IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

FIRST APPEAL NO. 2203 OF 2015

NEW INDIA ASSURANCE COMPANY LTD.
VERSUS
VAHID YUSUF PATHAN AND OTHERS
...
Adv. for Appellant : Mr. Mohit R. Deshmukh h/f Mr. S.G. Chapalgaonkar
Advocate for Respondent No.1 : Mr. V.S. Bedre
Advocate for Respondent No.3 : Mr. Amol S. Gandhi
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CORAM : V. K. JADHAV, J.
DATED : 6th JUNE, 2017

PER COURT:-

1. Heard finally with consent of the parties.

2. Being aggrieved by the judgment and award passed by the Member, M.A.C.T. Shrirampur dated 15.12.2014 in M.A.C.P. No. 23 of 2010, original respondent No.2 insurer has preferred this appeal to the extent that though the Tribunal in para 22 of the judgment has observed that the insurer consequently would not be liable to pay the compensation and the petitioner cannot get compensation amount from the insurer but they can get the compensation from the owner of the vehicle, fastened the liability on the appellant-insurer to pay the compensation as worked out by the Tribunal, jointly and severally alongwith the owner.

3. Learned counsel for appellant submits that the vehicle auto rickshaw bearing registration No. MH-17-V-4578 is a private vehicle and it does have permit to carry the passengers on hire. The same is evident from the policy Exh.45, certificate of insurance Exh.46 and registration particulars Exh.47. The appellant insurer has also examined witness Ashok Kamble, who happened to be employee of R.T.O. Office Shrirampur. He has deposed before the Tribunal on the basis of original record brought by him that the aforesaid vehicle, involved in the accident was not having permit to carry the passengers on hire and said vehicle falls under the category of private vehicle. Learned counsel for the appellant insurer submits that the appellant insurer has produced on record the police statement of driver (Ganesh Sonwane) of the said auto rickshaw involved in the accident at Exh.43, wherein he has stated that on the day of accident, cousin of respondent-claimant No.1 viz. Javed Yusuf Pathan R/o. Rahata had approached him and booked his auto rickshaw on hire for attending the marriage scheduled to be held at Pandharpur-Waluj. Even the respondent-original claimant has also admitted in his cross examination that he is knowing said driver Sonwane from the date of accident and there was no previous acquittance as such. He has further admitted that on the date of accident, he alongwith his cousin Javed boarded the Auto Rickshaw for going to attend the marriage at Pandharpur-Waluj. He has further

shown his ignorance that the said auto rickshaw whether hired by his relative or not.

4. Learned counsel for the appellant submits that the appellant insurer has discharged the burden of proving its defence and as such, the Tribunal though observed in the judgment that the compensation cannot be recovered from the appellant-insurer, erroneously fastened the liability on the appellant-insurer jointly and severally alongwith the owner of the said vehicle-auto rickshaw. Learned counsel in the alternate submits that in view of the authoritative pronouncement of Supreme Court in the case of ***National Insurance Company Ltd. vs. Challa Upendra Rao and others, reported in AIR 2004 SC 4882,*** it is almost settled view that in such a case, the compensation can be directed to be paid by the appellant-insurer and the same can be recovered thereafter from the owner of the vehicle involved in the accident.

5. Learned counsel for the respondent owner submits that the appellant insurer has failed to discharge the burden and as such, there is no evidence about breach of specified condition of policy. There is no evidence at all on record to show that the claimant alongwith his relatives were travelling in the auto rickshaw involved in the accident as passengers by paying fare charges. Considering the

same, the Tribunal has rightly fastened the liability on the appellant to pay the compensation jointly and severally to the claimant. Learned counsel submits that the police statement of the driver is not statement recorded on oath and as such the same cannot be read in evidence. Learned counsel has not made any submission so far as the quantum of compensation is concerned.

6. I have also heard learned counsel appearing for the respondent original claimant.

7. On careful perusal of the pleadings, evidence and the judgment and award passed by the Tribunal, it appears that in para 19 of the judgment, the Tribunal has observed that even though the vehicle is private vehicle, the passengers were carried out in the said vehicle on hire basis. The driver was not having permit to ply the said auto rickshaw on the road without valid permit. In para 22 of the judgment, the learned Member of the Tribunal has recorded the finding to the effect that in the case in hand, since there is no permit to carry the passengers in private vehicle, petitioner cannot get compensation from the insurer but they can get the compensation from the owner of the vehicle.

8. It is true that the burden is on the appellant insurer to prove the

defence if raised with regard to the breach of policy condition. The insurer can discharge the said burden by examining the witness or even by relying on the cross examination of the other witnesses and also on the basis of evidence adduced by the claimant or other respondents, as the case may be. In the instant case, the appellant insurer has not only examined the witness, an employee from R.T.O. Office and produced on record relevant documents to show that the vehicle auto rickshaw involved in the accident was not having valid permit to carry the passengers on hire basis but also produced on record the police statement of the driver of auto rickshaw, who has driven the said vehicle at the time of accident, which is marked at Exh.43, wherein he has stated that on the date of accident, cousin of respondent-claimant viz. Javed had approached him and booked his auto rickshaw on hire for attending the marriage.

9. In the case of ***Khatri and others vs. State of Bihar and others, reported in (1981) 2 SCC 493***, the Supreme Court held that bar under Sections 162 and 172 of Code of Criminal Procedure 1973, against the production or use in evidence of statement made before the police officer in the course of investigation or case diary prepared by the police officer, would not apply where the court calls for such statement or diary in civil proceeding. In view of the above ratio laid down by the Supreme Court, the statement of said driver

recorded by the police Exh.43 can be read in evidence. The respondent-claimant No.1 has also given certain admissions in his cross examination. Thus, in the light of above discussion, to my mind, the appellant insurer has sufficiently discharged the burden of proving its defence.

10. Learned counsel for the appellant has fairly concedes that in such case the insurer can be directed to satisfy the award and for the purpose of recovering the amount, the insurer may initiate the proceeding before the executing court. In the case of ***National Insurance Co. Ltd. vs. Challa Upendra Rao and others (supra)*** in para 12 and 13 of the judgment, the Supreme Court has made the following observations:-

> *"12. High Court was of the view that since there was no permit, the question of violation of any condition thereof does not arise. The view is clearly fallacious. A person without permit to ply a vehicle cannot be placed at a better pedestal vis-a-vis one who has a permit, but has violated any condition thereof. Plying of vehicle without a permit is an infraction. Therefore, in terms of Section 149(2) defence is available to the insurer on that aspect. The acceptability of the stand is a matter of adjudication. The question of policy being operative had no relevance for the issue regarding liability of insurer. High Court was, therefore, not justified in holding the insurer liable.*
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> *13. The residual question is what would be the appropriate direction. Considering the beneficial object of the Act, it would be*

proper for the insurer to satisfy the award, though in law it has no liability. In some cases the insurer has been given the option and liberty to recover the amount from the insured. For the purpose of recovering the amount paid from the owner, the insurer shall not be required to file a suit. It may initiate a proceeding before the concerned Executing Court as if the dispute between the insurer and the owner was the subject matter of determination before the Tribunal and the issue is decided against the owner and in favour of the insurer. Before release of the amount to the claimants, owner of the offending vehicle shall furnish security for the entire amount which the insurer will pay to the claimants. The offending vehicle shall be attached, as a part of the security. If necessity arises the Executing Court shall take assistance of the concerned Regional Transport Authority. The Executing Court shall pass appropriate orders in accordance with the law as to the manner in which the owner of the vehicle shall make payment to the insurer. In case there is any default it shall be open to the Executing Court to direct realization by disposal of the securities to be furnished or from any other property or properties of the owner of the vehicle i.e. the insured. In the instant case considering the quantum involved we leave it to the discretion of the insurer to decide whether it would take steps for recovery of the amount from the insured."

11. In view of above discussion and the ratio laid down by the Supreme Court in the aforesaid judgments, this first appeal can be disposed of by modifying the impugned judgment and award to the following effect. Hence, I proceed to pass the following order:-

O R D E R

I. The appeal is hereby partly allowed. No costs.

II. The judgment and award dated 15.12.2014 passed by the Member, M.A.C.T. Shrirampur in M.A.C.P. No. 23 of 2010 is modified in the following manner:-

"The original respondent No.1 shall pay compensation of Rs.2,46,905/- (Rupees two lacs forty six thousand nine hundred five) inclusive of 'no fault liability' amount to the petitioner alongwith interest @ 9% p.a. from the date of institution of petition till its full realization. However, respondent No.2 insurer shall pay the entire amount alongwith interest and recover the same from respondent No.1 owner, for which no independent proceeding is required to be initiated and the respondent No.2 insurer may initiate the proceedings before the executing court as if the dispute between the insurer and owner was the subject matter of determination by the Tribunal and issue is decided against the respondent-owner and in favour of insurer."

III. Rest of the judgment and award stands confirmed.

IV. Award be drawn up in terms of above modification.

V. Appeal is accordingly disposed of.

(V. K. JADHAV, J.)

rlj/