Atul

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
FIRST APPEAL (ST) NO. 19022 OF 2008
WITH
CIVIL APPLICATION NO. 4281 OF 2008
WITH
CIVIL APPLICATION NO. 4282 OF 2008

New India Assurance Co Ltd ...Appellant
Versus
Laxmi Govind Dhotre & Ors ...Respondents

Mr HG Misar, *for the Appellant.*
Ms Rachana Chavan, *i/b SV Sonawane, for Respondents Nos. 1 to 4.*

CORAM: G.S. PATEL, J
DATED: 21st July 2017

PC:-

1. For the reasons stated in Civil Application No. 4281 of 2008, the delay in filing the first appeal is condoned.

2. **Admit**. By consent, the first appeal is taken forthwith for hearing and final disposal.

3. A motorcycle pillion rider died when the motorcycle was hit by a truck or lorry. An amount of just over Rs 4 lakhs was awarded in compensation to his 22-year-old widow and their three minor children. The insurance company is in appeal against an order dated 14th August 2007. It says, and would have me hold, that there is no liability whatsoever, because the policy in question was a limited, statutory, Act-only policy, and not a comprehensive policy. It did not cover third party risk. This is sought to be supported by various judgments. But before precedents come the facts. This is after all a First Appeal, and its facts show us that the one entity that could have said precisely what the policy was, i.e., the insurance company, did not do so. It led no evidence. It did not even examine its own officer. It did not put into evidence the policy that it now claims was limited. It is argued before me with all seriousness that it was responsibility of this 22-year-old widow and her three minor children to produce the policy. For, without that policy, the claim would have to be rejected. In short, I am asked to hold that there is some sort of presumption that every policy, if not proved, is only a limited or statutory policy.

4. The exact nature of the policy was a matter especially within the knowledge of the insurance company within the meaning of Section 106 of the Evidence Act. If the insurance company wished to limit its liability, it had to show this by putting a copy of that policy into evidence. This was the minimum required. Far from this lack of evidence to the insurer's advantage, it is to its very disadvantage, for an adverse inference must now be drawn that had the insurance company produced that policy and got it marked in evidence, it would have been found that it was a comprehensive and not a statutory policy, one that did indeed cover third party risk.

5. This is the limited ground of challenge in this appeal. It is a ground that I cannot and will not countenance. The appeal will fail, and it will fail for these reasons.

6. A quick look at the facts. The accident occurred on 28th February 1992 at about 11.55 p.m. I am only noting this date because it means that a quarter century has passed since the date of the accident, and for the claimants there is still no light at the end of this interminable judicial tunnel; and the insurer would have them enshrouded forever in that darkness. The first claimant, the widow was 22 years old then. She is 47 years old now. All three children are now adults.

7. Justice has, like the cup of Tantalus, remained always just out of reach.

8. That situation ends today.

9. The motorcycle on which the deceased, Govind Sakharam Dhotre, was riding pillion was hit by a lorry coming from the opposite direction. So severe was the collision that the motorcyclists were thrown off. The lorry was driven so fast that it rolled on for nearly 200 feet, hit an electric pole and travelled a further 200 feet. Govind Dhotre was declared dead at the hospital.

10. A FIR was lodged. A certified copy was on record. Govind Dhotre's widow and children filed a claim. The insurer contested. In paragraph 6, the MACT noted that the insurer had not examined any witness in support of any of its pleadings. The cross-examination of the claimants by the insurer was utterly futile. The claimants led evidence of the widow. She was cross-examined, but to no avail. The Claimants examined police constable Prabhakar Kharat who was on site and filed the FIR. He was cross-examined. There were a number of suggestions put to PW2, Kharat including that there was no street light on that stretch of the LBS Road where the accident occurred.

11. Additional issue No. 4 was framed on 21st February 2005 and in this issue it seems that the burden was placed on the claimants to prove whether the truck was insured with the appellant. The claimants discharged this burden by bringing on record the RTO certificate. It showed the number of the vehicle, the name of the owner and the name of the insurance company. It also mentioned the insurance policy cover note and certificate No. 168798, and that the policy covered the period in question. Thus, the Claimants' initial burden of proof of insurance cover was adequately discharged. It then fell to the insurer, and there is no other way to look at it, to show affirmatively that its issued insurance policy was limited in its coverage and was only a statutory policy. This is not something that the claimants could have done or could reasonably have been expected to do. The law casts no such burden on the claimants in a motor accident claim. The burden of proving an exclusion or limitation is always on the insurance company or the insured or both. This burden was not discharged.

12. The Tribunal, therefore, could not have arrived at a conclusion on a limited liability or of non-coverage of third party liability. It quite correctly did not do so. Its judgment in this regard cannot be faulted.

13. The Tribunal considered the loss of dependency at Rs. 3,84,000/- and I will not interfere with that portion of the award.

14. However, the amounts awarded towards consortium, loss of estate and funeral charges are abysmally low even given that the award was delivered in 2007, ten years ago. Only Rs 5,000/- was awarded towards funeral charges, Rs. 10,000/- towards loss of estate and a meagre amount of Rs. 5,000/- for loss of consortium. Nothing at all was awarded for loss of love and affection to the three minor children who lost their father so early in life. The eldest of them was a boy then aged eight, the second a female child then six years old, and the third, a son aged only two. In my view, the funeral charges would need to be increased to Rs. 25,000/-. The amount for loss of consortium cannot be less than Rs 1 lakh. There would have to be a combined amount for loss of estate and loss of love and affection — it being not possible to segregate these two — in the amount of Rs. 1 lakh to each of the three children. This would mean that under these heads the total addition would be Rs. 4,25,000/-, and when added to the dependency figure of Rs. 3,84,000/- it would amount to Rs. 8,04,000/-, rounded of to Rs. 8 lakh.

15. Now that the three children are all majors, there is no question of setting aside any amount in investment for their future. Out of Rs 8 lakhs, Rs 5 lakhs is to be paid to the 1st claimant widow and Rs 1 lakh to each of the three children.

16. The balance or entire amount, as the case may be, is to be deposited with all accrued interest at the rate awarded of 7% per annum from 1st January 2004 till realization with the MACT Mumbai. The statutory deposit of Rs. 25,000/- is also to be transferred to the MACT Mumbai with all accrued interest.

17. The Claimants will be entitled to withdraw the entire amount and the statutory deposit, both with accrued interest. The MACT Mumbai will permit withdrawal on production of an authenticated copy of this order.

18. Civil Application No. 4182 of 2008 seeking stay does not survive and is disposed of as infructuous.

(G. S. PATEL, J)