IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

FIRST APPEAL NO. 1143 OF 2005

Amrut Ratanlal Pitale
Age : 63 years, occ : agri.,
R/o Belwandi (Bk.), Tal. Shrigonda,
District Ahmednagar. Appellant

Versus

1. Vimal Bhagchand Ethape
Age : 50 years, occ : nil
R/o Belwandi (Bk.) Tal. Shrigonda,
District Ahmednagar

2. Nana Bhagchand Ethape
Age : 32 years, occ : nil
R/o Belwandi (Bk.) Tal. Shrigonda,
District Ahmednagar

3. Balu Narayan Harde
Age : 50 years, occ : driver
R/o Narayangavhan, Tq. Parner,
District Ahmednagar.

4. Nana Narayan Harde
Age :40 years, occ : agri.,
R/o Ralegavan, Tq. Shrigonda,
District Ahmednagar.

5. Gorakh Daulat Sapre
Age : 50 years, occ : driver
R/o Saprewadi, Tq. Shrigonda,
District Ahmednagar.

6. Oriental Insurance Co. Ltd.,
Kisan Kranti Building, Market
Yard, Ahmednagar Respondents

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Mr. V.S. Bedre, Advocate for the appellant.
Mr. N.C. Garud, Advocate for respondent No.1.
Mr. P.B. Shirsath, Advocate holding for Mr. D.R. Korde,
Advocate for respondent No.4.

Mr. B.B. Shelke, Advocate for respondent No. 5.
Mr. Dhananjay Deshpande, Advocate for respondent No. 6.

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CORAM : **SANDIPKUMAR C. MORE, J.**

Judgment Reserved on : 23.08.2022
Judgment pronounced on : 20.09.2022

Judgment:

1. The appellant, who is the original respondent No.4, has challenged the judgment and award dated 09.09.2005 passed by the learned Member, Motor Accident Claims Tribunal, Ahmednagar (hereinafter referred to as "the learned Tribunal), in Motor Accident Claim Petition No. 653/1994.

2. The background facts are as under :

One deceased Bhagchand, who is the husband of respondent No.1 herein, alongwith his other relatives was travelling in a jeep bearing registration No. MH-16-7700 on 05.02.1994 from Belbandi to Dhawalgaon. As the jeep approached village Dhawalgaon, driver of the jeep dashed to one tractor coming from the opposite side and in the said accident Bhagchand sustained severe injuries and died on the spot. Accordingly, the original claimants, who are the present respondent Nos.1 and 2, had filed claim petition for getting compensation under Section 166 of the Motor Vehicles Act. The learned Tribunal, after conducting the trial, awarded compensation to the claimants to the to the tune of Rs.1,15,000/- (inclusive of the amount under Section 140 of the M.V. Act regarding the principal of “no fault liability”) alongwith interest at the rate of 9% per annum from the date of petition till it’s realization. The learned Tribunal, however, exonerated the present respondent No. 6 – Insurance Company and only fixed the liability of paying compensation on the present appellant and respondent No.4 Nana Harde being owners of the jeep and tractor respectively, which were involved in the accident, to the extent of 50% each. Feeling aggrieved with the said judgment and award, the appellant, who is owner of the jeep, is before this Court.

3. Learned Counsel for the appellant submits that the appeal is filed only on two grounds i.e. the jeep driver was not at all negligent while driving the jeep at the time of accident and that the learned Tribunal wrongly inferred that the jeep was not covered under the insurance policy issued by present respondent No.6 at the time of accident. He further submits that the appellant had, in fact, given a demand draft of the premium in respect of the insurance of jeep to the

concerned Insurance Company on the day of the accident itself in the morning, but as the office of the Insurance Company was closed on account of holidays falling on Saturday and Sunday, he had sent the demand draft on the same day i.e. on 05.02.1994 under Certificate of Posting to respondent No.6-Insurance Company, and therefore, as per Section 64VB of the Insurance Act, the vehicle i.e. the jeep was covered under the policy issued by respondent No.6 – Insurance Company. Learned Counsel for the appellant also relied on the judgment of this Court in the case of ***Oriental Insurance Co. Ltd. Mumbai vs Sadhana Devidas Gujrathi and others*** reported in ***2021 (5) Mh.L.J. 535***.

4. On the contrary, learned Counsel for respondent No.6 – Insurance Company, who is the only contesting respondent, has strongly opposed the submissions made on behalf of the appellant. He submits that there was absolutely no evidence by the appellant before the learned Tribunal to show that the cheque / demand draft was sent by him to the Insurance Company at 11.30 a.m. on the day of accident itself. He also pointed out that despite alleging the said fact in the claim petition itself by way of written statement, the appellant did not lodge any complaint before the Consumer

Forum against the Insurance Company as to why despite receiving the premium on the date of the accident, the policy was issued subsequently on 08.02.1994. According to him, the policy of the jeep started only from 08.02.1994 when the Company received demand draft of the premium, and therefore, on the day of the accident the jeep involved therein was not at all insured. He, thus, prayed for dismissal of the appeal.

5. I have gone through the impugned judgment and award alongwith entire oral and documentary evidence reflected from the record and proceedings of the original claim petition with assistance of the learned Counsel for the contesting parties.

6. It is to be noted that though the appellant has challenged the impugned award firstly in respect of the observation of the learned Tribunal that both the drivers of the tractor and jeep involved in the accident had contributed in the accident equally, but it is not in dispute that the F.I.R. in respect of the accident was lodged against the tractor driver and charge-sheet is also filed against him. Learned Counsel for the appellant is claiming that since the charge-sheet was against the tractor driver, the learned Tribunal

should not have held the contributory negligence to the extent of 50% of the jeep driver, who is present respondent No.5. However, on going through the impugned judgment as well as the spot panchnama, it is clearly evident that the accident took place on a bridge having width of only 11 ft. and it was head-on collision. As such, both the drivers of the vehicles involved in the accident were having opportunity to see each other, but they still continued their driving on the narrow bridge. This court and the Hon'ble Apex Court, in may of the judgments in the case of head-on collision, have fixed the liability on the drivers of both such vehicles holding that both of them contributed the accident without availing opportunity to avoid the same. Thus, the observation of contributory negligence to that effect recorded by the learned Tribunal, cannot be faulted.

7. It is pertinent to note that the second ground raised by the learned Counsel for the appellant for challenging the impugned judgment, proposes important question for consideration. The appellant has contended in his written statement before the learned Tribunal that on the day of the accident itself at about 11.30 a.m. he had gone to the office of the Insurance Company alongwith demand draft

of premium for continuation of the policy which was, according to him, valid upto 05.02.1994. However, the appellant has not produced that policy which, according to him, was valid upto 05.02.1994. Further, it has been contended by the appellant in the written statement that when he went to the office of the Insurance Company at about 11.30 a.m., the same was closed being holidays falling on Saturday and Sunday respectively on 05.02.1994 and 06.02.1994, and therefore, he could not hand over the said demand draft of the premium worth of Rs. 250/-. He has further submitted that he had sent demand draft to the Insurance Company on the same day and therefore, there was continuation of the insurance cover in respect of the jeep at the time of accident which admittedly took place by 6.30 p.m. on 05.02.1994.

8. On the contrary, learned Counsel for the Insurance Company strongly opposed the contention of the appellant as regards continuation of insurance cover. He pointed out that the appellant did not lead any evidence to support his contention as mentioned above and submitted that when the office of Insurance Company was closed on account of holiday being Saturday on 05.02.1994, how the

appellant could have delivered the amount of premium by way of demand draft to the Insurance Company on the say day. He also pointed out that since the office of Insurance Company was closed on 05.02.1994 and 06.02.1994 on account of holidays falling on Saturday and Sunday, the insurance policy was issued on 08.02.1994, that means on the day of the accident the jeep owned by the appellant was not covered as the said insurance policy was issued for the period from 08.02.1994 to 07.02.1995.

9. In the backdrop of these facts, let us consider the rival contentions and documents on record.

10. Admittedly, the policy (Exh.26) is issued on 08.02.1994 which is valid from the said date till 07.02.1995. As such, prima facie it appears that the jeep owned by the appellant was not covered under the insurance policy on the date of the accident. Learned Counsel for the appellant also pointed out that Exh.26 is in fact a receipt issued by respondent No.6 Insurance Company and it's right hand below column clearly indicates that cheque or DD No. 896174 drawn on A.D.C.C. Bank, Belwandi Branch for Rs. 250/- was dated 05.02.1994. However, there is no evidence on record adduced by the appellant that the cheque or demand draft of

the premium was, in fact, handed over to the Insurance Company on the very day of the accident i.e. on 05.02.1994. Further, there is no whisper in the written statement of the appellant before the learned Tribunal that despite the holidays and the office of the Insurance Company being closed on 05.02.1994 and 06.02.1994, how he delivered the demand draft or cheque of the premium to the Insurance Company. It is only stated in the written statement that sine the office was closed on account of holiday, he sent the demand draft to the Insurance Company on the same day. It is extremely important to note that there is nothing mention about the mode by which the appellant allegedly sent the demand draft to the Insurance Company. Learned Counsel for the appellant heavily relied upon the provision under Section 64VB (2) of the Insurance Act, which is reproduced herein below :

> *"64VB. No risk to be assumed unless premium is received in advance.—*
>
> *(1) ....*
>
> *(2) For the purposes of this section, in the case of risks for which premium can be ascertained in advance, the risk may be assumed not earlier than the date on which*

the premium has been paid in cash or by cheque to the insurer.

Explanation. —Where the premium is tendered by postal money order or cheque sent by post, the risk may be assumed on the date on which the money order is booked or the cheque is posted, as the case may be.

(3) ....

(4) ....

(5) ....

(6) ....

On going through the aforesaid provision, it is clearly evident from the explanation to the sub Section (2), that if the amount of premium is sent to the Insurance Company by Post, then the insurance cover will continue. However, in the written statement itself the appellant has nowhere stated as to by which mode he sent the demand draft of premium amount to the Insurance Company. It is surprising to note that the appellant, for the first time, mentioned such mode in Ground No.7 of the present appeal that since the office of Insurance Company was closed on account of holiday on

05.02.1994, he sent the demand draft of premium amount to the Insurance Company under Certificate of Posting on the same day at about 11.30 a.m. from Belwandi (Bk.), Taluia Shrigonda, District Ahmednagar. Thus, after a gap of about 11 years the appellant is trying to say that he had sent the demand draft of premium amount under Certificate of Posting. Even if it is presumed that the appellant had sent the demand draft of premium amount through Post under Certificate of Posting, then also it is extremely important to note that the appellant has not produced Under Posting Certificate issued by the Postal Authority.

11. Learned Counsel for the appellant heavily relied upon the judgment in the case of ***Oriental Insurance Co. Ltd. Vs Sadhana Devidas Gujrathi*** (supra), wherein the liability of insurer is discussed when the cheque in respect of the premium dishonoured after issuing the policy which subsequently cancelled by the Insurance Company. On going through the said judgment, it is evident that the Insurance Company cannot be absolved from it's liability on the ground that at the time accident there was no valid insurance policy because the policy has been cancelled post-accident as the cheque of the premium got dishonoured subsequently and in

such circumstances if the policy was cancelled, it was the duty of Insurance Company to intimate the insured about cancellation of policy well before the date of accident for absolving itself from the liability of paying compensation. However, in the instant case, there is no such contingency, since there was no dishonour of cheque involved in the instant matter. On the contrary, the appellant has miserably failed to show that he either delivered the demand draft of the amount of premium to the Insurance Company on the day of accident at about 11.30 a.m. i.e. prior to accident or he had posted the said demand draft under Certificate of Posting on that day at the same time i.e. at 11.30 a.m. Even though it is mentioned in the receipt of Insurance Company at Exh. 26 that the premium was accepted vide Cheque / DD No. 896174 dated 05.02.1994, but the Insurance Company had passed the said receipt on 08.02.1994 for the period from 08.02.1994 to 07.02.1995. Had it been the case that the premium was paid on 05.02.1994 itself, then the Company would have issued policy for the period from 05.02.1994 to 04.02.1995.

12. Thus, by looking from any angle it cannot be held that the insurance cover was available for the jeep involved in the accident on the day of the accident itself. It is extremely

important to note that the contention of the appellant in the above respect is not established by supporting evidence, since the appellant did not lead any evidence either. In view of the same, the judgment cited supra as well as the provision under Section 64VB of the Insurance Act cannot come to the rescue of the appellant. Thus, the appeal of the appellant fails on both the grounds as raised in the appeal. Accordingly the appeal stands dismissed. No order as to costs. The appellant is directed to deposit the amount of compensation falling to his share with the concerned Tribunal at Ahmednagar as per the impugned judgment and award, within three weeks from the date of this order.

The appeal is disposed of.

(SANDIPKUMAR C. MORE, J.)

VD_Dhirde