IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO.1618 OF 2011

United India Insurance Co. Ltd. ..Appellant
V/s.
Sunita Nagnath Gofane & Ors. ..Respondents

WITH
FIRST APPEAL NO.1633 OF 2011

Tukaram Bhagwan Dhanake ..Appellant
V/s.
Sunita Nagnath Gofane & Ors. ..Respondents

Mr.K.N. Kandekar for the Applicant in FA No.1618 of 2011.

Mr.Ujwal R. Agandhsurve for the Applicant in FA No.1633 of 2011.

Mr.R.S. Alange for Respondent Nos.1 to 3.

CORAM : M. S. SONAK, J.

DATE : 09 FEBRUARY 2017.

P.C.

1. Heard the learned counsel for the parties. At their request and with their consent, these appeals are disposed of finally at this stage.

2. The learned counsel for the parties also agree that these two appeals can be disposed of with the common judgment and order.

3. First Appeal No.1618 of 2011 has been instituted by the

Insurance Company to question the judgment and award dated 21 April 2011 made by MACT, Solapur (Impugned Award). Similarly, First Appeal No.1633 of 2011 has also been instituted to question the very same impugned award, but, by the owner of the motor vehicle which was involved in the accident.

4. The operative portion of the impugned award reads thus :

“Order

The claim petition is partly allowed as under.

(1) Respondent No.1 is liable to pay compensation of Rs.3,67,000/- (Rupees Three lakhs Sixty Seven Thousand only) to petitioners along with interest @ Rs.7/- p.c.p.a. from date of registration of petition till realization of entire amount.

(2) Respondent No.2-Insurance Company is exonerated from liability. However respondent no.2 is directed to pay amount of compensation to petitioners and then recover the same from respondent no.1-owner of the vehicle.

(3) Above amount includes amount payable on the basis of 'No fault liability' under section 140 of Motor Vehicle Act.

(4) After depositing above amount, same be divided in three equal shares. Petitioner Nos.2 and 3 are minors, therefore amount of their shares to be kept in Fixed Deposit in a Nationalized Bank by showing petitioner No.1 as guardian till minors attain age of majority.

(5) Amount of share of petitioner no.1 be paid to her by account payee cheque.

(6) Petitioners are also entitled for proportionate costs.

(7) Award be drawn accordingly."

5. Mr.K.N. Kandekar the learned counsel appearing for the Insurance Company has made two submissions in support of the appeal :-

(a) That in the present case, it is the deceased who was negligent and not the driver of the tractor involved in the accident. Therefore, no liability could have been fastened upon the driver, owner and consequently, the Insurance Company ;

(b) In any case, Mr.Kandekar submits that since it was established that the driver of the tractor had no valid driving license, there was a fundamental breach of the terms of the Insurance Policy. In such a situation, there is no question of requiring the Insurance Company to first pay the compensation amount and then to recover the same from the owner;

6. Mr.Surve the learned counsel for the owner of the tractor i.e. the appellant in the First Appeal No.1633/2011 submits that there was no negligence whatsoever on the part of driver of the tractor and therefore, there was no reason to fasten any liability upon the driver or the owner;

7. In any case, Mr.Surve submits that this was not a fit case to exonerate Insurance Company, since, the Insurance Policy was admittedly been taken out by the owner and the same was valid on the date of accident.

8. Mr.Alange the learned counsel for the respondent-claimants submits that in this case no evidence on the aspect of negligence was led either by the owner or the Insurance Company. In fact the owner filed a pursis that he does not want to led any evidence in the matter. The evidence on record amply establishes that the accident was on account of negligence of the tractor driver. He submits that the evidence establishes that it is the driver of the tractor who was driving in the rash and negligent manner and therefore the liability was rightly fastened, upon the owner/Insurance Company.

9. On the aspect of applicability of the principle of “Pay and Recover” Mr.Alange placed reliance upon the decision of the Hon’ble Supreme Court in the case *S.Iyyapan vs M/S United India Insurance [2013(7)-SCC-32]* and submitted that since the deceased was a third party, the principle of “Pay and Recover” was rightly applied. Mr.Alange submitted that these appeals are liable to be dismissed with cost.

10. The rival contentions now fall for my determination.

11. On the aspect of negligence, the MACT, has correctly appreciated the material on record and concluded that there was negligence on the part of the driver of the tractor. In this case, the owner filed the pursis that he does not wish to lead any evidence. The Insurance Company did examine a witness but obviously, such witness, was not in a position to throw light on the aspect of the negligence. In this case, the negligence is evident, since, the driver of the tractor possessed no valid driving license to drive the tractor.

Significantly, it is for this reason perhaps, that the owner led no evidence. The driver was also not examined because otherwise it would be evident that he possessed no license and therefore, was quite negligent in driving tractor in the first place. There is absolutely no case made out to interfere with the impugned award insofar as the finding of the negligence is concerned.

12. In this case, admittedly, we are concerned with the liability towards third party. This is also a case of statutory coverage. Therefore, taking into consideration series of the decisions of the Hon'ble Supreme Court, including, the decision in the case of S. Iyappan (supra), no fault can be found with the direction for “Pay and Recover”. In fact, such direction is consistent with the law laid down by the Supreme Court and there is no case made out to accept the second contention raised on behalf of the Insurance Company.

13. Mr.Kandekar submits that despite directions in First Appeal No.1633 of 2011, the owner has failed to deposit the compensation amount and therefore, recoveries are rendered difficult. Even if this is true, this by itself is certainly not a ground to interfere with the impugned award. The Insurance Company will have to institute execution proceedings against the owner for recoveries.

14. There is also no merit in the submissions of Mr.Surve that the Insurance Company ought not to have been exonerated in this matter. There is no serious challenge to the finding that the tractor was driven by driver without valid driving license. This was

a breach of the Insurance Policy term and the Insurance Company was therefore, rightly exonerated in the matter. However, since the principle of "Pay and Recover", was applicable in this case, the Insurance Company will have to first pay the claimants and thereafter recover such amount from the owner.

15. There is accordingly, no merit in either of the appeals which are liable to be dismissed and hereby dismissed. In the peculiar facts and circumstances of the present case however, there shall be no order as to costs.

16. The amount of Rs.25,000/- deposited by both the appellants in this Court shall be transferred by the Registry within a period of four weeks to the MACT at Solapur. The respondent-claimants shall be entitled to withdraw such amounts as also any further amounts which may have been deposited by the Insurance Company before the MACT in satisfaction of the impugned award.

17. In view of the dismissal of the Appeal, the Civil Applications do not survive and the same are disposed of.

(M. S. SONAK, J.)