

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**FIRST APPEAL NO. 1945 OF 2009
WITH
FIRST APPEAL NO. 1946 OF 2009**

ICICI Lombard General Insurance Co. Ltd.
Zenith House, Keshavrao Khade Marg,
Opp. Race Course, Mahalaxmi,
Mumbai 400 034

... Appellants
(Orig.Resp.No.2)

Versus

1. Sarjerao Pataloji Kshirsagar
(Deceased) through his Legal Heir
Nilima Raviraj Jadhav
Aged about 32 years,
R/at Bunglow No.2, Parijat
Housing Society, Sahunagar, Satara
2. Rajinder Harbhajan Singh,
Aged – Adult, Business,
R/o F-173, Vishnu Garden,
Khyala, Delhio

... Respondent
[Respdt.No.1 is LR of
orig. applicant and
Respondent No.2 is the
orig. Respdt.No.1 respdy.]

.....

Mr. Rajesh Kanojia, Advocate i/b Res Juris for the Appellant.
Mr. R.V. Bansode, Advocate for Respondent No.1.
Smt. Sheetal Mallikarjun Ubale, Advocate for Respondent No.2.

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CORAM : A. S. CHANDURKAR, J.

ARGUMENTS HEARD ON : 06th DECEMBER, 2018
JUDGMENT PRONOUNCED ON : 13th DECEMBER, 2018

JUDGMENT :

1. Since both these appeals arise out of a common judgment of the Motor Accident Claims Tribunal, Satara in M.A.C.P. No.219 of 2007 and M.A.C.P. No. 229 of 2007 awarding compensation to the claimant, they are being decided together by this common judgment.

2. The facts in brief are that, one Nilesh Kshirsagar and his wife Sheetal were travelling in a car. Said car met with an accident on 11/05/2007 with the vehicle owned by respondent No.2 resulting in their death. The offending vehicle was insured with the appellant-Insurance Company. Two claim petitions under Section 166 of the Motor Vehicles Act, 1988 (for short 'the said Act') were filed by the father of Nilesh and father-in-law of Sheetal. Claim Petition No.219 of 2007 seeks compensation for the death of Nilesh, while Claim Petition No.229 of 2007 seeks compensation for the death of Sheetal. In the written statement filed by the Insurance Company, a stand was taken that though the owner of the vehicle had issued a cheque for Rs.9195/- towards the amount of insurance premium for the period from 28/02/2007 to

27/02/2008, that cheque was dishonoured for want of sufficient funds. The Insurance Company informed the owner about the dishonour of the cheque and the cover note was therefore cancelled from its inception. In absence of there being any contract of insurance, the Insurance Company was not liable to pay the amount of compensation.

3. The Claims Tribunal after considering the evidence on record held that the accident was caused on account of rash and negligent driving by the driver of the offending vehicle. The offending vehicle was duly insured with the Insurance Company and that the dishonour of the cheque and cancellation of the cover note was not communicated to the owner. Both the Claim Petitions were accordingly allowed granting compensation therein. The Insurance Company being aggrieved by the said award has filed these two appeals.

4. Shri Rajesh Kanojia, learned Counsel for the appellant in both the appeals made a singular submission that in the light of the fact that the cheque issued by the owner of the vehicle in question towards the premium amount having been dishonoured,

the said vehicle was not duly covered with insurance and therefore it was the liability of the owner of the vehicle to satisfy the claim as made. There was no concluded contract of insurance. The evidence on record was sufficient to indicate the fact that dishonour of the cheque was duly intimated to the owner of the vehicle. The cancellation of the insurance policy as well as the cover note was also intimated to the Regional Transport Office. The learned counsel relied upon the documents at Exhibits-101/1 to 101/3 in that regard. Moreover, when the owner of the vehicle was aware of the fact that the cheque issued by him had been dishonoured, the liability could not be shifted upon the Insurance Company. The learned Counsel also relied upon the deposition of the witnesses examined by the Insurance Company to urge that said fact had been duly proved. In support of his submissions the learned Counsel relied upon the decision of the Hon'ble Supreme Court in **2012 (5) Mh.L..J 506 (United India Insurance Co. Ltd. Vs. Laxmamma & others)** and submitted that the Insurance Company was liable to be exonerated from its liability.

5. On the other hand, Shri R. V. Bansode, learned Counsel for the respondent No.1-claimant submitted that according to the

Insurance Company the amount of premium was Rs.9195/-. However, the cover note indicated premium amount of Rs.9993/-. The dishonoured cheque for Rs.9195/- was not produced by the Insurance Company before the Claims Tribunal and the witness examined in that regard had also admitted this fact. The Insurance Company in fact had issued the cover note after the dishonour of the cheque. The manner in which the dishonour of the cheque and cancellation of the policy in question was intimated to the owner of the vehicle and the Regional Transport Office was not proved. Thus, in absence of proof of such intimation, the liability of the Insurance Company would subsist and it was liable to satisfy the claim as made.

6. In the light of aforesaid submissions, the following points arise for determination.

- (i) Whether the Insurance Company has proved due intimation being given to the owner of the vehicle as regards dishonour of the cheque as well as of cancellation of the policy to the Regional Transport Office?

- (ii) Whether the Insurance Company is liable to be excluded from its liability on account of dishonour of the cheque towards the premium account?

7. The Insurance Company in its written statement has raised a specific plea that cheque No.105492 for Rs.9195/- issued by the owner of the offending vehicle towards the premium amount was dishonoured and therefore the cover note issued by the Insurance Company stood cancelled from its inception. The policy of the vehicle in question therefore did not operate from 28/02/2007. Since the Insurance Company intended to avoid its liability by raising said defence, the burden to prove the same was on the Insurance Company. To discharge the same the Insurance Company has examined its legal Manager Manish Waghmare at Exhibit-100. He has deposed that the owner of the offending vehicle had given a cheque for Rs.9195/- bearing No.105490 towards the premium amount on 24/02/2007. On 05/03/2007 the owner was informed that said cover note had been cancelled from inception as the said cheque was dishonoured on 24/02/2007. The said intimation was sent under certificate of posting. In his cross examination said witness has stated that two cheques had been given by the owner of the vehicle on

24/02/2007. One cheque was for Rs.798/- and the other cheque was for Rs.9195/-. On that basis the cover note was issued on 28/02/2007. The witness admitted that the dishonoured cheque with the endorsement that it was returned on account of insufficient funds was not produced on record. Similarly, the intimation about dishonour of the cheque was not given to the owner by registered post. He further admitted that he could not state the date mentioned on the postal seal that was put on the certificate of posting informing the owner of the vehicle as to dishonour of the cheque. He also could not state the date on which the Insurance Company came to know about the status of the cheque in question. He further admitted that the number of the vehicle insured was not mentioned in the letter issued by the Insurance Company to the owner of the vehicle on 05/03/2007. He also admitted that he had not produced any document to show that the policy number mentioned in the letter at Exhibit-101/2 was corresponding to the concerned cover note. He was also not aware as to who had issued the letter in question to the owner and that there was no reference in that letter that it was being sent under certificate of posting.

8. The learned Member of the Claims Tribunal after considering the aforesaid evidence found that the said evidence was insufficient to come to the conclusion that there was no concluded contract between the owner of the vehicle and the Insurance Company on account of dishonour of the said cheque. It was also observed that the date of the postal seal appeared to be of 22/05/2007, which was after the date of the accident. In absence of the said cheque being brought on record the defence as raised was not accepted.

9. Perusal of the letter dated 05/03/2007 at Exhibit-101/2 indicates that the same is issued to the Regional Transport Office, New Delhi with a copy to the owner of the vehicle stating therein that the cover note issued in favour of the owner of the vehicle had been cancelled from inception as cheque bearing No.105490 for Rs.9195/- had been dishonoured. The certificate of posting at Exhibit-101/1 indicates that three articles were dispatched on 05/03/2007 out of which one was addressed to the owner of the offending vehicle. The postal seal thereon is not very clear and the observation as made by the learned Member of the Claims

Tribunal that the date appearing thereon was 22/05/2007 is also possible. It is to be noted that the reference number of letter dated 05/03/2007 at Exhibit-101/2 is 19129, while the reference number mentioned in the certificate of posting is 23190. It can also be seen that the certificate in question indicates an article addressed to the owner of vehicle, but there is nothing to indicate that any such intimation was also given to the Regional Transport Office. The document at Exhibit-101/3 indicates the status of cheque No.105490 having been dishonoured on 24/02/2007.

10. As regards sending of intimation under certificate of posting is concerned, it is to be noted that the date on which the said articles were dispatched under said certificate of posting is not very clear from the document at Exhibit-101/1. The Courts have been slow in recognising as a proper mode of service any article sent under certificate of posting. In ***Gadakh Yashwantrao Kankarrao Vs. E. V. alias Balasaheb Vikhe Patil and others – AIR 1994 SC 678*** it was observed by the Hon'ble Supreme Court that a certificate of posting is very easy to be obtained and the same is not reliable mode of delivery. Similarly, in ***Shiv Kumar and others Vs. State of Haryana and others – (1994) 4 SCC 445***

the Hon'ble Supreme Court observed that it did not feel safe to decide the controversy in question on the basis of certificates of posting. It was further observed that it was not difficult to get such postal seals at any point of time. The Court refused to rely upon the certificate of posting therein as a mode of proper service. Reference can also be made to the decision in **(2006) 1 SCC 407 - (State of Maharashtra Vs. Rashid B. Mulani)**, wherein it has been observed in clear terms that a Certificate of posting obtained by a sender is not comparable to a receipt for sending a communication by registered post. No record is maintained by the post office either about receipt of the letter or of the certificate issued and in absence of such record, a certificate of posting would be of very little assistance. It was also observed that the ease with which such certificates can be prepared by affixing an antedated seal is a matter of concern.

In the light of the aforesaid decisions and in absence of any clear evidence with regard to the date on which the intimation was sent both to the owner of the vehicle and the Regional Transport Office, it would not be permissible to solely rely upon the certificate of posting at Exhibit-101/2 to come to the

conclusion that the intimation in that regard was given to the insured as well as to the Regional Transport Office for avoiding the liability of the Insurance Company.

11. As per provisions of Section 147 (4) of the said Act, it is the duty of the insurer to notify the fact that the cover note issued by it is not followed by a policy of insurance. This has to be done within seven days from the expiry of the period of validity of the cover note. The aforesaid provisions have been considered in various decisions. In **(2008) 2 SCC 595 - (Deddappa and others Vs. Branch Manager, National Insurance Co. Ltd.)**, it has been held that if the contract of insurance has been cancelled and all concerned have been intimated about the same, the Insurance Company would not be liable to satisfy the claimant. Thus in absence of any reliable evidence indicating compliance with the statutory requirements under Section 147(4) of the said Act, it would not be permissible to exonerate the Insurance Company from its liability. It is to be noted that the provisions of the said Act are beneficial in nature and in absence of any reliable evidence on record to exonerate the Insurance Company, the claimant cannot be deprived of receiving the amount of

compensation from the insurer. Moreover, the deceased were third parties in so far as the offending vehicle is concerned. There can be no dispute with the proposition of law as laid down in ***United India Insurance Co. Ltd.(supra)*** relied upon by the learned Counsel for the appellant. However, as the provisions of Section 147 of the said Act have not been shown to have been complied with by the insurer, ratio of said decision cannot be made applicable to the case in hand.

12. Thus, on considering the entire material on record, it is found that the Claims Tribunal did not commit any error while coming to the conclusion that the Insurance Company was liable to satisfy the claim for compensation. Point No. (i) as framed is answered accordingly.

In view of this conclusion the judgment of the Claims Tribunal holding the Insurance Company liable to satisfy both the claims does not call for any interference. Said adjudication therefore stands confirmed. Point No.(ii) is answered accordingly.

13. In the light of aforesaid discussion, the following order is passed :

ORDER

- (i) The judgment dated 06/10/2009 passed by the Member, Motor Accident Claims Tribunal, Satara in M.A.C.P. Nos. 219 of 2007 and 229 of 2007 stands confirmed. First Appeal Nos.1945 of 2009 and 1946 of 2009 are dismissed. The parties shall bear their own costs.
- (ii) The claimant is free to withdraw the balance amount of compensation lying in deposit with the Claims Tribunal after a period of eight weeks from today.
- (iii) In view of dismissal of both the appeals, pending civil applications, if any, do not survive and the same are also disposed of.

(A. S. CHANDURKAR, J.)