

IN THE HIGH COURT OF BOMBAY AT GOA**FIRST APPEAL NO.93 OF 2012**

Shri Laxman Vithu Majik (since deceased)
through LR's

- 1(a) Mrs. Laxmi Laxman Majik,
Major of age.
1(b) Mr. Anil Laxman Majik,
Major of age.
1(c) Mr. Prashant Laxman Majik,
Major of age,
All Indian Nationals,
All residents of H.No.141,
Majikwada, Poriem, Satari, Goa.

....Appellants

V/s

1. Shri Anant Suryakant Wadkar,
Major, S/o Suryakant Wadkar,
resident of House No.119,
Ghoteli No.1, Kerim, Sattari-Goa.
2. Mulkkanna Shivaji Pujari,
major, House No. not known,
at Post Top, Rajiv Gandhi Nagar,
(Driver of Vehicle), Taluka Hatkanagle District,
Kolhapur Maharashtra.
3. Shri Dilip Dnyaneshwar Chawan,
major, House No. not known,
at Post Top, Taluka Hatkangle,
District Kolhapur, Maharashtra.
4. National Insurance Company Ltd.
Bicholim Branch, First Floor,
Town Centre, Bicholim Goa-403504,
Through its Branch Manager.

.... Respondents

Shri J. Godinho, Advocate for the Appellants.
Shri D. Gaonkar, Advocate for the Respondent No.1.
Shri D. Pangam, Advocate for the Respondent No.3.
Shri U.R. Timble, Advocate for the Respondent No.4.

Coram:- NUTAN D. SARDESSAI, J.
Reserved on : 9th JUNE, 2017
Pronounced on : 22nd JUNE, 2017

JUDGMENT :

This is an appeal by the registered owner and later his legal heirs challenging the judgment and award dated 27/08/2009 passed by the learned MACT, Mapusa pursuant to which she partly allowed the petition and held the original claimant entitled to the sum of ₹17,31,514/- with interest while fastening the liability on the respondents no.1 & 2 and absolving the respondents no.4 insurer of the liability arising therefrom. It is the registered owner alone who is in appeal challenging the said judgment and award.

2. Shri J. Godinho, learned Advocate came to be heard on behalf of the appellants who assailed not only the impugned judgment and award dated 27/08/2009 but also the order dated 10/10/2008 pursuant to which the learned MACT had dropped the insurer i.e. the respondents no.4 from the proceedings on the premise that there was no insurance cover to the vehicle on the date of the accident. It was the contention of Shri Godinho, learned Advocate for the appellants that the accident had taken place on 14/06/2006 at 20.45 hrs. and as per the case of the respondents no.4, the Policy was effective from 15/06/2006 till the midnight of 14/06/2007 i.e. not covering the accident which had taken place on the night of 14/06/2006. It was his contention that the payment towards the premium of the Insurance Policy was

effected on 14/06/2016 i.e. prior to the accident and therefore the learned MACT was in error to drop the respondents no.4 from the proceedings and to finally absolve them of the liability to indemnify the registered owner.

3. It was further the contention of Shri Godinho, learned Advocate for the appellants that the original appellant, since deceased, as the respondent no.2 in the proceedings before the MACT was not served with the notice of the proceedings inasmuch as the summons was not served on him and therefore the impugned judgment and award was not binding on him. The notice on his son was not served in accordance with law as he had to be served personally in the matter and even otherwise he was not made aware of the acceptance of the notice by his son Prashant on his behalf which in any event was not a good service and not binding on him. The impugned judgment and award was vitiated on that count alone and had to be quashed and set aside. He adverted to the roznama dated 9/03/2007 wherein the learned MACT had recorded his absence but the records did not at all indicate that he had been duly served with the notice of the summons in the Claim Petition.

4. Shri Godinho, learned Advocate for the appellants further contended that the Policy was effective from the date of the

payment of the premium and not any future date. The learned MACT could not have dropped the respondents no.4 from the proceedings on the premise that there was no valid and effective Insurance Policy at the time of the accident and on that premise the appellant was prejudiced and the impugned judgment and award was liable for interference in appeal. It was his contention that the Proposal Form relied upon by the insurer i.e. the respondents no.4 was blank and therefore no consent of the original appellant could be inferred on that count. The learned MACT could not have dropped the insurer which he could do only after the evidence and on proof that there was tacit approval of the insured to give effect to the policy at a later date was confirmed during the trial. The award had therefore to be quashed and set aside on these grounds and the matter remanded to the MACT for a trial afresh. He relied in **New India Assurance Co. Ltd. V/s. Sushilabai w/o Ghanshyam Anerao & Ors. [2010 (4) Mh.L.J. 955]** and **Balbir Kaur & Ors. V/s. New India Assurance Company Limited & Ors. [(2009) 13 SCC 370]** to buttress his case. It was further his contention that although there were two certificates of disability on record, the learned MACT without any justification relied on the Disability Certificate certifying the extent of permanent disability at 80% and ignoring the certificate quantifying the disability at 25% and fixed the compensation thereby causing undue prejudice to the appellants. The impugned

award had also to be quashed on that count and the appellants had to be afforded an opportunity to canvass their case on all these aspects before the learned MACT.

5. Shri U.R. Timble, learned Advocate for the respondents no.4 submitted that the service on the original respondent no.2 i.e. the appellant through his son was proper. There was no affidavit filed by the son that though he had received the notice he had not handed it over to his father i.e. the original owner. It was a proper service effected on the appellant in terms of order V Rule 15 CPC and therefore this was not at all valid ground to assail the impugned judgment and award. He next contended that entertaining such an appeal would open the floodgates to challenge every litigation on the premise that the party had not been served and therefore such a ground was not available to the appellants to assail the impugned award.

6. Learned Advocate U.R. Timble contended that in so far as the validity of the Policy was concerned that the Cover Note was issued on the date of the tender of the cheque i.e. on 14/06/2006 pursuant to which the date of commencement of risk was known to the appellants as 15/06/2006. It was therefore not open to the appellants to allege that the Policy would commence on 14/06/2006 covering the accident. Besides, it was his submission

that the Proposal Form was duly signed by the proposer which gave the date of commencement of the policy as 15/06/2006 and which commenced from that date and continued till the midnight of 14/06/2007. The Policy was not in force on the date of the accident and therefore no fault could be found with the order of the learned MACT dropping the respondents no.4 from the proceedings and hence the impugned judgment and award was not liable for interference. He placed reliance in **National Insurance Company Ltd. V/s. Smt. Sobina Iakai & Ors. [(2007) 7 SCC 786]** and concluded his arguments.

7. Shri D. Pangam, learned advocate for the respondent no.3 submitted that the appellant's son was entitled to accept the notice and there was no basis in the appellants' contention that service was not proper when it was otherwise in consonance with Order V Rule 15 of the Civil Procedure Code. It was also not the case of the original appellant that his son was not residing with him or that his relation with his son was strained. The impugned judgment and award was therefore not liable for interference on that count. He however supported the contention of Shri Godinho, learned Advocate for the appellants that the vehicle was duly insured on the date of the Policy and therefore it was a fit case to quash the order dated 10/10/2008 and to quash and set aside the award by remanding the file to the learned MACT for a proper adjudication of

the matter. It was further his contention that the consent of the insured i.e. the respondent no.2 had to be taken to take effect from a future date but unlike the submission now there was no pleading on the said consent. In the absence of any procurement of consent, the Policy was to start when the contract was concluded i.e. on effecting the payment of the insurance premium. He adverted to the explanation to sub-section 2 to the Insurance Act and once again contended that there was no basis in the plea raised on behalf of the insurer respondents no.4 that the Policy commenced from 15/06/2006 and/or they were not liable to indemnify the registered owner.

8. Shri Gaonkar, learned Advocate for the respondent no.1-original claimant adopted the arguments of Shri D. Pangam qua the point of service on the appellant's son and contended that it was valid service and therefore the award was not open to interference in appeal. On the issue of the Insurance Policy, it was contended by him that there was suppression by the insurer on the receipt of the cheque towards the insurance premium on 14/06/2006. Therefore it was not open to the insurer to contend that the party had not challenged the order. It was otherwise his contention that even assuming without admitting that the remand was allowed, it had to be restricted to the Policy conditions alone and the finding in favour of the respondent no.1 qua the quantum had not to be

disturbed. Shri Godinho in reply submitted that there was no plea taken by the respondents no.4 in their written statement that the policy was effective from 15/06/2006. The judgment relied by Shri U.R. Timble in **Smt. Sobina Iakai** (supra) was clearly distinguishable and not applicable to the case at hand and therefore it was a fit case to remand the file on quashing the impugned judgment and award not only on the aspect of non-service and the validity of the Insurance Policy but also on the aspect of quantum.

9. i have considered their contentions on these two vital aspects and decided the two material issues namely whether the appellant was duly served with the notice of the proceedings before the learned MACT and whether the learned MACT was in error to hold that there was no valid insurance on the date of the accident and to absolve the respondents no.4 finally of the liability to indemnify the registered owner.

10. Order V CPC deals with the issue of service of summons. Rule 1 requires that when a suit has been instituted, a summons may be issued to the defendant to appear and answer the claim and to file the written statement of his defence, if any, within thirty days from the date of the service of summons on that defendant. The sub-section is circumscribed by the two provisos which have no

material bearing in so far as the present case is concerned. Order V Rule 15 CPC contemplates that where in any suit the defendant is absent from his residence at the time when the service of summons is sought to be effected on him at his residence and there is no likelihood of his being found at the residence within a reasonable time and he has no agent empowered to accept service of the summons on his behalf, service may be made on any adult member of the family, whether male or female, who is residing with him. The Bombay Amendment to Rule 15 requires such service to be made on a male member of the defendant's family and excluding a servant from the definition of 'a member of a family' within the meaning of this Rule. In this backdrop it would be pertinent to consider the contention of Shri Godinho whether the original appellant as the original respondent no.2 was served or otherwise with the notice of summons in the proceedings before the MACT, there being no dispute on the applicability of Order V to such proceedings.

11. A cursory perusal of the summons issued to the appellant/original respondent no.2 would show that the summons was served by the bailiff who had gone to his residence on his son and he had accepted the service on his behalf. By no stretch of the imagination can the contention of Shri Godinho be accepted that it was not a valid service on the appellant when the said summons

was duly served on the son with whom the appellant had no bad/strained relations and it was also not the case of the appellant that his son was not on talking terms with him and/or not residing with him. In these circumstances therefore the contention of Shri Godinho that it was not at all good service on the appellant and that he had no notice of the proceedings before the learned MACT cannot at all be entertained and on that count his submission that the impugned judgment and award ought to be reversed cannot be accepted.

12. In **Sushilabai** (supra), a learned Single Judge of this Court held that the date on which the payment in cash is accepted by the Insurance Company, it being a special contract, the insurance/risk will be applicable from that date. The amount having been accepted on 3/05/1997, naturally the contract to indemnify would operate with immediate effect. In the brief facts, the insurer/appellant questioned the legality of the award passed by the District Judge, MACT Nanded. The Court formulated the question for consideration whether the cash for insurance cover remitted on 3/05/1997, Saturday, a holiday, and the Cover Note showing the effective date as 5/05/1997 would exonerate the insurance company, if the accident had taken place in the intervening period of 4/05/1997. In the facts of that case, the Development Officer of the insurer/appellant had confirmed that

the Cover Note was issued by him on 3/05/1997. He did not dispute the recitals in the Cover Note. He had received the amount towards the premium from the owner of the truck in cash at his house and issued the Cover Note while the accident had taken place on 4/05/1997.

13. In **Sushilabai** (supra), the insurer took a plea that the insurance was from 5/05/1997 and therefore it could not be fastened with the liability. The Development Officer had virtually negated this position since he had not informed in writing to the owner about the policy being effective from 5/05/1997. Reliance was placed in **Balbir Kaur** (supra), where the Apex Court had observed at para 11 of the judgment as under:

“11. For the purpose of this case, we would assume that an insurance policy, in law, could be issued from a future date. A policy, however, which is issued from a future date must be with the consent of the holder of the policy. The insurance company cannot issue a policy unilaterally from a future date without the consent of the holder of a policy. Even the said circular letter had not been produced and/or no material was placed as to why the policy was issued from a later date. It is, however, not necessary for us to delve deep into the matter in view of the limited notice issued by this Court. Respondent 3, the owner of the vehicle, however, has not questioned that part of the order passed by

the High Court. He, therefore, accepted the judgment of the High Court. Accordingly, liability to pay the awarded amount by him is not in question.”

In **Sushilabai** (supra), the learned Single Judge observed that the contract for insurance company naturally will be applicable from the date of the payment received in cash from 3/05/1997 by the insurance company. Even if it was a Saturday, it will not obliterate the effect of enforcement of the policy and consequently indemnification. Any incorporation unilaterally made in the Cover Note as to its effective date, will not have adverse impact on the contract of insurance effected between the insured and the company.

14. **Balbir Kaur** (supra), was in appeal before the Apex Court questioning the judgment of the High Court which set aside the award passed by the Tribunal absolving the insurer from the liability to indemnify the registered owner. In the brief facts, Baljit Singh, the deceased, who was riding the two wheeler was hit by a bus, suffered multiple injuries and was declared “brought dead” to the Din Dayal Upadhyay Hospital, New Delhi. The appellant filed an application before the MACT, Delhi under Section 166 of the Motor Vehicles Act, 1988 ('Act' for short hereinafter) claiming compensation towards his death on the premise that the accident was caused due to the rash and negligent driving of the bus by its

driver. The Tribunal on the basis of the material awarded a sum of ₹7,96,000/- and which was challenged in appeal by the insurer before the High Court. The High Court by the impugned judgment set aside the award opining that as the Cover Note of the insurance had been issued on 15/03/1996 but the same was to take effect from 19/03/1996 and the accident having taken place on 18/03/1996, the insurer were not liable.

15. In **Balbir Kaur** (supra), the Tribunal in the petition formulated the issue whether the insurance cover in the case was effective only from 19/03/1996 to 10/03/1997 and whether the premium on the insurance policy was paid on 15/03/1996 and if so to what effect? The Tribunal had found that in the Cover Note the policy was shown to have been issued with effect from 18/03/1996 in view of a circular issued by the insurance company but it had not been given effect to. However, having regard to the fact, that a photocopy thereof had been produced, it was held that besides the Proposal Form relating to the impugned insurance policy had also not been produced to show as to what were the terms and conditions on which the insurance policy was to be executed with regard to the offending vehicle. There was no material on record to show that the insured was made aware of the office circular that if there was no other insurance policy in operation with regard to

the offending vehicle immediately proceeding 15/03/1996, in these circumstances the insurance policy insured third-party three days after the receipt of the proposal. The material placed on record showed that the insured had made the payment of the premium on 15/03/1996 and there was no reason for the insurance company to have issued the insurance policy covering the third party interest with effect from 18/03/1996. The Hon'ble Apex Court considered Sections 146 & 147 of the Act read with Section 64-VB of the Insurance Act, 1938 and observed that for the purpose of this case it would assume that the insurance policy, in law, could be issued from a future date. It was held that the policy, however, which is issued from a future date must be with the consent of the holder of the policy. The Insurance Company cannot issue a policy unilaterally from a future date without the consent of the holder of a policy.

16. In **Sobina Iakai** (supra), the question which fell for adjudication was whether the insurance company should be held liable for payment of compensation for a period when the Insurance Policy was not even in existence. In the brief facts, the appellant had originally issued an Insurance Policy to the respondent on 22/06/1992 at 12.45 p.m. which expired on 21/06/1993. This policy was renewed after nine days from its expiry on 30/06/1993 and it expired on 29/06/1994. Twenty one

days after the expiry of this policy, the bus met with an accident at about 9.15 a.m. on 20/07/1994 killing two persons, one having died on the spot and the other a few days later in the hospital. Admittedly in the present case, the Insurance Policy was renewed on 20/07/1994 at 2.00 p.m. whereas the accident had occurred at 9.15 a.m. on 20/07/1994. The time was specifically mentioned in the document called Motor Renewal Endorsement and it is incorporated in the document that the policy was renewed for twelve months from 20/07/1994 (2.00 p.m.) to 19/07/1995.

17. In **Sobina Iakai** (supra), a petition came to be filed for compensation before the MACT, Jowai. The appellant/insurer filed a written statement taking a specific plea that the policy was not in operation at the time of the accident. The MACT allowed the petition ignoring the specific terms of the policy and the averments of the written statement, ignored the settled legal position as crystallized by a series of judgments and awarded the compensation directing the appellant/insurer to pay the amount within two months. The appellant insurer assailed the order of the Tribunal before the Shillong Bench of the Gauhati High Court which after discussing various judgments of the Apex Court had culled out the following proposition of law:

- (i) If time is mentioned in the Insurance Policy or Cover Note, the effectiveness of the policy would start from that

time and date and not from an earlier point of time;

(ii) If the accident takes place on that very date before the time which is mentioned in the Insurance Policy, the Insurer will not be liable to indemnify the insured;

(iii) If the time is not mentioned in the Insurance Policy, it would commence from the date which means midnight and in case accident occurred on the date of taking the policy, the insurer will be liable to meet the liability of the insured under the award.

Though the ratio culled out by the High Court was correct, the High Court has wrongly applied the ratio and erroneously held the Insurance Company liable to pay the compensation for the reason that the Cashier and the Development Officer had not been produced by the appellant/Insurer. At the cost of repetition, the accident had occurred at 9.15 a.m. on 20/07/1994 and the respondent did not have the insurance cover. The Insurance Policy was obtained at 2.00 p.m. on 20/07/1994, which was clearly evident from the motor renewal endorsement. In that context the Hon'ble Apex Court held that the Tribunal and the High Court had seriously erred in ignoring the basic and vital documents and decided the case against the appellant/insurer on the ground of non-production of the Cashier and Development Officer. This manifestly erroneous approach of the High Court had led to serious miscarriage of justice. It was in the background of these facts that the Apex Court observed at para 19 as follows :

"19. In order to curb this widespread mischief of getting insurance policies after the accidents, it is absolutely imperative to clearly hold that the effectiveness of the insurance policy would start from the time and date specifically incorporated in the policy and not from an earlier point of time."

These observations of the Hon'ble Apex Court were in the facts of that case and which in any way do not substantiate the contention of Shri U. R. Timble, learned Advocate for the respondent no.4 that there was no policy in force at the time of the accident.

18. In that context i would advert to the certificate of the Insurance Policy produced on record by him which no doubt reads that it was issued on 15/06/2006 as against the collection date 14/06/2006. The Proposal Form produced on record by him indicates that the policy of insurance was from 15/06/2006 to 14/06/2007. However, it was not singularly disputed on behalf of the insurer that the insured had effected the payment of the insurance premium on **14/06/2006** much prior to the accident. There was no dispute that the Cover Note was issued on the date of the tender of the cheque i.e. 14/06/2006. At the same time, the insurer had not obtained the consent of the insurer that the policy would take effect from a future date. Though the respondents no.4

had filed the written statement in defence, there was no pleading that they had obtained the consent of the insured that the Policy would be effective from 15/06/2006 and therefore in the absence of procurement of the consent, the Policy would start when the contract was concluded i.e. on effecting the payment.

19. Besides, in terms of Section 64-VB of the Insurance Act, 1938 the insurer shall not assume any risk in respect of any insurance business on which premium is not ordinarily payable outside India unless and until the premium payable is received by him or is guaranteed to be paid by such person in such manner and within such time as may be prescribed or unless and until deposit of such amount as may be prescribed, is made in advance in the prescribed manner. Sub-section 2 reads as for the purposes of this section, in the case of risks for which premium can be ascertained in advance, the risk may be assumed not earlier than the date on which the premium has been paid in cash or by cheque to the insurer. The explanation thereto reads thus:

Where the premium is tendered by postal money order or cheque sent by post, the risk may be assumed on the date on which the money order is booked or the cheque is posted, as the case may be.

Thus from a reading of this Section it is apparent that the payment of the premium is also contemplated by cheque and the

policy would begin to run no sooner such document is received.

20. Most pertinently, the respondents no.4 had moved an application for dropping them from the proceedings spelling out briefly that the vehicle was not insured with them at the relevant time and therefore they were not a necessary party to the petition. There was no disclosure or rather there was suppression by the respondents no.4 that the respondent/insured had effected the payment of the insurance premium by cheque on **14/06/2006** and in those set of circumstances was the learned MACT carried away by the policy showing its effective date or validity from 15/06/2006 till 14/06/2007 to hold that it did not cover the accident which took place on the previous night i.e. 14/06/2006 at 20.45 hrs. Had the respondents no.4 made a clear disclosure of the receipt of the premium by cheque on 14/06/2006, the learned MACT may not have been inclined to entertain the application and allowed the respondents no.4 to be dropped from the proceedings. In that context too there is force in the contention of Shri Godinho, learned Advocate for the applicant that the learned MACT could have dropped the respondents no.4 only after evidence and on proof that there was tacit approval of the insured to give an effect to the policy at a later date or rather on the evidence to hold that the policy was effective from 15/06/2006.

21. The fact that the respondents no.4 had suppressed the receipt of the premium on 14/06/2006 would not leave it open to the insurer to canvass that the appellant had not challenged the order. Considering thus the effect of the policy qua the lack of the consent of the insured to make the policy effective from a future date and the appellant having shown that the insured had effected the payment on **14/06/2006** at 12.04 hrs. i.e. much prior to the accident at **20.45** hrs., i am satisfied that the appellants have amply justified the quashing of the order dated 10/10/2008 whereby the learned MACT held that there was no privity of contract between the respondents no.4 and the insured at the time of the accident and dropped them from the proceedings. Having concluded that the learned MACT was in error to discharge the respondents no.4 from the proceedings, i am satisfied that it is a fit case to quash the impugned order and consequentially the impugned judgment and award and to remand the file to the learned MACT for a determination afresh particularly on the aspect of the validity of the Insurance Policy.

22. Last but not the least Shri Godinho, learned Advocate for the applicant canvassed a plea that the learned MACT had not assigned any reason why it was accepting the disability certificate quantifying the extent of permanent disability at 80% and ignoring the other disability certificate certifying 20% permanent disability.

Shri D. Gaonkar, learned Advocate for the respondent no.1 submitted that he was agreeable to a remand of the case only on the aspect of the Insurance Policy while no interference was called for with the finding of the learned MACT in so far as the quantum of compensation was concerned merely on the premise that the learned Judge had taken into account one disability certificate against the other. Here again on a consideration of the impugned judgment and award with the evidence adverted to by Shri Godinho, it must be said that on the face of it the learned Presiding Officer of the MACT had not at all assigned justifiable reason why he felt it appropriate to consider the disability certificate certifying the disability at 80% as against the other certifying it at 20%. Therefore on that premise too, the matter needs a remand to the learned MACT for assigning valid reasons and computing the quantum of compensation appropriately in favour of the respondents no.1, there being no dispute with the findings regarding the rashness and negligence of the truck driver. In the result i therefore pass the following order:

O R D E R

- (i) The impugned order dated 10/10/2008 is quashed and set aside.
- (ii) The impugned judgment and award dated 27/08/2009 too is quashed and set aside with a direction to the learned MACT to decide on the validity or otherwise of the Insurance Policy and also to quantify

the compensation due to the respondent no.1 after justifying the extent of disability certified by the two Doctors qua the same patient.

(iii) The parties are directed to appear before the learned MACT on 5th July, 2017 at 10.00 a.m. and the learned MACT is further directed to dispose off the petition as expeditiously as possible and in any event within 6 months from the date of the order.

(iv) The appeal stands disposed off accordingly.

NUTAN D. SARDESSAI, J.

NH