IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE JURISDICTION

FIRST APPEAL NO. 1404 OF 2005
WITH
CIVIL APPLICATION NO. 2920 OF 2016

New India Assurance Co. Ltd., Kolhapur .. Appellants
Vs.
Ms Sharada Lahu Gaikwad and Ors. .. Respondents

...

Mr. Ravindra S. Pachundkar for Appellants.
Mr. Saumen Vidyarthi i/b Mr. S.M.Vidyarthi for Respondents.

CORAM : M.S. SONAK, J.
DATE : 17th MARCH 2017.

P.C. :

1. Heard learned counsel for the parties.

2. The challenge in this appeal is to the judgment and award dated 23 November 2004 made by Motor Accident Claim Tribunal, Pune to the extent it fixes a liability in excess of Rs.1,50,000/- upon the appellant insurance company.

3. The operative portion of the impugned judgment and award dated 24 November, 2004, reads thus :-

"1. The petition is partly allowed.

2. The respondents nos. 1 and 3 do jointly and *severally deposit compensation amount of Rs.2,17,780/- (Rs. Two Lac seventeen thousand seven hundred and eighty) (excluding interim compensation) together with interest thereon @ 6% p.a. from date of petition till realisation and the proportionate costs of this petition by issuing account payee cheque for the said amount in the name of this Tribunal.*

3. On receipt of the amount with this Tribunal, it be disbursed as under :-

A) By issuing account payee cheques for the amounts of Rs.50,000/- (Fifty Thousand) each in the separate names of the petitioners nos. 2, 3, 4, 6 and respondent no.5.

The account payee cheque in the name of petitioner no.2 Deepamala Lahu Gaikwad, be forwarded to any nationalized bank of her choice for investing in fixed deposit in her name for a period of thirty nine months;

The account payee cheques in the name of the 3rd and 4th petitioners be issued under the guardianship of the 1st petitioner and the said cheques be forwarded to any nationalized bank of the choice of 1st petitioner for investing in fixed deposit in the names of the 3rd and 4th petitioners under guardianship of the 1st petitioner, for a period until the minor 3rd and 4th petitioners attain majority;

The account payee cheque issued in the name of petitioner no.6 Nanubai Hari Gaikwad be forwarded to any nationalised bank of her choice for investing in fixed deposit in her name for a period of twelve months;

B) By issuing account payee cheque for an amount of Rs.50,000/- (Fifty thousand) in the name of the respondent no.4 Chaya Lahu Gaikwad, which cheque be handed over to her;

C) By issuing account payee cheque for the amount of Rs.20,000/- (Rs.Twenty thousand) + the costs awarded in this petitioner in the name of the 1st *petitioner Sharada Lahu Gaikwad, which cheque be handed over to her;*

D) By issuing account payee cheque for the balance amount of compensation in the name of the 4th respondent Chaya Lahu Gaikwad, which cheque be forwarded to any nationalised bank of her choice for investing in fixed deposit in her name for a period of thirty nine months with quarterly interest payable to her.

The 4th respondent Chaya Lahu Gaikwad should execute indemnity bond before this Tribunal to the effect that in case any competent Civil Court decides that the 1st petitioner is the legally wedded wife of deceased, she would return amount of compensation received by her, to the 1st petitioner. The investment of the amount in the name of this 4th respondent be made, and the cheque amount of Rs.50,000/- be handed over to her only after she executes such indemnity bond.

On maturity of the above FDRs the amounts thereunder be paid to the respective petitioners, without further reference to this Tribunal.

4. The respondent no.2 is exonerated from liability.

5. Award be drawn accordingly."

3. Mr. Vidhyarthi, learned counsel for the insurance company submits that the insured vehicle bearing registration No. MHL 4271 was a Goods vehicle. The insurance policy makes it clear that third party risk is covered to the extent of Rs.1,50,000/- only. In this case, no extra premium was paid by the truck owner and therefore, the liability of insurance company will be restricted to Rs.1,50,000/- only. Mr.

Vidhyarthi, relies upon the decision of the Hon'ble Supreme Court in the case of ***New India Assurance Co. Ltd., Vs. C.M.Jaya, 2002 ACJ 271 (SC).***

4. Mr. Ravi, learned counsel for the respondent Nos. 9 and 10 submits that in this case, no evidence was led by the Insurance Company and therefore, the insurance company, cannot be permitted to raise such an issue in the appeal. He submits that the avoidance of liability clause in the insurance policy makes it clear that the insurance company is liable to make payment to the third parties but, may recover such amount from the insured. He submits that there are several decisions rendered by the Hon'ble Apex Court, including in particular, the decision in the case of ***National Insurance Co. Ltd., Vs. Swaran Singh and Ors. 2004(3) SCC 297.*** It takes the view that insurance company must satisfy the award qua third parties, who may thereafter recover such amount from the insured without the necessity of having resort to separate proceeding against the insured.

5. The issue raised in this appeal is required to be disposed of in accordance with the law laid down by the Hon'ble Supreme Court in the case of ***New India Assurance Company Ltd Vs. Vimal Devi and others 2010 ACJ 2878***. In the said case, the contention, similar to the one,

now raised by Mr. Vidyarathi was raised by the Insurance Company. Relying upon the decision of the Constitution Bench in the case of *New India Assurance Co. Ltd. -Vrs- C.M. Jaya* (Supra), learned counsel for the respondent-claimant appearing before the Hon'ble Supreme Court, made reference to the avoidance of liability clause in the policy and, on such basis, submitted that the insurance company cannot resist or avoid the claim by the claimant, who is a third party. This contention was upheld by the Hon'ble Supreme Court. The discussion in this regard is contained in paragraphs 5 to 7 which reads thus:

> *"5. The avoidance clause came up for consideration before a three-Judge Bench of this court in Amrit Lal Sood Vs. Kaushalya Devi Thapar, 1998 ACJ 531 (SC). In its decision court observed :*
>
> *"(13) In the policy in the present case also, there is a clause under the heading:*
>
> *Avoidance of certain terms and right of recovery- which reads thus:*
> *'Nothing in this policy or any endorsement hereupon shall affect the right of any person indemnified by this policy or any other person to recover an amount under or by virtue of the provisions of the Motor Vehicles Act, 1939, section 96. But the insured shall repay to the company all sums paid by the company which the company would not have been liable to pay but for the said provisions'.*
>
> *(14) The above clause does not enable the insurance company to resist or avoid the claim made by the claimant. The clause will arise for consideration only in a dispute between the insurer and the insured. The*

question whether under the said clause the insurer can claim re-payment from the insured is left open. The circumstance that the owner of the vehicle did not file an appeal against the judgment of single Judge of the High court under the Letters Paten may also be relevant in the event of claim by the insurance company against the insured for repayment of the amount. We are not concerned with that question here.

(15) In the result, we hold that the insurance company is also liable to meet the claim of the claimant and satisfy the award passed by the Tribunal and modified by the High Court. The judgment of the High Court insofar as it exonerates the insurance company (respondent No.5 herein) from the liability, is set aside. The award passed by the Division Bench of the High Court can be enforced against the respondent No.5 also. The appeal is allowed to the extent indicated above. The parties will bear their respective costs."

6. Mr. Calla further submitted that in C.M.Jaya, 2002 ACJ 217 (SC), a Constitution Bench of this court indeed held that in a policy for limited liability it was not open to the court to direct the insurance company to make any payment beyond the amount of the limited liability but it took note of the decision in Amrit Lal Sood, 1998 ACJ 531 (SC), with approval. He referred to paras 8 and 12 of the judgment in C.M. Jaya (supra) where the decision in Amrit Lal Sood (supra) is noticed with approval.

7. The avoidance clause in the policy in this case makes all the difference and the direction of the High court to the appellant, insurance company to make payment of the full amount of compensation to the claimants and to recover its dues from the owner of the vehicle is directly in accordance with that clause. In our view, the submission of Mr. Calla is well founded. The appellant in this case can derive no benefit from the decision in C.M.Jaya 2002 ACJ 271(SC)."

6. In the present case as well, the avoidance of liability clause, quite

similar to the one considered by the Hon'ble Supreme Court in the case of *Vimal Devi* (Supra) or *Amrtilal Sood* (Supra) finds place in the Insurance Policy. Therefore, even if Mr. Vidhyarthi's contention on the basis of the decision of the Hon'ble Supreme Court *C.M. Jaya* (Supra) is upheld, an appropriate order to be made would be that the insurance company must honour the impugned award in the present case. The appeal therefore is to be dismissed as against the respondent-claimant.

7. In so far the owner of the Goods vehicle, the insured i.e. Respondent No.7 is concerned, the appeal will have to be partly allowed. This is because qua the owner or, at present, the legal representative of the owner, the appellant insurance company is entitled to rely upon the clause in the insurance policy which had limited their liability to Rs.1,50,000/-. Therefore, in so far as the liability which is in excess of Rs.1,50,000/- is concerned, the appellant insurance company, upon satisfying the liability towards the respondent claimant, shall be entitled to recover the same from the legal representative of Respondent No.7 who has already been brought on record. Such excess amount would be Rs.67,780/- alongwith apportionate interest thereon. For this purpose, it shall not be necessary for the insurance company to file any separate proceeding. Such a direction will be consistent with the

principle of "*Pay and Recover*" laid down by the Hon'ble Supreme Court in the case of *Swaran Singh* (Supra) and *Vimal Devi* (Supra)

8. This appeal is therefore partly allowed. As against the respondent-claimant the appeal is dismissed. However, as against the owner of the vehicle i.e respondent No.7 (or the legal representative of the respondent No.7), the appeal is partly allowed to the aforesaid extent.

9. There shall be no order as to costs.

10. In view of disposal of the appeal, civil application does not survive and is disposed of accordingly.

(M. S. SONAK, J.)