IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO. 1220 OF 2016

The New India Insurance Company Ltd. ...Appellant
Versus
Sou. Ujwala Udayraj Kulkarni & Anr. ...Respondents

Mr. Misar, for the Appellant.

Mr. N.B. Wakle, i/b Kedar J. Patil, for the Respondents No. 1 and 2.

CORAM : M.S. SONAK, J.
DATE : 4 April 2017

ORDER :

1. Heard Mr. Misar for the Appellant and N.B. Wakle for the Respondents No. 1 and 2-original Claimants.

2. Taking into consideration the grounds which Mr. Misar has pressed in support of this Appeal, it will be appropriate that the Appeal is disposed of finally at this stage.

Mr. Wakle, the learned Counsel for the Respondents No. 1 and 2 has stated that these Respondents are not desirous of filing any cross-objections in the matter.

3. Mr. Misar, the learned Counsel for the Appellant has basically raised the following grounds in support of the Appeal :-

(a) That the driver of insured vehicle was not having an effective driving licence, when accident took place at the relevant point of time. This constitutes breach of the terms of the insurance policy and accordingly, the Insurance Company is not liable for payment of compensation;

(b) The deceased Chetan Kulkarni was not wearing a helmet-headgear and therefore, was himself responsible for the accident, in any case, there is contributory negligence involved.

(c) The motor cycle, which Chetan was riding, has dashed against the insured vehicle towards the rear and from this, it is evident that Chetan was negligent. In any case, it is submitted that it is the case of contributory negligence on the part of Chetan.

(d) It is possible that the Respondents-Claimants have also raised claim under the Employees Compensation Act, 1923. It is submitted that there is a bar to raise the claims in two fora concurrently. On this ground also, the claim should have been dismissed by the Motor Accident Claims Tribunal, Sangli.

4. As regards as the first ground, the Appellant, in paragraph 9 of the Written Statement, has pleaded as follows :-

"Without prejudice to above said statements this Respondent submits that, the Driver of Tata Truck bearing No. MH-09-BC-3290 i.e. Respond no. 1,

> *driving licence is not on record, there for there is reason believe that, said driver was not having valid & effective driving licence for driving vehicles at the relevant point of time. It is clear breach of policy terms & condition; on this count also this Respond is not liable to pay any compensation to the Petitioner.*

5. From the aforesaid, it is clear that the Insurance Company has not made any categorical statement that the truck driver was not having any licence to drive the truck. The averment, is only for the purpose of expressing the same doubt that he might not have had a driving licnece. Such averment, cannot even be construed as some proper denial in the eyes of law.

6. In any case, even assuming that such averment is to be given any credence, then, nothing precluded the Appellant Insurance Company itself from leading evidence in the matter. The insurance Company could have merely summoned the truck driver or could have summoned the RTO Authority to establish

the truck driver was indeed not having any licence and therefore, there was some breach of terms and conditions of the insurance policy. Nothing of this sort has been done by the Insurance Company. In such circumstances, there is no merit in the first ground raised in support of this Appeal.

7. In so far as the second ground is concerned, it does not appear to have been raised in the Written Statement. In absence of any such plea, there was no question of MACT, Sangli, even being required to go into this issue. Mr. Misar, the learned Counsel for the Appellant submits that this is a question of law and therefore, can be raised for the first time in this Appeal. The submission is totally misconceived. The question, whether Chetan was wearing helmet, was purely a question of fact and unless, such issue was raised in Written Statement, the same cannot be raised or adjudicated for the first time in the Appellate Court. Accordingly, there is no merit in the second ground urged in support of this Appeal.

8. Third ground basically relates to the issue of negligence or contributory negligence. In this case, the evidence

was led on behalf of the Claimants. Apart from the oral evidence, the Claimants have produced certain documents on record which establish the manner in which an accident has taken place. On the basis of such material, it cannot be said that the accident took place on account of negligence on the part of the deceased. The truck driver and the owner of the truck are also parties to the claim Petition. They have chosen not to contest the proceedings. Insurance Company, though, had raised issue of negligence also chose not to lead evidence in the matter. On the basis of material on record, the least that can be said is that the Claimants had discharged the onus, which was initially upon them. Thereafter, in case any rebuttal was necessary, it was for the Insurance Company to have led further evidence in the matter which Insurance Company failed to do so. In these circumstances, it is not possible to accept the third ground raised in this Appeal.

9. The fourth ground is again in the nature of surmises or conjectures. In case, Insurance Company, had any credible material with it to show that the Claimants had already raised and received certain compensation under the Employees

Compensation Act, 1923, then, it is for them to place on record such material. Merely raising a doubt that this might have been the position, is hardly the manner in which a serious issue of this nature can be permitted to be raised. Accordingly, there is no merit in the fourth ground as well.

10. Mr. Misar also submitted that without there being any evidence, the learned MACT has awarded Rs. 50,000/- towards medical expenses including hospitalisation, medicines and transportation. There is no dispute that Chetan did not expire on the spot and was required to be hospitalised after the accident. In these circumstances, it cannot be said that there is some error in awarding Rs. 50,000/- towards the medical expenses. However, even if the submission of Mr. Misar is accepted and the compensation amount of Rs. 50,000/- is to be deducted, it is to be noted that learned MACT has awarded compensation of only Rs. 1,00,000/- to the Claimant for loss of love and affection on account of the demise of their son Chetan. In fact, in accordance with law laid down in the Supreme Court in case of ***Rajesh and Ors. Vs. Rajbir Singh and Ors***.[1],

1 ***2013 ACJ 1403***

compensation of Rs. 1,00,000/- each should have been awarded to both the Claimants.

11. Accordingly, there is no case made out to interfere with the impugned Award. This Appeal is accordingly, dismissed. Civil Application does not survive and the same is also dismissed.

12. Since the Appeal is dismissed, the Respondents No. 1 and 2 are obviously entitled to the compensation amount as has been awarded by the MACT. There is no necessity to make any separate order in Civil Application No. 929 of 2017, which is basically for withdrawal of the compensation amount which has been deposited by the Appellant. This Civil Application is also disposed of accordingly.

13. Registry to transmit the amount of Rs. 25,000/- deposited in this Court to the MACT, Sangli within a period of two weeks from today.

[M.S. SONAK, J.]