Santosh

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
CIVIL APPLICATION NO.760 OF 2013
WITH
FIRST APPEAL NO. 1045 OF 2013

Ashok Damu Gaikwad & Ors ...Applicants
Versus
United India Insurance Co Ltd ...Respondent

Mr Sachin Gite, *for Applicants Nos.1 to 3.*
Mr Sachin D Kadam, *for Applicant No.4.*
Mr KN Kandekar, *for the Respondent, original Appellant.*

CORAM: G.S. PATEL, J
DATED: 5th July 2017

PC:-

1. This Civil Application is filed by Respondents Nos.1 to 3, the original Claimants, seeking leave to withdraw the entire amount deposited.

2. To assess this Application, it is necessary to consider briefly the claim and the grounds of Appeal. This is a fatal accident claimed under Section 166 of the Motor Vehicles Act, 1988 (**"MV Act"**). Claimant No.1 is the husband of the deceased Chhaya. Claimants Nos.2 and 3 are their sons, who were 19 years and 12 years old respectively at the time of the claim. Opponent No.1 was the vehicle owner and driver, and Opponent No.2 was the Insurer, which is now in Appeal, and is the Respondent to this Civil Application.

3. The 1st Claimant, Ashok, the husband of the deceased Chhaya, stated that on 31st March 2009 at about 7.45 a.m. Chhaya was going to the school where she worked. She was riding pillion on a motorcycle being driven by her son Claimant No. 2. At that time, a Maruti Omni Taxi No. MH-15-E-3135 driven by the 1st Opponent came from Nashik towards Pimpalgaon at high speed. It collided with the motorcycle that was being driven by Claimant No.2. Chhaya was thrown off motorcycle and sustained severe injuries to her left head, left thigh, left ankle, left shoulder, left elbow and right arm and elbow. Her pelvic bone was also fractured. She was immediately admitted to the Shatabdi Super Speciality Hospital, Nashik. She died the same day.

4. Before the MACT, Niphad, the driver/owner, Opponent No.2, did not appear. The Insurer contested the claim. It said that the owner of the Maruti Omni Taxi did not have a valid licence. It also claimed that there was negligence on the part of the Claimant No.2.

5. After considering the material and the evidence, the Trial Court rejected the submission that the taxi driver did not hold a valid licence. The licence was found to be valid till 2012. No evidence was led by the Insurer on this point.

6. As to the question of contributory negligence, the Insurance Company also contended that the taxi was not insured at all. Paragraph 14 of the impugned order makes it clear that this was not a defence raised in the written statement at all. It was therefore not a defence pleaded. It was raised only in arguments. It is highly doubtful if such a plea can be raised only in arguments without a supporting pleading. Even if proceedings under MV Act are not as formal in nature as matters in a civil court, fundamental rules must be followed. Before the Trial Court it was contended that the policy in question No. PR63000109162 for a period from 27th February 2009 to 26th February 2010 was not issued by the Insurer at all. A copy of the policy was marked as Exhibit 51.

7. Exhibit 42 was the cover note that was issued. This showed the validity of the policy for one year from 27th February 2009 to 26th February 2010. Despite this, the insurer contended that a policy was not issued. The Insurer was required to inform the RTO, Nashik about this. It was required to establish that the notice had been given of the non-issuance of the policy. The learned Judge referred to Section 147 of the MV Act which mandates the procedure for intimation of non-issuance of a policy. This procedure was not shown to have been followed at all. The cover note itself was issued in terms of Section 147. There was no evidence that the cover note was cancelled. No evidence was led of compliance with the requirement of Section 147 of the MV Act. The Trial Court therefore concluded that it was not possible to hold that there was no policy.

8. This is the limited conspectus of the Appeal.

9. At this stage, both sides request that the Appeal itself can be disposed of forthwith. Since there is a private paper-book that has been filed, which is otherwise complete, at their request the matter is so taken up.

10. I have already set out the relevant facts above. The Trial Court framed six issues and answered them thus:

	Issues	**Findings**
1	Is it proved by the claimant that the motor accident dated 31.03.2009 on Kokangaon Phata, Kokangaon Shiwar, Mumbai-Agra Road, Nashik was the outcome of the rash and negligent driving of the driver of Kali Pivli Maruti Van No.MH-15/E-3135 ?	In the Affirmative.
2	Is it proved by the claimants that the deceased Sau.Chhaya Ashok Gaikwad r/o Kokangaon, Taluka Niphad, Dist.Nashik died due to injuries sustained to her in motor vehicle accident ?	In the Affirmative.
3	Does opponent no.2 prove that driver of the offending vehicle bearing registration No.MH-15/E-3135 was not having effective and valid licence at the relevant time of accident and thereby there was breach of terms and conditions of insurance policy and so insurance company is not liable to pay any compensation to applicants ?	In the negative.

4	Whether claimant petition is bad for non joiner of necessary parties i.e. owner and driver of motorcycle bearing No.MH-15/BS-8287 ?	No.
5	Whether the claimants are entitled to the amount of compensation if so to what extent and from whom ?	Yes. Rs.22,40,200/- from both opponents with interest @ 7.5% p.a. from the date of claim petition.
6	What order and award ?	As per final order.

11. As we have seen the limited issue is whether there was in fact in place an insurance policy. The two documents to be considered are Exhibit 51 and Exhibit 42. Exhibit 42 is the cover note. There is no dispute about these documents and they were marked in evidence. The limited case of the insurer is that the insurance policy was "never issued". In the insurer's written statement (Exhibit 15, at page 40 of the Appeal paper-book) there is no such pleading at all. This would necessarily mean that the insurance company was trying to lead evidence on a plea never taken. It is well settled law that no amount of evidence can substitute for a plea not taken. Even if it is accepted that strict rules of pleadings do not apply to the Motor Vehicles Tribunal and under the MV Act, this does not by itself mean that a substantive question of fact can be left out of the pleadings altogether and raised only at the time of trial. This is manifestly unfair. The other side, namely the Claimants, must know the case that has been made. They cannot be taken by surprise by evidence being led on a plea not taken. The Court too must have before it in the pleadings an accurate statement of the matter on which the parties are at issue. In fact, the only pleading, if it can be called that, is in paragraph 2 of the written statement which says that at the time of the alleged accident the policy 'not available' with the insurer and hence the policy of the offending vehicle is not admitted. This is all about as meaningless a pleading as it is possible to have. It is for the insurer company to keep its records in a proper fashion.

12. Indeed this pleading completely destroys an attempt to argue to the contrary. With this pleading, the insurer could not have argued that the policy was never issued. Its only pleading was that it did not have available the policy. Therefore it could not know whether the policy was issued or not. It was not in a position to state affirmatively that no policy was issued. This was therefore not even evidence but the purest speculation.

13. Consider in this context the provisions of Section 147 of the MV Act.

> **"147 Requirements of policies and limits of liability. —**
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> **(1)** In order to comply with the requirements of this Chapter, a policy of insurance must be a policy which—
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> **(a)** is issued by a person who is an authorised insurer; and

(b) insures the person or classes of persons specified in the policy to the extent specified in sub-section (2)—

(i) against any liability which may be incurred by him in respect of the death of or bodily [injury to any person, including owner of the goods or his authorised representative carried in the vehicle] or damage to any property of a third party caused by or arising out of the use of the vehicle in a public place;

(ii) against the death of or bodily injury to any passenger of a public service vehicle caused by or arising out of the use of the vehicle in a public place:

Provided that a policy shall not be required—

(i) to cover liability in respect of the death, arising out of and in the course of his employment, of the employee of a person insured by the policy or in respect of bodily injury sustained by such an employee arising out of and in the course of his employment other than a liability arising under the Workmen's Compensation Act, 1923 (8 of 1923), in respect of the death of, or bodily injury to, any such employee—

(a) engaged in driving the vehicle, or

(b) if it is a public service vehicle engaged as conductor of the vehicle or in examining tickets on the vehicle, or

(c) if it is a goods carriage, being carried in the vehicle, or

(ii) to cover any contractual liability.

Explanation. —For the removal of doubts, it is hereby declared that the death of or bodily injury to any person or damage to any property of a third party shall be deemed to have been caused by or to have arisen out of, the use of a vehicle in a public place notwithstanding that the person who is dead or injured or the property which is damaged was not in a public place at the time of the accident, if the act or omission which led to the accident occurred in a public place.

(2) Subject to the proviso to sub-section (1), a policy of insurance referred to in sub-section (1), shall cover any liability incurred in respect of any accident, up to the following limits, namely:—

(a) save as provided in clause (b), the amount of liability incurred;

(b) in respect of damage to any property of a third party, a limit of rupees six thousand:

Provided that any policy of insurance issued with any limited liability and in force, immediately before the commencement of this Act, shall continue to be effective for a period of four months after such commencement or till the date of expiry of such policy whichever is earlier.

(3) A policy shall be of no effect for the purposes of

this Chapter unless and until there is issued by the insurer in favour of the person by whom the policy is effected a certificate of insurance in the prescribed form and containing the prescribed particulars of any condition subject to which the policy is issued and of any other prescribed matters; and different forms, particulars and matters may be prescribed in different cases.

(4) Where a cover note issued by the insurer under the provisions of this Chapter or the rules made thereunder is not followed by a policy of insurance within the prescribed time, the insurer shall, within seven days of the expiry of the period of the validity of the cover note, notify the fact to the registering authority in whose records the vehicle to which the cover note relates has been registered or to such other authority as the State Government may prescribe.

(5) Notwithstanding anything contained in any law for the time being in force, an insurer issuing a policy of insurance under this section shall be liable to indemnify the person or classes of persons specified in the policy in respect of any liability which the policy purports to cover in the case of that person or those classes of persons."

14. Section 147(1)(b) clearly applicable to the case on hand. The cancellation of the policy was required to be done in the manner stipulated in Section 147(4). If therefore it was the case of the insurer that the policy was not issued at all then it would have to show that it had followed the prescribed procedure under Section 147(4).

15. This takes us to the evidence Affidavit of insurer's witness Ashok Karbhari Pawar, which is at Exhibit 47, and his cross-examination which is at Exhibit 35. In the examination-in-chief the witness only stated that the policy was not issued. It was not stated that why the cover note was issued but not followed by the policy for the prescribed term. The witness did not say that the insurer within seven days notified this fact to the Registration Authority — in this case the RTO Nashik — in whose records the vehicle and the cover note were registered. Therefore, assuming that the insurer was entitled to lead this evidence in the first place, and which, in my view, it was not, the evidence led by insurer did not actually prove the case that was sought to be placed. All that remained was the bare words of the insurance company that no policy had been issued. This, as we have seen, was based merely on the insurer's inability to find the policy in its records rather than on actual evidence of notice being given in the manner required by Section 147(4) that the policy had not been issued.

16. Returning to the judgment under Appeal, MACT then examined the question of income for the purpose of computing dependency. The claim was for a gross salary of Rs.21,257/-. But this, the MACT found, was not actual salary in hand but included a yet to be paid 6th Pay Commission increase. The income taken was rounded off to Rs.14,200/-, in my view, quite correctly. The deduction was taken at 1/3rd. An addition of 30% was allowed as future prospects and a multiplier of 15 was used. An additional

Rs.25,000/- was awarded towards loss of love and affection and consortium and the total compensation worked out was Rs.22,40,200/-. Interest was awarded at 7.5% per annum.

17. If anything, I would say that the amount awarded towards loss of love and affection and consortium is considerably on the lower side. Chhaya was at the time of her demise about 40 years old. She left behind a widowed husband and two sons. This amount in my view should have been in the region of Rs. 1,00,000/- to constitute just compensation.

18. The amount totally awarded was divided between the three Claimants in the ratio of 34:33:33.

19. There can be no quarrel with any of the findings, reasoning or conclusion of the MACT. The Appeal will have to dismissed. It is.

20. As I said, here, the amount awarded towards loss of consortium etc was Rs.25,000/-, very much on the lower side. However, to increase the award at this stage would require the Applicants-Claimants to go through considerable more hardship and inconvenience in recovery. I will therefore refrain from interfering with the order to increase the amount awarded.

21. The Appeal is dismissed with costs quantified at Rs. 75,000. I award these costs keeping in mind the nature of the defence, one I find to be thoroughly misconceived, frivolous and self-serving.

22. The Applicants will be entitled to withdraw the entire amount deposited with the MACT with accrued interest. The amount of Rs.25,000/- deposited in this Court is to be transferred to the MACT, Niphad and that amount will also be permitted to be withdrawal.

23. The costs awarded of Rs.75,000 are to be paid into the trial court and will also be permitted to be withdrawn.

24. The MACT will permit the withdrawals on production of an authenticated copy of this order. R&P to be returned to the MACT Niphad.

(G. S. PATEL, J.)