Vidya Amin

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

FIRST APPEAL (St.) No. 11891 OF 2012
WITH
CIVIL APPLICATION NO. 1765 OF 2012

The New India Assurance Co. Ltd. ... Appellant/Applicant
Vs.
Ramshankar Motichand Gupta & Ors. ... Respondents

Ms. Poonam Mittal, Advocate for the appellant/applicant.
Mr. T.J. Mendon, Advocate for respondent no. 1.

CORAM: **MRS.MRIDULA BHATKAR, J.**
DATE: **4th October, 2017.**

P.C.:

Upon mentioning, taken on production board.

2. Admit. The learned counsel for respondent no. 1 waives service. By consent of the parties, the Appeal is heard finally at the stage of admission.

3. This Appeal is directed against the judgment and award dated 13th December, 2011 passed by the learned Member, Motor Accident Claims Tribunal, Mumbai in M.A.C.P. No. 1432 of 2001 thereby granting compensation of Rs.38,400/- including NFL with interest @8.5% p.a. from the date of the Application. Two vehicles, i.e. motor tempo bearing No. MH-04-AG-2741 and motor trailer bearing No.

MH-04-F-3071 are involved in the accident. However, both the vehicles are insured with the same insurance company, i.e., New India Assurance Company Ltd. The learned Member of the Tribunal held that it is a case of contributory negligence and directed the owner of the trailer and insurer to jointly and severally pay 75% of the compensation amount whereas the owner of the motor tempo and insurer shall jointly and severally pay 25% of the compensation amount.

4. The applicant/injured was 30 years old and was doing a business of vegetables. On 27th March, 2001 the applicant/injury had hired a motor tempo bearing No. MH-04-AG-2741 for transport of his vegetables from Vashi market to Borivli. At 2 a.m. when the tempo was proceeding on a highway, one motor trailer bearing No. MH-04-F-3071 was parked in the middle of the road in a negligent manner without parking lights and tail lamps. The tempo driver could not see the offending motor trailer parked in the middle of the road and gave dashed to the motor trailer from the rear side. Due to the impact, the applicant sustained injuries. He was referred to the hospital and had to take treatment for two months. Therefore, he filed the injury claim. In the said claim, the opposite parties/owners did not appear and did not file written statement. The insurance company appeared, filed

written statement and contested the claim on the ground that the applicant/injures was unauthorized passenger in goods vehicle, i.e., motor tempo and therefore, the insurer is not liable to pay compensation. The claimant has examined himself. The learned Member of the Tribunal, after considering the oral as well as documentary evidence, has partly allowed the Application. Being aggrieved by the said judgment and award, the insurance company has filed this Appeal.

5. The learned counsel for the appellant/insurance company has submitted that the learned Member of the Tribunal ought to have appreciated that there was default in payment of premium of the policy of the insurance and the cheque given by the owner of the vehicle was dishonoured and, therefore, the insurer is not liable to pay any compensation in respect of such policy to the applicant. It was prayed by the learned counsel for the insurance company that this issue was not raised before the Tribunal and therefore, the matter to be remanded to the Tribunal and the insurance company be given opportunity to tender evidence.

6. Per contra, the learned counsel for respondent no. 1 supported the finding given by the Tribunal. He has submitted that the accident

occurred only because of the negligent parking of the trailer in the middle of the road, which is insured by the appellant/insurance company. The insurer who filed the written statement ought to have examined the officer on the point of premium and dishonouring of cheque. The learned counsel also placed reliance on the judgments of the Supreme Court in the case of **Pawan Kumar & Anr. vs. Harikishan Dass Mohan Lal & Ors.**, reported in **2014 ACJ 704** and also in the case of **Andhra Pradesh State Road Transport Corporation & Anr. vs. K. Hemalatha & Ors.**, reported in **2008 ACJ 2170**. He submitted that if there is a composite negligence on the part of more than one wrongdoers, each wrongdoer is jointly and severally liable to pay to the injured for payment of the entire damages and the injured person has the choice of proceeding against all or any of them.

7. Heard the submissions. Perused the judgment and evidence placed before the Tribunal. I am of the view that on the point of quantum, the learned Tribunal has properly assessed the evidence in respect of medical expenses and also loss of income. The insurance company has not tendered any evidence in respect of dishonouring of cheque. The learned Tribunal has rightly relied on the principles laid down by the Supreme Court in the case of **National Insurance**

Co. Ltd. vs. Kaushalya Devi & Ors. reported in **(2008) 8 SCC 246** and in the case of **National Insurance Co. Ltd. vs. Sarojamma & Ors.,** reported in **2009 ACJ 119**. Since both the vehicles were insured with the appellant/insurance company herein, the Tribunal, after considering the oral as well as documentary evidence, has apportioned the liability in the ratio of 75% and 25%. The cheque in one of the policy of the vehicle was dishonoured, however, other vehicle was properly insured. Moreover, no evidence was tendered in respect of dishonouring of cheque and, therefore, no ground can be allowed to raise at this stage across the bar. Thus, there is no merit in the Appeal. The compensation awarded by the Tribunal is just and adequate. Hence, the First Appeal is dismissed.

8. In view of dismissal of First Appeal, Civil Application does not survive, hence the same is also disposed of accordingly.

9. Office is directed to transfer a sum of Rs.25,000/- deposited by the appellant in compliance of Section 173 of the Motor Vehicle Act to the Motor Accident Claims Tribunal, Mumbai.

(MRIDULA BHATKAR, J.)