IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

FIRST APPEAL NO. 1474 OF 2015

THE NEW INDIA ASSURANCE CO. LTD.
VERSUS
NILOFAR JABEEN GAFFAR KHAN AND OTHERS
...
Advocate for Appellant : Mr. Deshpande Dhananjay P.
Advocate for Respondents 1 to 5 : Mr. P.C. Mayure
.....

CORAM : V. K. JADHAV, J.
DATED : 16th JANUARY, 2017

PER COURT:-

1. Being aggrieved by the judgment and award dated 24.2.2015, passed by the Member, M.A.C.T. Aurangabad in M.A.C.P. No. 314 of 2012, the original respondent No.3 insurer has preferred this appeal.

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

a) On 9.4.2012 at 7.00 p.m. deceased Raziya Gaffar Khan was proceeding on foot and when she reached in front of Kandi Hospital, at that time, one auto rickshaw bearing registration No.MH-20-AA-4601 came in high speed. Respondent No.2 was driving the said auto rickshaw in rash and negligent manner and it gave dash to deceased Raziya. In consequence of which, deceased Raziya fell down on the ground and sustained serious injuries on her head and other parts on her person. She was immediately shifted to the hospital, where she died on 14.4.2012 while undergoing the treatment. The claimants, who are legal representatives of deceased Raziya, preferred M.A.C.P. No. 314 of 2012 before the Member, M.A.C.T. Aurangabad for grant of compensation under various heads. Respondent No.1 owner did not appear before the Tribunal and therefore, hearing of the claim petition ordered to be proceeded exparte against him.

b) Respondent No.2 driver of the said auto rickshaw has resisted the claim petition by filing written statement Exh.19. According to him, he has valid and effective driving licence and he was driving the auto rickshaw in moderate speed. He has denied that the accident occurred due to rash and negligent driving. He has contended that the auto rickshaw was insured with respondent No.3 at the relevant time and therefore, the compensation if any be recovered from the respondent No.3 insurer.

c) Respondent No.3 insurer has also strongly resisted the claim petition by filing written statement Exh.15. It has contended that driver of auto rickshaw had carried the passengers in the said auto rickshaw though the said vehicle is meant for commercial purpose. Thus, there is breach of condition of policy and hence, respondent No.3 insurer is not liable to pay the compensation.

d) The claimants have adduced oral as well as documentary evidence, however, the respondents have not examined any witness. Learned Member of the Tribunal by its impugned judgment and award partly allowed the claim petition and thereby directed the respondent Nos. 1 to 3 to pay compensation of Rs.5,69,116/-, including no fault liability alongwith interest at the rate of 9% p.a. from the date of filing of petition till realization, to the claimants. Hence, this appeal.

3. Learned counsel for the appellant insurer submits that there is no evidence on record ascertaining thereby the involvement of the vehicle in the accident. Though, accident had taken place on 9.4.2012 the complaint came to be lodged in the concerned police station four days after the accident, against the driver of unknown auto rickshaw. Subsequently, charge sheet came to be filed against respondent No.2, however, the claimants have not examined any eye witness to prove the accident. Learned counsel submits that respondent No.2 driver has also denied the involvement of vehicle in the accident.

Learned counsel for the appellant placed his reliance on the orders of this court passed in first appeal No.2973 of 2013 (New

India Assurance Company Ltd. vs. Laxman Dadarao Karpe and others decided on 28.7.2015) and in first appeal No. 2018 of 2010 (Bajaj Allianz General Insurance Co. Ltd. vs. Wahibdi, decided on 24.6.2014.)

4. Learned counsel for respondents claimants submits that deceased Raziya died on 14.4.2012 in the hospital and till that time she was undergoing the treatment. On 14.4.2012, though the complaint came to be lodged in the police station against the driver of the unknown vehicle, during investigation, it was revealed that respondent No.2 was driving his auto rickshaw at the time of accident and he had driven the said vehicle in rash and negligent manner and caused the accident. Learned counsel submits that respondent No.2 driver has not denied the accident and on the basis of oral evidence and also on the basis of the documents, such as police investigation papers, the claimants have proved the factum of accident. Learned counsel submits that by application of maxim *res ipsa loquitur,* the burden shifts on respondent No.2 to prove that he had not driven the auto rickshaw in rash and negligent manner and caused the accident. It is also pertinent to note that respondent No.1 owner has failed to contest the claim and respondent No.2 driver has not examined himself to substantiate his contentions. Learned Member of the Tribunal has therefore, rightly held all respondents

jointly and severally liable to pay the compensation. No interference is required.

5. On careful perusal of the pleadings, evidence and the police papers, it appears that on 9.4.2012 at 7.00 p.m. deceased was proceeding on foot and when she reached in front of Kandi Hospital, at that time auto rickshaw gave dash to her. She had sustained injuries on her head and other parts on her person. She was immediately shifted to hospital where she remained under treatment till 14.4.2012 and on that day succumbed to the injuries.

6. Respondent No.1 owner has not bothered to appear before the Tribunal and contest the claim petition on merits. On perusal of written statement, filed by respondent No.2 driver, it appears that there is evasive denial and there is no specific denial about happening of the accident. On the other hand, respondent No.2 when cross examined the claimant No.1, suggested that in the said accident, there was no mistake of auto rickshaw driver (himself). It thus appears that respondent No.2 driver has not denied the accident and according to him, there was no mistake on his part. It has come in the evidence that deceased Raziya met with an accident while crossing the road. She was pedestrian and once the fact of accident is established, by application of maxim *res ipsa loquitur, the* burden

shifts on the owner and driver to prove that the driver of the vehicle involved in the accident had not driven the vehicle in rash and negligent manner and caused accident as alleged. Respondent No.1 has not contested the claim nor respondent No.2 driver has examined himself to prove that there was no mistake on his part.

7. In view of above, the claimants succeeded in proving that the deceased Raziya died in the accident arising out of the driving of auto rickshaw bearing registration No. MH-20-AH-4601 owned by respondent No.1 and on account of driving of the auto rickshaw by respondent No.2 in rash and negligent manner.

8. In so far as the reliance placed by learned counsel for the appellant is concerned, the ratio laid down in first appeal No. 2973 of 2013 is on different point, as such in the facts of said case, this Court has exonerated the insurer. In first appeal No. 2018 of 2010 the facts of the said case are altogether different and thus Court has elaborately discussed the points of initial burden to prove breach of conditions of policy.

9. So far as the assessment of compensation is concerned, learned counsel for the appellant insurer has accepted that the Tribunal has rightly considered the income of deceased and awarded

just and reasonable compensation. In view of above discussion, no interference is required in the impugned judgment and award. There is no merits in the appeal. Hence, I proceed to pass the following order:-

O R D E R

I. Appeal is hereby dismissed with costs.

II. Appeal is accordingly disposed of.

III. If the appellant insurer has deposited the amount before this Court, the respondents claimants are permitted to withdraw the same.

(V. K. JADHAV, J.)

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