IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

FIRST APPEAL NO. 4072 OF 2016
WITH
CIVIL APPLICATION NO. 14892 OF 2016
WITH
CIVIL APPLICATION NO. 9885 OF 2019
WITH
CIVIL APPLICATION NO. 10917 OF 2021

National Insurance Co. Ltd.,
Through its Divisional Manager,
Division Office, Hajari Chambers,
Station Road, Aurangabad,
District Aurangabad. ...Appellant
(Orig. R-2)

Versus

1. Vikas S/o Bapurao Patil (died),
Deceased through L.R.

1-a) Nalini w/o Bapurao Patil,
Age : 58 years Occu: Agriculturist,
R/o. 1324/74/1, Arun Nagar, Chopda,
Tq. Chopda, District Jalgaon.

2. Vikas Bhika Indhe,
Age 48 Years, Occ. Business,
(Owner of car No. MH-19-AX-4595),
R/o Kharad Tq. Chopda,
Tq. Chopda, Dist. Jalgaon. ...Respondents
(R-1.Org. Claimant
R-2 Org. R-1)

Mr S.R. Bodade, Advocate for Appellant
Mr Kishor Sant, Advocate for Respondent No.1(a)
Mr G.S. Rane, Advocate for respondent No. 2

CORAM : SHRIKANT D. KULKARNI, J.

RESERVED ON : 17.11.2021
PRONOUNCED ON : 23.02.2022

JUDGMENT :

1. This appeal is directed against the impugned Judgment and Award dated 17.06.2016 passed in Motor Accident Claim Petition No. 58/2012 by the Member, Motor Accident Claims Tribunal, Amalner, Dist. Jalgaon.

2. The facts giving rise to this appeal in brief are as under :-

(a) The petitioner/original claimant along with others were proceeding on 05.05.2011 from Chopda to Malegaon in a vehicle Indica Car bearing No. MH-19-AX-4595. Mr Jitendra Sonawane was driving the car. It is contended that Jitendra Sonawane drove the car in a rash and negligent manner near village Pilkhod at about 12.15 p.m. The indica car turned turtule due to negligent driving of Jitendra Sonawane and resulted into accident. The petitioner/original claimant sustained injuries including fracture injuries. He was taken to Appasaheb Y.P. Hospital, Chalisgaon. The accident was reported to Mehunbare Police Station against the said Jitendra Sonawane.

(b) The petitioner/original claimant was working as a driver and thereby used to earn Rs. 5,000/- per month. The petitioner/original claimant is unable to do any work due to injury and permanent disability caused to him in the accident. The claimant has filed petition under section 166 of the Motor Vehicles Act, 1988 for grant of compensation on account of injuries and permanent disability caused to him in motor vehicle accident dated 05.05.2011.

(c) Respondent/owner of the vehicle has denied the claim for compensation. According to respondent No.1, original respondent No.1 was driving the car in a moderate speed. There was one curve near spot of accident. All of a sudden, indica car driver noticed the truck coming from opposite direction in a high speed, took the car by the side of the road in order to avoid the collision and it resulted into accident. The injuries sustained by the petitioner/original claimant were very minor.

(d) The appellant had contested the claim on the ground that the policy issued in favour of the car owner of the vehicle was a private car policy. At the time of accident, the car owner had hired out the car and thus, committed breach of terms and conditions of the policy. As such, the insurance company is not liable to pay any compensation.

(e) The learned Member of the Motor Accident Claims Tribunal after appreciating the facts of the case, evidence on record and considering the argument advanced on behalf of the respective sides, was pleased to hold that the petitioner/original claimant is entitled to get compensation of Rs. 13,73,000/- (inclusive of NFL amount) with interest @ 7.5 % on amount of Rs. 10,67,000/- from the date of filing of claim petition till realisation of the entire amount.

(f) The owner/insured and the appellant/ensurer were both held jointly and severally liable to pay compensation and costs.

(g) Feeling aggrieved by the impugned Judgment and Award passed by the Member of Motor Accident Claims Tribunal, Amalner, Dist. Jalgaon, the appellant/National Insurance Company Ltd. Branch Jalgaon has preferred this appeal by taking aid of section 173 of the Motor Vehicles Act, 1988.

3. Heard Mr S.R. Bodade, learned counsel for the appellant, Mr K.C. Sant, learned counsel for respondent No. 1(a) and Mr G.S. Rane, learned counsel for respondent No.2.

4. Perused the impugned Judgment and Award passed in MACP No. 58/2012 by the Member of Motor Accident Claims Tribunal, Amalner, Dist. Jalgaon. I have also gone through the record and proceedings and evidence produced by the respective parties before the Tribunal.

5. At the outset, it is necessary to mention here that the original petitioner Vikas s/o Bapurao Patil died during pendency of the appeal and his mother is brought on record in his place as respondent No.1 (a).

6. Mr S.R. Bodade, learned counsel for the appellant/insurance company sought permission to place on record copies of statement of witnesses (occupants of the car) recorded by the Police under section 161 of the Cr.P.C. by way of additional evidence. He therefore, urged to allow the Civil Application No. 9885/2019. He submitted that the said additional evidence would throw light on the defence raised by the appellant.

7. Mr Bodade, learned counsel for the appellant vehemently

submitted that Indica car which was driven by one Mr Jitendra Sonawane owned by respondent No.1. It is duly insured with the appellant as a private car and it is a package policy/comprehensive policy. As per the terms and conditions of the insurance policy, the car cannot be used for hire or reward. He pointed out a copy of FIR vide Exh. 25 and submitted that FIR clearly reveals that the Indica car was carrying passengers and it was taken on hire basis when met with an accident on 05.05.2011. The petitioner/original claimant along with others were proceeding from Chopda to Malegaon to attend one wedding ceremony when the car met with an accident. Mr Bodade, learned counsel for the appellant also invited my attention to the copy of policy vide Exh. 27, more particularly terms and conditions embodied in the insurance policy of the car which met with an accident. Mr Bodade, learned counsel for the appellant submitted that it is a clear case of breach of policy. The appellant/insurance company is not liable to pay any compensation.

8. Mr Bodade, learned counsel for the appellant further submitted that the Tribunal has awarded exorbitant compensation without proper appreciation of evidence on record. The findings recorded by the Tribunal are erroneous. The Tribunal has committed an error in holding the appellant jointly and severally liable along with the owner of the vehicle to pay the compensation. Therefore, he urged to allow the appeal.

9. Mr Bodade, learned counsel for the appellant has placed his reliance on the citation in case of ***Yashpal Luthra and Anr. Vs. United***

India Insurance Co. Ltd. and Anr. Delhi High Court (MACP No. 176/2009 decided on 9th December, 2009.

10. Mr K.C. Sant, learned counsel for respondent No.1 supported to the findings recorded by the Tribunal. He submitted that the Tribunal has considered the evidence coupled with the defence raised by the insurance company/appellant and rightly turned down the plea raised by the insurance company. He pointed out that the owner of the vehicle has received the compensation about the damage caused to the indica car which met with an accident. It shows that the insurance company has accepted the liability of the accident. Now, the appellant cannot take turn around and deny the liability to pay the compensation to the injured, who was travelling in the car at the time of accident. He submitted that the Tribunal has rightly assessed the compensation.

11. Mr K.C. Sant, learned counsel for respondent No.1 submitted that even though a copy of FIR vide Exh. 25 speaks about taking indica car on hire basis for attending wedding ceremony, the FIR cannot be said to be conclusive proof unless its author is examined. He submitted that the Tribunal is required to give weightage to the evidence adduced before it. The Tribunal has rightly considered this aspect and turned down the plea raised by the insurance company. Mr Sant has relied upon the citation in case of the ***National Insurance Company Ltd. Vs. Chamundeswari and Ors. Civil Appeal No. 6151/2021 (arising out of Special Leave Petition (C) No. 4705 of 2019) decided by the Hon'ble Supreme Court on 1st October, 2021***.

12. Mr Sant learned counsel for respondent No.1 submitted that the case in hand is not a fundamental breach of policy even if plea raised by the insurance company is accepted. He therefore, submitted that the principle of pay and recover needs to be applied by directing to the insurance company to pay the compensation to the victim and then recover it from the owner of the vehicle. He has placed his reliance in case of ***Shamanna and Ors. Vs. Divisional Manager, Oriental Insurance Company Ltd. and Ors.*** *reported in* ***(2018) 9 SCC 650.*** Mr Sant also placed his reliance on the decision rendered by this Court in ***First Appeal No. 177/2014 (Raju Narayan Ghodekar Vs. Santoshkumar Vaijinath Patel decided on 23rd August, 2018*** and submitted that insured vehicle was having a comprehensive package policy. As such, the risk of the occupant/claimant is covered. The insurance company cannot run away from that risk. He submitted that there is no merit in the appeal.

13. Mr G.S. Rane, learned counsel for respondent No. 2/owner of the vehicle strongly opposed to allow Civil Application No. 9885/2019 for production of additional evidence. He submitted that the appellant cannot be allowed at this stage to produce copies of statements of witnesses recorded by the Police under section 161 of Cr.PC since appellant does not comply necessary legal requirements as contemplated under Order 41 Rule 27 of CPC. Mr Rane has placed his reliance in case of **A. Andisamy Chettiar** ***Vs. A. Subburaj Chettiar*** reported in ***(2015) 17 SCC 713.*** Mr Rane, learned counsel for respondent No. 2 submitted that respondent

No. 2 has received the compensation about the damage caused to his indica car. Said fact is not denied by the witness examined by the insurance company. If it was a case of breach of policy, certainly, the insurance company could not have made payment of compensation to the owner of the vehicle. It means that the insurance company has accepted its liability and paid compensation in respect of damage caused to the vehicle owned by respondent No. 2 at the time of accident. He submitted that in case in hand, the vehicle was having a comprehensive package policy. As such, the risk of the occupant is covered to the extent of persons restricted in the policy and insurance company is liable to pay the compensation. Mr Rane has placed his reliance in case of ***National Insurance Company Ltd. Vs. Balakrishnan and Anr. reported in AIR 2013 SC 473***.

14. First, I shall deal with Civil Application No. 9885/2019, which is moved by the appellant seeking permission to place on record copies of statements of witnesses recorded by the Police under section 161 of Cr.PC by way of additional evidence. There cannot be any debate that the appellate court while hearing the matter finally could exercise jurisdiction one way or the other under Order 41 Rule 27 of CPC specially clause (b). In case of ***K.R Mohan Reddy Vs. Net Work Inc. represented through M.D, reported in (2007) 14 SCC 257,*** it is held by the Hon'ble Supreme Court that “The appellate court should not pass an order so as to patch up the weakness of the evidence of the unsuccessful party before the trial court, but it will be different if the court itself requires the evidence to do

justice between the parties. The ability to pronounce judgment is to be understood as the ability to pronounce the judgment satisfactorily to the mind of the court. But mere difficulty is not sufficient to issue such direction.”

15. Having regard to the legal position made clear by the Hon'ble Supreme Court in above referred two citations, if the facts of the case in hand are taken into consideration, at this stage, the appellant cannot be allowed to produce copies of statements of witnesses recorded by the Police under section 161 of Cr.PC so as to patch up the weakness of the case of the appellant which was unsuccessful before the trial court. Those documents were available and there was no difficulty for the appellant to produce the same before the Tribunal at the time of trial. At this stage, I do not see any reason to allow the application for production of additional evidence when the appellant has failed to make out its case as contemplated under Order 41 Rule 27 of CPC. The appellant has failed to fulfill the necessary conditions mentioned under Order 41 Rule 27 of CPC in view of citation of the Apex Court in case of ***A. Andisamy Chettiar*** (supra). As such, the application for production of additional evidence vide Civil Application No. 9885/2019 is hereby rejected.

16. The appellant/insurance company has raised the defence that indica car was given on hire though it was a private car. The original claimant and four others were travelling in the indica car to attend one wedding ceremony when met with an accident. In view of the terms and conditions of the insurance policy, the risk is covered if the private car is

not used for hire or reward.

17. The liability of the appellant to pay the compensation is the main controversy in the appeal.

18. It is undisputed position that indica car bearing Registration No. MH-19-AX-4595 was owned by respondent No. 2/Vikas Bhika Indhe, which met with an accident on 05.05.2011 at about 12.15 noon on the way to Malegaon. The indica car was registered as a private car. On the date of accident, it was duly insured with the appellant. It was a comprehensive policy/package policy.

19. It is true that copy of FIR vide Exh. 25 reveals that indica car was taken on hire so as to attend one wedding ceremony. The claimant and other persons were travelling in the said car when met with an accident. However, the author of the FIR is not examined in order to prove the contents of it. The owner of the vehicle/respondent No. 2 has produced his evidence and denied the fact that his car was given on hire at the time of accident and original claimant and others were travelling in the said car as fare paying passengers. In that background, it was very much necessary on the part of the insurance company to examine author of the FIR to substantiate its contentions that the car which met with an accident was given on hire at the time of accident. No such pains were taken by the insurance company to examine author of the FIR. In case of ***National Insurance Company Ltd. Vs. Chamundeswari and Ors.*** *(supra),* it is held by the Hon'ble Supreme Court that there is no reason to

give weightage to the contents of the FIR if any evidence before the Tribunal runs contrary to the contents in the FIR. The evidence which is recorded before the Tribunal has to be given weightage over the contents of the FIR.

20. In view of the legal position made clear by the Hon'ble Supreme Court, no more weightage can be given to the FIR when concerned author of the FIR is not examined and when evidence before the Tribunal runs contrary to the contents of the FIR.

21. It is brought on record through the evidence of respondent No.2/owner of the vehicle that he has given information about the accident of his indica car to the appellant/insurance company. He has also filed damage claim of his vehicle with the appellant/insurance company. The appellant/insurance company has assessed damage claim of his vehicle/indica car and also paid damages sustained in the said accident. The witness examined by the insurance company has not denied such fact. He stated before the Tribunal that he does not know anything about the same. Certainly, the statement made by the owner of the vehicle before the Tribunal needs to be accepted. Moreover, the insurance company has not produced any documentary evidence to show contrary picture to disbelieve the testimony of owner of the vehicle.

22. In the above premise, it must be inferred that the appellant/insurance company has accepted the liability of the accident and that is why paid damages to the owner of the vehicle. Now, the

appellant/insurance company cannot take somersault and deny its liability by raising plea of breach of policy. The appellant/insurance company is estopped from raising such plea of breach of policy when it has accepted its liability and paid damages to the vehicle owner/respondent No.2.

23. Moreover, perusing the copy of insurance policy vide Exh. 27, it would be clear that it is a package/private car policy. The risk of four persons is covered. The owner has paid additional premium to cover that risk. The appellant has no voice to deny its liability when the claimant was found to be one of the occupants travelling in the car when met with an accident. The Tribunal has rightly held the owner and the insurer/ appellant as jointly and severally liable to pay the compensation in view of the evidence on record and in view of the terms and conditions of the comprehensive policy of the vehicle/indica car which met with an accident.

24. Mr Bodade, learned counsel for appellant has placed his reliance in case of ***Yashpal Luthra and Anr. Vs. United India Insurance Co. Ltd. and Anr. Delhi High Court*** *(supra),* but in view of the Hon'ble Supreme Court decision in case of ***National Insurance Company Ltd. Vs. Balakrishnan and Anr*** *(supra)* that a “comprehensive/package policy would cover the liability of the insurer for payment of compensation for the occupant in a car. There is no cavil that an "act policy” stands on a different footing from a comprehensive/package policy.”

25. Having regard to the above reasons and discussion and in view of the above legal position made clear by the Hon'ble Supreme Court in

above referred stock of citations, I do not find any merit in the defence raised by the appellant/insurance company regarding breach of policy. I am unable to accept the argument advanced by Mr Bodade, learned counsel for the appellant.

26. So far as the quantum of compensation assessed by the Tribunal is concerned, it is rightly pointed out by Mr Bodade, learned counsel for the appellant that though the Tribunal has observed in its judgment para No. 33 that there is no documentary evidence in order to show that claimant requires Rs.2,000/- per month towards medical expenses, even then granted Rs.1500/- per month towards medical expenses assessed at Rs. 3,06,000/-. The Tribunal has committed an error in awarding Rs.3,06,000/- under the head of future medical expenses when there is no iota of evidence to support the claim of original claimant.

27. The amount of Rs. 3,06,000/- needs to be deducted from the total compensation of Rs. 13,73,000/- determined by the Tribunal. After deducting the same, the claimant is entitled to get compensation of Rs. 10,67,000/- with interest @ 7.5% per annum. To that extent, the impugned Judgment and Award passed by the Member, Motor Accident Claims Tribunal, Amalner needs to be modified.

28. Having regard to the above reassessment of the compensation, the original claimant is entitled to get compensation after deducting the earlier payment received by him. The appeal needs to be partly allowed as under :-

ORDER

(i) The appeal stands partly allowed.

(ii) The impugned Judgment and award dated 17.06.2016 passed in Motor Accident Claims Petition No. 58/2012 by the Member, Motor Accident Claims Tribunal, Amalner, Dist. Jalgaon is hereby modified as under :-

> Respondent Nos. 1 and 2 (as per the title clause of Judgment of M.A.C.T., Amalner) shall be jointly and severally liable to pay compensation of Rs. 10,67,000/- (Rupees Ten Lakhs and Sixty Seven Thousand Only) inclusive of NFL amount to the original claimant/respondent No.1(a) with interest @ 7.5% per annum from the date of filing of claim petition till realization of the said amount.

(iii) The amount of compensation shall be paid to the original claimant with interest @ 7.5 % per annum.

(iv) The amount lying with the Registry be transferred to the Member, Motor Accident Claims Tribunal, Amalner, Dist. Jalgaon for payment to the original claimant/respondent No.1(a) as per the procedure.

(v) The Registry to note and comply.

(vi) If any excess amount is found, the same shall be paid to the appellant.

(vii) The Award be drawn up accordingly.

(viii) No order as to costs.

(ix) The appeal stands disposed of accordingly.

(x) Civil Application No. 9885/2019 filed by the appellant is rejected and remaining two civil applications are disposed of in view of disposal of First Appeal.

(xi) Record and Proceedings be sent to the concerned Tribunal.

[SHRIKANT D. KULKARNI, J.]

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