

IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR

FIRST APPEAL NO. 1186/2008

Vasant s/o. Sadashiv Dhamnikar,
a/a adult, Occ. - Business,
r/o. Dhamni, Tq. Manora,
Distt. Washim.
[Ori. Respondent No.1, On R.A.] ... APPELLANT

---VERSUS---

1. Ramdhan s/o. Pratap Katare,
a/a 51 yrs., Occ. - Labourer.
2. Sandip s/o. Ramdhan Katare,
a/a 22 yrs., Occ. - Education,
3. Dipak s/o. Ramdhan Katare,
a/a 19 yrs., Occ. - Education.

Nos. 1 to 3 r/o. Amagaon,
Tq. Manora, Distt. Washim,
[Ori. Petitioners]

4. The New India Assurance Co. Ltd.,
through its Divisional Office,
Cotton Federation building,
Old Cotton Market, Akola,
Tq. & Distt. Akola.
[Ori. Respondent No.2] ...RESPONDENTS.

Mr. C. A. Joshi, Advocate for the Appellant.
Mr. P. R. Agrawal, Advocate for the Respondent Nos.1 to 3.
Mr. M. B. Joshi, Advocate for the Respondent No.4.

CORAM : M. S. SONAK, J.

DATE : 07.12.2021.

ORAL JUDGMENT :

1. Heard Mr. C. A. Joshi, learned Counsel for the appellant (vehicle owner), Mr. P. R. Agrawal, learned Counsel for the respondent Nos.1 to 3 (claimants), and Mr. M. B. Joshi, learned Counsel for the respondent No.4 (Insurance Company).

2. The challenge in this appeal is to the judgment and award dated 25.04.2008 made by the Motor Accident Claims Tribunal (Tribunal), Washim in M.A.C.P. No.226/2005 to the extent the impugned award exonerates the Insurance Company and foists the liability of payment of compensation entirely on the appellant – owner.

3. Mr. C. A. Joshi, learned Counsel for the appellant pointed out that in this case, the only plea raised by the Insurance Company was that the driver of the tractor did not have a valid and effective driving license to drive the said vehicle and this amounted to a fundamental breach of the terms and conditions of the policy. He submitted that apart from this pleading, there was no other pleading in the written statement filed on behalf of the Insurance Company. He, therefore, submits that the Tribunal erred in taking into consideration the case of the Insurance Company that the tractor was being used for a commercial purpose or that a tractor had one or two trolleys attached to it and even that constituted a fundamental breach of the terms of the

Insurance Policy. He submitted that the issue of the license of a tractor driver now stands settled by the three-Judge Bench of the Hon'ble Supreme Court in *Mukund Dewangan Vs. Oriental Insurance Company Limited* reported in (2017) 14 SCC 663 and the Tribunal, in this case, has incorrectly relied on the decisions which have now been overruled by the Hon'ble Supreme Court. For these reasons Mr. C. A. Joshi, learned Counsel for the appellant submits that this appeal may be allowed.

4. Mr. M. B. Joshi, learned Counsel for the Insurance Company submitted that the vehicle insured was a tractor (non-transport vehicle). He submits that the license of the driver of this tractor did not permit him to drive such a non-transport vehicle and that too for commercial purposes. He submits that this amounts to a fundamental breach of the terms of the Insurance Policy and therefore, the Tribunal quite correctly exonerated the Insurance Company from the liability to bear any amount of compensation.

5. Mr. M. B. Joshi, learned Counsel for the Insurance Company further submitted that in this case, witnesses were examined on behalf of the Insurance Company, who have deposed that two trolleys were attached to this tractor and through the two trolleys, the commercial business of sale of water was being carried out. He submits that even this amounts to a fundamental

breach of the terms of the Insurance Policy. He pointed out that the policy had covered only one trolley to be attached to the tractor and not two trolleys. He submits that this is an additional reason why the impugned award be not interfered with.

6. Mr. P. R. Agrawal, learned Counsel for the claimants submitted that the claimants are not concerned with the issue raised. But without prejudice, he submitted that the issue now raised in this appeal stands covered by the decision in ***Mukund Dewangan*** (*supra*), and based on the same, it is the Insurance Company that should be made liable to pay the compensation.

7. The rival contentions now fall for determination.

8. The claimants in the present petition had pleaded that on 09.06.2004, when deceased Hunabai and her son were sitting in front of their house, the tractor bearing registration No. MH-30-A-0550 came at a very high speed. The driver of the tractor lost control over the tractor and the tractor dashed Hunabai and her son Dipak. Due to this dash, Hunabai suffered injuries and died on the spot, and her son Dipak was also seriously injured.

9. On the aforesaid pleadings, it is significant to note that at least the claimants had not pleaded that there were any trolleys, whether one or two, attached to the tractor at the time of

the accident. Therefore, if any of the respondents wished to deny their liability, then, it was for them to plead this alleged factor of one or two trolleys being attached to the tractor.

10. The appellant-owner filed a written statement, which contains general denials possibly because the owner was quite confident that the Insurance Company will be held liable for the compensation, if payable. Therefore, details of the Insurance Policy were furnished by the appellant-owner.

11. The Insurance Company also filed its written statement to the claim petition. Therein, the Insurance Company did not dispute that the tractor was covered by a valid Insurance Policy issued by this Insurance Company. The only defense to avoid liability was taken if the following words to be found that paragraph D of the written statement :

“D]..... It is submitted that claim of claimant is too much excessive exaggerated and calculated without any legal basis. It is submitted that claim of claimant is liable to be dismissed on the point of breach and terms and conditions of the policy only because driver of the tractor not having valid and effective driving licence to drive the said vehicle. It is fundamental breach of the terms and conditions of the policy hence claim is liable to be dismissed against this non-applicant.”

12. From the aforesaid, it is apparent that the sole defense taken by the Insurance company was that there was a

fundamental breach of the terms and conditions of the Policy only because the driver of the tractor was not having a valid and effective driving license to drive the said vehicle. Conversely, there was no defense taken by the Insurance Company that the tractor was being used for commercial purposes or that there were two trolleys attached to the tractors or that it was through these two trolleys attached to the tractors that the tractor owner was carrying of the business of sale of water on a commercial basis.

13. The Insurance Company, did examine a witness who tried to depose on the latter aspect of the tractor being used for commercial purposes or that there were two trolleys attached to the tractors. However, according to me, such evidence ought not to have been even considered by the Tribunal because there were no pleadings to back the same. It is well settled that there should be no variance between pleading and proof. No amount of evidence that is not backed that pleading to support the same can ordinarily be considered by a Tribunal or a Court. This principle is a facet of the principle of natural justice and fair play. In the absence of proper pleadings, the opposite parties cannot be caught by surprise during the evidence.

14. In this case, the claimants had not even hinted that there were two trolleys attached to the tractor or that the tractor was transporting any water for commercial purposes or otherwise

at the time of the unfortunate accident. The Insurance Company despite the opportunity had not pleaded to this alleged fact as well. Therefore, the Tribunal was not at all justified in considering such a matter and based on the same exonerating the Insurance Company.

15. The only pleading raised by the Insurance Company was that there was a fundamental breach of the terms of the policy because the driver of the tractor was not having a valid and effective driving license to drive the said vehicle. This plea has also been considered and accepted by the Tribunal relying *inter alia* on the decision of the Hon'ble Supreme Court in the case of ***New India Assurance Company Limited Vs. Prabhu Lal*** reported in ***(2008) 1 SCC 696***.

16. The above decision has been expressly overruled by the larger Bench of the Hon'ble Supreme Court in the case of ***Mukund Dewangan*** (*supra*) and this is a sufficient reason to now reverse the Tribunal to the extent it exonerates the Insurance Company.

17. In ***Mukund Dewangan*** (*supra*), the Hon'ble Supreme Court was answering the reference having regard to the conflict in decisions on the point of whether transport vehicles are excluded from the definition of Light Motor Vehicle as defined in Section 2(21) of the M. V. Act and whether the holder of a license to drive

the class of light motor vehicle would be competent to drive a transport vehicle or omnibus, the “gross vehicle weight” of which did not exceed 7500 kg. or a motor car or a *tractor* or a road roller, the “unladen weight” of which did not exceed 7500 kg.

18. The Hon’ble Supreme Court framed the questions referred for its decision in paragraph 3, which reads as follows:-

“3. Following questions have been referred for decision to the larger Bench :

“1. What is the meaning to be given to the definition of "light motor vehicle" as defined in Section 2(21) of the MV Act? Whether transport vehicles are excluded from it?

2. Whether “transport vehicle” and “omnibus” the "gross vehicle weight" of either of which does not exceed 7500 kg. would be a "light motor vehicle" and also motor car or tractor or a roadroller, "unladen weight" of which does not exceed 7500 kg. and holder of a licence to drive the class of "light motor vehicle" as provided in Section 10(2)(d) would be competent to drive a transport vehicle or omnibus, the "gross vehicle weight" of which does not exceed 7500 kg. or a motor car or tractor or roadroller, the "unladen weight" of which does not exceed 7500 kg.?

3. What is the effect of the amendment made by virtue of Act 54 of 1994 w.e.f. 14.11.1994 while substituting clauses (e) to (h) of Section 10(2) which contained "medium goods vehicle", "medium passenger motor vehicle", "heavy goods vehicle" and "heavy passenger motor vehicle" by "transport vehicle"? Whether insertion of expression “transport vehicle” under Section 10(2)(e) is related to said substituted classes only or it also excluded transport vehicle of light motor vehicle class from the purview of Sections 10(2)(d) and 2(41) of the Act?

4. What is the effect of amendment of Form 4 as to the operation of the provisions contained in Section 10 as amended in the year 1994 and whether the procedure to obtain the driving licence for transport vehicle of the class of "light motor vehicle" has been changed ?"

19. The above questions were answered by the Hon'ble Supreme Court in paragraph 60 that reads :

"60. Thus, we answer the questions which are referred to us thus:

60.1. "Light motor vehicle" as defined in Section 2(21) of the Act would include a transport vehicle as per the weight prescribed in Section 2(21) read with Section 2(15) and 2(48). Such transport vehicles are not excluded from the definition of the light motor vehicle by virtue of Amendment Act 54 of 1994.

60.2. A transport vehicle and omnibus, the gross vehicle weight of either of which does not exceed 7500 kg. would be a light motor vehicle and also motor car or tractor or a roadroller, "unladen weight" of which does not exceed 7500 kg. and holder of a driving licence to drive class of "light motor vehicle" as provided in Section 10(2)(d) is competent to drive a transport vehicle or omnibus, the gross vehicle weight of which does not exceed 7500 kg. or a motor car or tractor or roadroller, the "unladen weight" of which does not exceed 7500 kg. That is to say, no separate endorsement on the licence is required to drive a transport vehicle of light motor vehicle class as enumerated above. A licence issued under Section 10(2)(d) continues to be valid after Amendment Act 54 of 1994 and 28-3-2001 in the form.

60.3 The effect of the amendment made by virtue of Act No.54 of 1994 w.e.f. 14.11.1994 while substituting clauses (e) to (h) of Section 10(2) which contained "medium goods vehicle" in Section 10(2)(e), medium passenger motor vehicle in Section 10(2)(f), "heavy goods vehicle" in Section 10(2)(g) and "heavy passenger motor vehicle" in Section 10(2)(h) with expression "transport vehicle" as substituted in Section 10(2)(e) related only to the aforesaid substituted classes only. It does not exclude transport vehicle, from the purview of Section 10(2)(d) and Section 2(41) of the Act i.e. light motor vehicle.

60.4. The effect of amendment of Form 4 by insertion of “transport vehicle” is related only to the categories which were substituted in the year 1994 and the procedure to obtain driving licence for transport vehicle of class of “light motor vehicle” continues to be the same as it was and has not been changed and there is no requirement to obtain separate endorsement to drive transport vehicle, and if a driver is holding licence to drive light motor vehicle, he can drive transport vehicle of such class without any endorsement to that effect.”

20. As noted earlier, the earlier ruling in ***Prabhu Lal*** (*supra*) upon which the reliance was placed by the Tribunal was expressly overruled in ***Mukund Dewangan*** (*supra*) as discussed in paragraphs 46, 47, and 48 of the said decision. The Larger Bench has now held that a light motor vehicle as defined under section 2(21) of the said Act will include a transport vehicle within the weight limits prescribed in sections 2(21), 2(15), and 2(48) of the said Act. Even a tractor, the unladen weight of which does not exceed 7500kg. can be driven by a license holder under section 10(2)(d) without the requirement of any additional endorsement to drive such transport vehicle.

21. In my judgment, the decision of the Larger Bench in ***Mukund Dewangan*** (*supra*) entirely supports the contention now raised by Mr. C. A. Joshi, the learned Counsel for the appellant. In this case, there is documentary evidence that the driver had a license to drive Light Motor Vehicle/tractor (See-Exh. 47). There is evidence that the tractor, in this case, had an unladen weight of 1200 kg. This is evident from the registration certificate at Exh.33.

Thus, the observations in ***Mukund Dewangan*** (*supra*) apply, and based on the same, it cannot be said that the driver who was driving the tractor did not have a valid license to drive the same or that consequentially there was any breach of the terms of Insurance Policy on this score. The contrary view taken by the Tribunal relying upon ***Prabhu Lal*** (*supra*) will therefore have to be interfered with. This appeal is, therefore, allowed.

22. The impugned award is interfered with to the extent it exonerates the Insurance Company. The Insurance Company is held liable to pay the compensation amount as determined by the Tribunal in its impugned award.

23. The Insurance Company must now deposit the entire awarded amount together with interest within 2 months from today. Once its deposit is made, the claimant will be at liberty to withdraw the same after adjusting the amount that they have already received. Similarly, the appellant will be entitled to withdraw the amount of Rs.1,81,000/- with proportionate interest since this is the amount they have paid/deposited under the impugned award.

24. The appeal is allowed to the aforesaid extent. There shall be no order for costs.

25. Pending application(s), if any, do not survive(s) and even the same is/are disposed of.

(M. S. SONAK, J.)

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