IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

FIRST APPEAL (ST) NO. 10960 OF 2013
WITH
CIVIL APPLICATION NO. 3362 OF 2013
WITH
CIVIL APPLICATION NO. 3440 OF 2014
WITH
CIVIL APPLICATION NO. 4714 OF 2016

The Oriental Insurance Co. Ltd. .. Applicant
vs.
Smt. Anusaya B. Sonawale and ors. .. Respondents

AND

FIRST APPEAL (ST) NO. 10835 OF 2013
WITH
CIVIL APPLICATION NO. 3365 OF 2013
WITH
CIVIL APPLICATION NO. 4715 OF 2016

The Oriental Insurance Co. Ltd. .. Applicant
vs.
Waman Deu Thakare and ors. . .. Respondents

Ms Poonam Mital for the Applicant-Appellant.
Mr. Ramesh Chavanke for Respondent Nos.1 and 2.

CORAM : M. S. SONAK, J.
DATE : 18 JANUARY 2017.

P.C. :-

1] With the consent of and at the request of learned counsel for the appellant and respondent Nos.1 and 2 (original claimants) the appeals are taken up for final disposal, in view of the short point involved. Learned counsel for the parties state that common issues of law and fact arise in both these appeals and, therefore, they can be disposed of by a common order by treating the appeal in case of Anusaya B. Sonawale as the lead matter.

2] Ms. Poonam Mital, learned counsel for the appellant, submits that the Insurance Policy had very clearly provided that the vehicle can be used only for social, domestic or pleasure purposes and not for hire or reward. She submits that in the present case, the deceased Bhurabai was a fare paying passenger and the owner of the vehicle, having permitted fare paying passenger to ply in the vehicle, has committed a breach of terms and conditions of the insurance policy. Ms Mital submits that the appellant-Insurance Company would, therefore, cannot be held liable for payment of compensation.

3] Mr. Ramesh Chavanke, learned counsel for respondent Nos.1 and 2 (original claimants) submits that there is absolutely no evidence brought on record to establish that the deceased was a fare paying passenger. He submits that a bare statement made by Assistant Manager of the appellant-Insurance Company, is no evidence to establish such a circumstance. The Insurance Company did not examine the owner or the driver of the vehicle. Even otherwise, the material on record, establishes that the deceased was not a fare paying passenger. Mr. Chavanke places reliance upon the decisions of the Hon'ble supreme Court in ***National Insurance Company Ltd. vs. Tulna Devi – 2008 (3) TAC 748 (S.C)*** and ***New India Assurance Co. Ltd. Vs. Kamla and ors. - 2001 ACJ 843 (SC).***

4] The rival contentions now fall for my determination.

5] In this case, the appellant-Insurance Company has examined its Assistant Manager Shri. Shirish Medhi, who has deposed that the jeep in which the deceased was travelling was insured with the appellant-Insurance Company, subject to certain terms and conditions. He has placed on record the certificate-cum-policy of insurance, which is marked as Exhibit-39 by the Motor Accident Claims Tribunal (MACT). This witness has deposed that as per the insurance policy, the jeep was to be used only for social, domestic and pleasure purposes and there was a bar to user of the jeep for hire or reward. This witness has stated that according to him, the said jeep was carrying fare paying passengers illegally and, therefore, there is a breach of the terms and conditions of the insurance policy. He has concluded that the appellant-Insurance Company is, accordingly, not liable to pay any compensation in the matter.

6] The statement made by Shri. Shirish Medhi has been challenged in the course of cross-examination. In any case, a bare statement to the effect that the jeep was carrying fare paying passenger is hardly any material to establish such a circumstance. The appellant - Insurance Company did not apply for examination of the owner or the driver or any other witnesses, who may have been travelling in the jeep or who may have some proper knowledge that the jeep in question had indeed been used for hire or reward contrary to the terms of the Insurance Company. On the basis of such a challenged statement, it cannot be said that the Insurance Company has succeeded in establishing that there was any breach of terms and conditions of the insurance policy.

7] Ms Mital then made reference to the FIR, which, according to her, is a part of the record and in which there is reference to the jeep carrying the passengers. Such document, *per se*, can hardly be regarded as evidence of the circumstance that the jeep was carrying any fare paying passengers. Even the FIR, makes no reference to "*fare paying passengers*". In any case, the Insurance Company has led no evidence, either by examining the person who lodged the FIR or other wise to establish that the jeep was indeed carrying fare paying passengers. In such a situation, it cannot be held that there was any breach of the terms and conditions of the insurance policy.

8] The MACT has rightly relied upon the decision of the Hon'ble Supreme Court in *Tulna Devi (supra)*, which held that where the Insurance Company does not lead any evidence to prove that there was disqualification of the driver to drive passenger vehicle, the Insurance Company cannot escape liability to pay compensation by merely alleging breach of the terms and conditions of the insurance policy. In *Kamla (supra)* the Hon'ble Supreme Court has held that the insurer and insured are bound by the conditions enumerated in the policy and the insurer is not liable to the insured if there is violation of any policy condition. But, the insurer who is made statutorily liable to pay compensation to third parties on account of the certificate of insurance issued, shall be entitled to recover from the insured the amount paid to the third parties, if there was any breach of policy conditions on account of the vehicle being driven without a valid driving license. In this case, the Insurance Company has failed to establish that there was a breach of terms and conditions of the Insurance policy on the part of the insured. In any case, respondent Nos.1 and 2 are third parties and there is no question of the appellant avoiding any liability towards them.

9] For the aforesaid reasons, these appeals are dismissed with costs assessed at Rs.20,000/- in each of the appeals.

10] According to the appellant - Insurance Company the entire awarded amounts together with interest and costs as determined in the impugned awards have been deposited before the concerned MACT. Mr. Chavanke, learned counsel for respondent Nos.1 & 2, however, states that the entire amount has not been deposited. Be that as it may, now since the appeals are dismissed, respondent Nos.1 and 2 shall be at liberty to withdraw the amounts alongwith accrued interest, if any, deposited unconditionally. For the balance, if any, respondent Nos.1 and 2 can always file appropriate application for execution. The appellant-Insurance Company is however, directed to deposit the amount of costs in each of the appeal now imposed within a period of two weeks from today before the concerned MACT.

11] The appeals and all the civil applications are disposed of accordingly.

(M. S. SONAK, J.)

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