

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

FIRST APPEAL NO. 2796 OF 2010

Yogesh s/o. Uttam Kalvane,
Age: 25 years, Occu.: Driver,
R/o. Malivadgaon, Tq. Gangapur,
Dist. Aurangabad

**...APPELLANT
(Orig. Claimant)**

VERSUS

1. Raibhan S/o. Narayan Kokre,
Age: 32 years, Occu.: Driver,
R/o. Damori, Tq. Gangapur,
Dist. Aurangabad
Driver of Truck No. MH-20-AT-2402
2. Nanasaheb s/o. Baburao Jadhav
Age: Major, Occu.: Owner,
R/o. Malivadgaon, Tq. Gangapur,
Dist. Aurangabad
Owner of Truck No. MH-20-AT-2402
3. ICICI Lombard General Insurance Company Ltd.,
Through its Divisional Manager,
Division Officer near Baba Petrol Pump,
Opposite LIC Building, Adalat Road,
Aurangabad

...RESPONDENTS

...

Mr. Narayan A. Matkar, Advocate h/f. Mr. R.V. Gore,
Advocate for appellant.
Mr. Swapnil S. Patil, Adv. h/f. Mr. R.H. Dahat
Advocate for Respondent No.3

...

CORAM: P.R. BORA,J

DATE : 25/07/2017

ORAL JUDGMENT :

1. Heard learned Counsel appearing for the appellant and the learned Counsel appearing for respondent.

2. Aggrieved by the judgment and order passed by the Motor Accident Claims Tribunal, Aurangabad in M.A.C.P. No.135/2008, decided on 25th of August, 2010, the claimant therein has filed the present appeal. The appellant is, hereinafter, referred to as 'the claimant'.

3. The claimant had filed the aforesaid petition claiming compensation on account of injuries caused to him in a vehicular accident happened on 19th of July, 2007, having involvement of a Mini Truck bearing registration No. MH-20-AT-2402 owned by respondent no.2 and insured with respondent no.3. As is revealing from the averments in the claim petition, the claimant was travelling by the said truck from Dhule to Sakri. The said truck rammed into a tree and in the accident so happened, the claimant received several injuries. It was the contention of the claimant that the alleged accident happened because of rash and negligent driving of the driver of the said truck. It was the case of the claimant before the Tribunal that he was the second driver in the said truck and was thus entitled for receiving the compensation from the owner and insurer of the said truck for the alleged negligent acts of the driver of the said

truck. The claimant had claimed compensation of Rs.2,00,000/- (Rs. two lakhs).

4. The claim petition was opposed by the owner as well as the Insurance Company. The owner denied the fact stated by the claimant that he was second driver on his truck. The Insurance Company has raised defense of breach of policy conditions by the owner of the vehicle by carrying a fare paying passenger in a goods truck.

5. Learned Tribunal, after having assessed the oral and documentary evidence brought on record before it, held the claimant entitled for the total compensation of Rs.72,420/-, inclusive of the No Fault Liability compensation, however, the award was passed only against the owner of the truck and the Insurance Company was exonerated from its liability to pay the compensation. Aggrieved thereby, the appellant has preferred the present appeal.

6. Learned Counsel appearing for the appellant submitted that the Tribunal has grossly erred in arriving at the conclusion that the claimant did not prove that he was a second driver on the truck which met with the accident. Learned Counsel submitted that sufficient evidence was adduced by the claimant evidencing that he was second driver on the alleged truck and, as such, his risk was covered by the policy of insurance. Learned Counsel submitted that when a specific defense was raised by the

Insurance Company as about the breach of policy conditions, it was incumbent on the part of the Insurance Company to prove the said fact by adducing positive evidence in that regard. Learned Counsel submitted that, admittedly, the Insurance Company did not adduce any evidence. Learned Counsel further submitted that inspite of any specific evidence on record, the Tribunal has wrongly exonerated the Insurance Co. from its liability to indemnify the insured. Learned Counsel, therefore, prayed for setting aside the finding so recorded by the Tribunal and further prayed for holding the Insurance Company jointly and severally liable to pay the amount of compensation and accordingly modify the award.

7. Shri Swapnil Patil, learned Counsel appearing for the Insurance Company, supported the impugned judgment and award. Learned Counsel submitted that the claimant utterly failed in proving the plea raised by him that he was second driver on the offending truck. Learned Counsel submitted that the Tribunal in paragraph nos. 9, 10 and 11 of the impugned judgment has elaborately discussed the issue as regards to the liability of the Insurance Company. Learned Counsel submitted that the Tribunal has recorded an unambiguous finding that the claimant did not prove that he was second driver on the offending truck. Learned Counsel submitted that it was, thus, evident that the claimant at the relevant time was travelling as a fare paying passenger or gratuitous passenger in a goods truck. Learned Counsel submitted

that in such circumstances, no interference is warranted in the impugned judgment and award.

8. I have carefully considered the submissions made on behalf of the learned Counsel appearing for the respective parties. I have perused the impugned judgment, the evidence on record and the other material available on record. The only question which falls for my consideration in the present appeal is whether the finding recorded by the tribunal that the claimant was a fair paying passenger and has failed to prove that he was second driver on the offending truck can be interfered with. On perusal of the evidence on record and the discussion made by the Tribunal while analyzing the said evidence, it does not appear to me that any case is made out by the appellant to cause any interference in the impugned judgment and award. It is significant to note that the owner of the offending truck in his written statement has denied the fact stated by the claimant that he was the second driver of the said truck. The owner was the best person to depose or state before the Court whether the claimant was a second driver on his truck or not. In view of the fact that the owner himself has denied that the claimant was second driver in his truck and in absence of any other evidence brought on record so as to reach to conclusion that the claimant was, in fact, second driver on the said truck, no fault can be found in the finding recorded by the Tribunal. Even in appeal nothing is brought on record to suggest that the inference

drawn by the Tribunal is wrong or palpably incorrect. Since the claimant has failed in bringing on record any evidence to support his plea that he was second driver on the said truck, the only inference, which emerges is that the claimant was a fare paying passenger travelling in the goods truck. No risk of such passenger was covered by the Insurance policy of the said truck. There appears no error in the impugned judgment and award.

9. Though, it was sought to be canvassed by the learned Counsel that at least an order be passed directing the Insurance Company to first pay the amount and then to recover it from the owner in view of the fact that the claimant being fare paying passenger in goods truck, his risk was not covered by the insurance policy, such order also cannot be passed. I do not see any reason to interfere with the impugned judgment and award. The First Appeal, therefore, stands dismissed, however, without any order as to the costs.

(P.R. BORA, J.)

...

AGP/