against the driver of the auto rickshaw involved in the accident. The claimant Pandurang therefore, constrained to file private complaint before the J.M.F.C. Majalgaon bearing S.C.C. No. 568 of 2012. The certified copy of the said complaint filed before the Magistrate is placed on record and the same is marked at Exh.39. On careful perusal of the said complaint, it appears that all details about the accident and the manner of the accident have been mentioned in the complaint as well as explanation about filing of the complaint belatedly before the Court is also tendered. The certified copy of spot panchnama is also produced on record and the same is marked at Exh.31. On careful perusal of the same, it appears that the concerned police station of Majalgaon city has registered crime No. 4 of 2011, and also drawn spot panchnama. Spot of the accident was shown by respondent driver of auto rickshaw.

11. It also appears from the contents of spot panchnama that Auto rickshaw was found on the spot itself in damaged condition. After noticing the damage caused to the auto rickshaw, the panchas have approximately estimated the cost of damage to the tune of

Rs.40,000/- to Rs.45,000/- to the auto rickshaw. Furthermore, in referral card issued by the Rural Hospital, Majalgaon at Exh.32, reference has been given to the road traffic accident of 27.10.2011 (date of accident) at about 9.40 a.m.. The Referral card Exh.32 has been issued by Rural Hospital, Majalgaon on the same day in respect of claimant Pandurang. Even in Form COMP “B” Exh.36, issued by the Police Inspector, police station Majalgaon, a reference has been given to the registration of crime No. 4 of 2011. However, it appears that the concerned police station has not taken any action against the driver of auto rickshaw nor submitted any summary before the Magistrate in the aforesaid crime.

12. In view of the above exhibited documents on record, it is clear that both the claimants met with an accident out of use of auto rickshaw bearing registration No. MH-23-X-498. Both the claimants have deposed about rash and negligent driving on the part of driver of auto rickshaw. They are injured witness and the Tribunal has therefore, rightly relied upon their evidence and recorded the findings to the effect that the accident had taken place on account of rash and negligent driving of auto rickshaw by its driver. The appellant insurer cannot take advantage of inaction on the part of investigating agency to proceed further against the driver of auto rickshaw. The claimants have proved that involvement of auto rickshaw in the accident as well

as rash and negligent driving on the part of its driver. The appreciation of evidence in criminal trial is altogether different and mere acquittal of driver of auto rickshaw in the private complaint is not helpful to the appellant insurer to substantiate its contention about non involvement of the vehicle in the accident.

13. Learned counsel for the appellant-insurer has vehemently submitted that the claimant Pandurang has contended in the private complaint before the Magistrate that on the date of accident, he was going to Majalgaon from his village alongwith milk container. Learned counsel submitted that the auto rickshaw was insured as “private vehicle” i.e. for use of “private purpose” and not for hire and rewards i.e. commercial purpose. There is no permit to said auto rickshaw to carry passengers for hire and reward and thus, the appellant is not liable to indemnify the insured.

14. The claimant Pandurang has stated in his affidavit of evidence Exh.28 that on 27.10.2011 i.e. date of accident at about 7.30 a.m. he alongwith another claimant Kashinath boarded the said auto rickshaw. The driver of said auto rickshaw was of their previous acquaintance. It has nowhere contended by the claimants that they have boarded the said auto rickshaw for carrying their milk container by paying fare to the driver of auto rickshaw. On perusal of the

certificate of insurance Exh.35, I find that the vehicle auto rickshaw involved in the accident was insured under private car package policy and occupants i.e. number of passengers (3 in numbers) excluding the driver are considered and accordingly accident premium risk is covered. This position is not disputed. Respondent Nos. 1 to 3 failed to file their written statement in the claim petition filed by claimant Pandurang. However, respondent No.1 has filed his written statement in the claim petition filed by injured claimant Kashinath. Respondent No.1 has admitted occurrence of accident, however, denied the negligence on the part of driver of the vehicle. It has been specifically contended in the written statement filed by respondent No.1 that claimants, being relatives, sat in the offending auto in good faith. Respondent No.1 has not adduced any evidence to substantiate his contention. Furthermore, in the light of defence raised by the appellant-insurer, no issue appears to have been framed by the Tribunal. Though the appellant insurer has strongly contested the claim petitions on the ground as mentioned above, has not raised any objection before the Tribunal for not framing the issue. Thus, only inference could be drawn that the appellant-insurer gave up the said defence before the Tribunal and concentrated only on the point of non involvement of the vehicle in the accident and further the defence about not holding valid and effective driving licence by the driver of auto rickshaw at the time of accident. The appellant-insurer has not adduced any evidence so far as the defence about breach of condition of policy with regard to limitation as to the use. Even otherwise also, on the basis of evidence as discussed above, I do not think that there is breach of condition of policy as regards the limitation as to the use. There is no evidence even to suggest that both the claimants were travelling in the auto rickshaw at the time of accident as fare paying passengers. Learned counsel for the appellant-insurer vehemently submitted that it is not possible for the insurer to come with direct evidence in this regard and the inference could be drawn on the basis of averments made in the private complaint before the Magistrate. I do not find any substance in the submissions made on behalf of appellant-insurer. Only on the basis of averments made in the complaint that claimant Pandurang was travelling in the auto rickshaw alongwith his milk, inference could not be drawn that the claimant were travelling in the auto rickshaw as fare paying passengers. It is for the appellant-insurer to substantiate and prove its defence. The appellant-insurer has failed to discharge the burden.

15. Learned counsel for the appellant has submitted that the driver of the auto rickshaw was not holding appropriate licence. The appellant-insurer has examined one witness Kiran Bansode, the Assistant Inspector of the Motor Vehicle at Exh.42 to establish the

fact that the driver of auto rickshaw was not holding valid and effective driving licence at the time of accident. The driving licence of the respondent driver is placed on record before the Tribunal and the same is marked at Exh.45 in claim petition filed by Pandurang. On careful perusal of the same, it appears that driving licence has been issued in favour of respondent driver Baliram to drive motor cycle with gear and light motor vehicle tractor. Witness Kiran Bansode has deposed that respondent driver Baliram was holding driving licence to drive motor cycle with gear and tractor only and on the basis of the said driving licence Exh.45 he was not permitted to drive auto rickshaw. However, he has admitted in his cross examination that three wheeler (auto rickshaw) non transport vehicle and tractor falls under light motor vehicle category and driving licence at Exh.45 pertains to non transport vehicle.

16. In the case of ***New India Assurance Company Ltd. vs. Roshanben Rahemansha Fakir and another (supra)*** relied upon by learned counsel for the appellant, in para 13 and 14 of the judgment, the Supreme court has made the following observations:-

> *"13. From the discussions made herein before, it is evident that the driver of the vehicle was not holding an effective licence. Possession of an effective licence is necessary in terms of Section 10 of the Motor Vehicles Act.*

14. **In National Insurance Co. Ltd. v. Swaran Singh and Ors. [(2004) 3 SCC 297]***, this Court opined :*

"89. Section 3 of the Act casts an obligation on a driver to hold an effective driving licence for the type of vehicle which he intends to drive. Section 10 of the Act enables the Central Government to prescribe forms of driving licences for various categories of vehicles mentioned in sub-section (2) of the said section. The various types of vehicles described for which a driver may obtain a licence for one or more of them are: (a) motorcycle without gear, (b) motorcycle with gear, (c) invalid carriage, (d) light motor vehicle, (e) transport vehicle, (f) road roller, and (g) motor vehicle of other specified description. The definition clause in Section 2 of the Act defines various categories of vehicles which are covered in broad types mentioned in sub-section (2) of Section 10. They are "goods carriage", "heavy goods vehicle", "heavy passenger motor vehicle", "invalid carriage", "light motor vehicle", "maxi-cab", "medium goods vehicle", "medium passenger motor vehicle", "motor-cab", "motorcycle", "omnibus", "private service vehicle", "semi-trailer", "tourist vehicle", "tractor", "trailer" and "transport vehicle". In claims for compensation for accidents, various kinds of breaches with regard to the conditions of driving licences arise for consideration before the Tribunal as a person possessing a driving licence for "motorcycle without gear", [sic may be driving a vehicle] for which he has no licence. Cases may also arise where a holder of driving licence for "light motor vehicle" is found to be driving a "maxi-cab", "motor-cab" or "omnibus" for which he has no licence. In each case, on evidence led before the Tribunal, a decision has to be taken whether the fact of the driver possessing licence for one type of vehicle but found driving another type of vehicle, was the main or contributory cause of accident. If on facts, it is found that the accident was caused solely because of some other unforeseen or intervening causes like

> *mechanical failures and similar other causes having no nexus with the driver not possessing requisite type of licence, the insurer will not be allowed to avoid its liability merely for technical breach of conditions concerning driving licence.*
>
> *The said decision has been considered by this Court in Kusum Rai"*

17. In the above cited case, the Supreme court observed that driver Salim was not granted valid driving licence for driving transport vehicle. In view of the above facts, the Supreme court held that the driver of the vehicle involved in the accident was not holding effective licence and possession of effective licence is necessary in terms of Section 10 of the Motor Vehicles Act. Admittedly, in the cited case, the accident caused by the goods transport vehicle (auto rickshaw delivery van) and the driver of the vehicle was not possessing valid licence to drive the vehicle. In the instant case, however, respondent driver was holding valid and effective driving licence to drive the non transport vehicle, as required in terms of Section 10 of M.V. Act.

18. In the case of ***Mukund Dewangan vs. Oriental Insurance Company Ltd. and others (supra)*** the Supreme Court has considered the submissions about "class of vehicles" and "type of vehicles" and whether it is necessary to obtain an endorsement to drive transport vehicle of light motor vehicle category when a person is competent to drive the same class of vehicle i.e. a light motor

vehicle, as per amendment Act 54 of 1994 and Forms 4 and 6 as amended in 2001. The Supreme Court has also dealt with the submission that the provisions of “light motor vehicle” in Section 10(2) (d) shall remain intact even after the amendment. After noticing the conflicting decision on the point whether holder of light motor vehicle is required to obtain specific endorsement on licence to drive the transport vehicle or light motor vehicle as provided under Section 2(41) of the Act with respect of the pre-amended provisions and also after amendment has been effected in the year 2001, recommended to constitute the Larger Bench to resolve the conflicts on the following points:-

i) *What is the meaning to be given to the definition of “light motor vehicle” as defined in section 2(21) of the M.V. Act?*

ii) *Whether transport vehicles are excluded from it?*

Iii) *Whether holder of the licence to drive class of “light motor vehicle” as provided in Section 10(2) (d) would be competent to drive a transport vehicle or omnibus, the “gross vehicle weight” of which does not exceed 7500 kg or a motor car or tractor or road-roller, the “unladen weight” of which does not exceed 7500 kg.*

iv) *What is effect of the amendment made by virtue of Act 54 of 1994 w.e.f. 14.11.1994 while substituting clauses (e) to (h) of Section 10(2) and insertion of expression “transport vehicle” under section 10 (2) (e) is related to the said substituted classes* *only or it also excluded transport vehicle of light motor vehicle class from the purview of Sections 10(2) (d) and 2(41) of the Act.*

v) What is effect of amendment of Form 4 as to operation of the provisions contained in Section 10 as amended in the year 1994 and whether procedure to obtain driving licence for transport vehicle of class of "light motor vehicle" has been changed?

19. As per the amendment in Forms 4 and 6, in terms of clause G of Form No.4, description of Motor Vehicles Act for which licence is sought, is required to be mentioned. Similarly, in amended form No.6, the 'motor vehicle' specified description is required to be mentioned. However, the licence is issued to drive the motor vehicle other than the transport vehicle and/or the licence to drive the transport vehicle alongwith its validity period, is specified in the form of driving licence. It appears that considering the said amendment in form Nos. 4 and 6, licensing authority, is issuing the driving licence by mentioning the specified description of motor vehicle. In terms of point (v) framed by the Supreme Court in the aforesaid case, the effect of amendment of Form 4 as to the operation of provisions contained in Section 10, as amended in the year 1994, would be under consideration of the Larger Bench.

20. The learned Member of the Tribunal has considered the age of the claimant Pandurang as 44 years on the basis of the discharge

card and the affidavit Exh.28. Learned Member of the Tribunal has not considered the age of claimant Pandurang as shown in the disability certificate Exh.40 as 50 years. However, the learned Member of the Tribunal on the identical set of documents and difference of age of the claimant Kashinath in the discharge card, affidavit and referral letter, considered the age of the claimant Kashinath as 55 years as shown in the referral letter. Thus, the age of Pandurang is required to be considered as 50 years as mentioned in the disablement certificate. In view of this, the relevant multiplier would be 13 instead of 14 in the claim petition filed by claimant Pandurang. The impugned judgment and award thus requires modification to the extent of quantum in the claim petition preferred by claimant Pandurang. In view of above, I deem it appropriate to direct the appellant insurer to satisfy the award and then recover the amount from respondent owner. Hence, I proceed to pass the following order:-

O R D E R

I. First appeal No. 3125 of 2016 and 3135 of 2016 are hereby partly allowed. No costs.

II. The judgment and award dated 07.11.2015, passed by learned member, M.A.C.T. Ambajogai in M.A.C.P. No. 5 of 2013 is modified in the following manner:-

> “The respondent No.2 do pay an amount of Rs.1,26,166/- (Rupees One lac twenty six thousand one hundred sixty six only) inclusive of 'no fault liability' together with interest @ 9% p.a. from the date of petition till realization thereof, to the claimant. However, respondent No.4-insurer shall pay the aforesaid entire amount of Rs.1,26,166/- to claimant and recover the same from respondent No.2, for which no separate proceeding is required to be initiated”

III. The judgment and award dated 16.11.2015, passed by the learned Member in M.A.C.P. No. 18 of 2012 is also modified in the following manner:-

> “The respondent No.2 do pay an amount of Rs.6,28,200/- (Rupees Six lacs twenty eight thousand two hundred only) inclusive of 'no fault liability' together with interest @ 9% p.a. from the date of petition till realization thereof, to the claimant. However, respondent No.4-insurer shall pay the aforesaid entire amount of Rs.6,28,200/- to claimant and recover the same from respondent No.2, for which no separate proceeding is required to be initiated”

IV. Rest of the judgment and awards stand confirmed.

V. The awards be drawn up separately in both the claim petitions, as per the above modification.

VI. If the amount is deposited in this Court, the claimants are entitled to withdraw the same as per the modified award and amount in excess, if any deposited by the appellant-insurer, the same shall be refunded to it.

21. In view of disposal of first appeals, pending civil applications are also disposed of.

(V. K. JADHAV, J.)

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