Amrut

IN THE HIGH COURT OF BOMBAY AT GOA

FIRST APPEAL NO.20 OF 2015

Corrections carried out as per order dated 04.05.2023 passed in M.C.A. No.855/2023(F).

SHRI SANTOSH ~~Y.~~ P. NAIK,
son of ~~Y.~~ P. Naik, R/o Flat No.302,
3rd floor, Gurudatta complex,
M.G. Road, Panaji Goa
(Owner of Maruti Car
No.GA-01-C-6364) … Appellant

Versus

1. SHRI VINAYAK DHAKU NAIK,
since deceased, through LR's

1a) Vinanti Vinayak Naik
wife of late Vinayak Dhaku Naik
aged 56 years, Indian National

b) Rakshali Vinayak Naik
Daughter of late Vinayak Dhaku Naik
24 years of age, Indian National

c) Tushar Vinayak Naik
son of late Vinayak Naik
All above residing at H.No.10,
Dutalem wada,
Near Mallikaarjun Temple,
Madkai Ponda-Goa.

d) Ms. Tanishka Tushar Naik
aged 34 years, married,

e) Tushar Tulshidas Naik, major,
both residing at H.No.77/C,
Konar Gaunem, Bandora,
Ponda-Goa.

2. SHRI TULSHIDAS VASANT
GOLTEKAR, son of Vasant Goltekar,
major of age, R/o House No.68,
Murdawada Merces,
Tiswadi Goa
(Driver of M. Car No.GA-01-C-6364)

3.UNITED INDIA INSURANCE
CO.LTD. Mascarenhas Bldg.,
IInd floor, M.G. Road, Panaji Goa
(Insurar of Maruti Car No.
GA-01-C-6364)

4. MR MICHAEL R. FERNANDES,
Major of age, R/o H.No.C 19/80,
Singbal Marad, Caranzal Kerant,
Ilhas Goa. … Respondents

Mr U. R. Timble and Ms Y. Mandrekar, Advocates for the Appellant.
Mr A. R. S. Netravalkar, Advocate for Respondent No.3-Insurance Company.

CORAM: M. S. SONAK, J.

DATED : 23rd DECEMBER 2022

ORAL JUDGMENT

1. Heard Mr U. R. Timble who appears along with Ms Y. Mandrekar, learned counsel for the Appellant, and Mr Netravalkar, learned counsel for Respondent No.3-Insurance Company. Other Respondents are served, but they are neither present nor represented.

2. The Appellant, who continues as the registered owner of a Maruti car bearing registration No.GA-01-C-6364 has instituted this appeal to question the judgment and award dated 10.11.2014 in Claim Petition No. 34/2007 requiring him to pay the compensation of ₹72,500/- with interest at the rate of 9% per annum from 29.03.2007 till actual payment to Respondent No.1 (Vinayak, now deceased) for the injuries sustained by the said Vinayak in a vehicular accident dated 19.08.2006.

3. The Appellant's case is that he sold the Maruti car to Respondent No.4 – Michael Fernandes; therefore, the Appellant was not liable to pay any compensation to Vinayak. In any case, the Appellant contends that the insurance policy was in force and Respondent No.3 – Insurance Company was wrongly absolved of its liability to pay the compensation. Finally, the Appellant contends that there is no clear evidence about the involvement of the Maruti car in the accident, and even the compensation awarded was excessive.

4. Mr Timble, learned counsel for the Appellant, submitted that the finding about Respondent No.2 – Tulshidas driving the Maruti car without a licence is vitiated by perversity. He presents that the burden to prove the breach of the insurance policy's terms is always on the insurance company. In this case, such a burden was far from the discharged by the insurance company. He states that there is a serious dispute about Tulshidas's address. He says that the Tribunal has wrongly proceeded based on the premise that Tulshidas's licence must have been issued post-2004-2005. He states that the Tribunal improperly discarded the evidence of AW7- Investigating Officer having seen Tulshidas's licence. If all such factors were duly considered, it was apparent that the insurance company had failed to discharge the burden of the law. Mr Timble relied on ***Narchinva V. Kamat and another Vs Alfredo Antonio Doe Martins and others***[1]***, Karan Singh Vs Manoharlal and others***[2] ***, National Insurance Co. Ltd., Vs Swaran Singh and others***[3] in support of his above contentions.

5. Mr Timble submitted that the evidence on record does not establish the involvement of the Maruti car in the accident. He proposes that since the car was sold to Respondent No.4, no liability could have been imposed upon the Appellant. He points out an arithmetical error in computing the compensation amount, which is otherwise excessive.

6. Based on all the above contentions, Mr Timble submits that this appeal may be allowed and the impugned judgment and order be set aside. However, in the alternative, he proposes that the exoneration of the insurance company should be interfered with.

7. Mr Netravalkar, learned counsel for the insurance company, submitted that the burden of proving that the driver held a valid

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1 AIR 1985 SC 1281

2 (1989) 1 ACC 291 (MP)

3 (2004) 3 SCC 297

licence was upon the driver or the owner of the vehicle. He submitted that neither the owner (Appellant) nor the driver (Tulsidas) discharged this burden. He relied upon ***New India Assurance Co. Ltd. Vs Manu Krishna and others***[4] to support this proposition.

8. Mr Netravalkar submitted that in this case, the insurance company, by registered A/D letters, called upon the owner and the driver to produce a licence. However, they failed to produce such a licence; therefore, the Tribunal was justified in presuming that Tulsidas had no licence at the time of the accident. He submitted that the law casts statutory obligations on the owner and the driver to produce a licence when called upon. He relied on ***Sardari and others Vs Sushil Kumar and others***[5] supporting this proposition.

9. Mr Netravalkar submits that the evidence of RW2 Prakash Azavedo, RTO Official is crucial in this matter. This witness has deposed that records from 2004-2005 were computerized, and no licence in the name of Tulsidas was detected. He submitted that the evidence of Shyamrao Desai (AW7), Investigating Officer was primarily unreliable. In any case, even AW7 could not trace the licence of Tulshidas.

10. Based upon the above contentions and case laws, Mr Netravalkar submitted that the exoneration of the insurance company was legal and proper. However, he offered that there was a

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4 2011 ACJ 466
5 2008 ACJ 1307

calculation error, and upon correction, the compensation would come to ₹67,500/- and not ₹72,500/-. He also submitted that the interest should be reduced to 7% per annum. Finally, he proposed that the appeal be dismissed or disposed of after making this correction.

11. The rival contentions now fall for determination.

12. From the evidence on record, the involvement of the Maruti car in the accident has been substantially proved. Even the evidence about the Appellant transferring the Maruti car to Michael is entirely besides the point because there is overwhelming evidence that the Appellant's name continues as a registered owner in the RTO records. Therefore, based upon the alleged non-involvement of the Maruti car in the accident or alleged transfer of the Maruti car to Michael, the Appellant, cannot avoid liability for payment of compensation.

13. In so far as the quantum of compensation is concerned, again, there is no case made out to interfere. However, a case is made to reduce the compensation from ₹72,500/- to ₹67,500/- because of an apparent calculation error in para 46 of the impugned award. From the context, it is evident that the Tribunal has awarded only ₹4,500/- towards travelling expenses (see para 41). But this amount is reflected erroneously as ₹45,000/-. Upon proper correction, the total compensation payable comes to ₹67,500/- and not ₹72,500/-. Since the accident occurred in the year 2006, no case has been made out to interfere with the award of interest at the rate of 9% per annum.

14. The crucial question in this appeal concerns the Tribunal's exoneration of the insurance company. The Tribunal has reasoned that the evidence on record leads to an inference that Tulshidas – the driver of the Maruti car, was not holding a valid driving licence. The Tribunal has further reasoned that since the non-holding of such a valid driving licence by the driver of the Maruti car amounts to a breach of the insurance policy's terms, the insurance company was not liable to indemnify or pay the compensation as determined.

15. Mr Netravalkar relied upon the decision of the learned Single Judge of Allahabad High Court in *Manu Krishna and others* (supra) to contend that the burden to prove that the driver held a valid licence was upon the driver and owner of the vehicle. If they failed to discharge this burden, the legitimate inference was to be drawn that the driver had no such driving licence. However, this decision has not referred to the ruling of the Hon'ble Supreme Court in *Narchinva V. Kamat* (supra) and *Swaran Singh and others* (supra).

16. In *Narchinva V. Kamat* (supra), the Hon'ble Supreme Court has held that the burden of proving the breach of a term of the insurance policy is upon the insurance company. Therefore, if the insurance company failed to prove that there was a breach of the terms of the contract of the insurance as evidenced by the policy of the insurance on the ground that the driver who was driving the vehicle at the relevant time did not have a valid driving licence, the insurance company could not avoid liability. The Hon'ble Supreme Court held that once the insurance company failed to prove this aspect, its liability under the insurance contract remained intact and unhampered. Therefore, it was bound to satisfy the award under the comprehensive insurance policy.

17. In *Swaran Singh and others* (supra), the Hon'ble Supreme Court held that the breach of policy condition, e.g., disqualification of the driver or invalid driving licence of the driver, has to be proved to have been committed by the insured for avoiding liability by the insurer. Mere absence, fake or invalid driving licence, or disqualification of the driver for driving at the relevant time, are not in themselves defences available to the insurer against either the insured or the third parties. To avoid its liability towards the insured, the insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding the use of vehicles by a duly licensed driver or one who was not disqualified from driving at the relevant time. The insurance companies, however, with a view to avoid their liability, must not only establish the available defences raised in the said proceedings but also establish 'breach' on the part of the vehicle owner. The burden of proof, therefore, would be upon the insurance company. The Court cannot lay down any criteria for how the said burden would be discharged since the same would depend upon the facts and circumstances of each case.

18. Thus, both the judgments of the Hon'ble Supreme Court in terms hold that the burden of proving a 'breach' of the terms of the insurance policy is squarely upon the insurance company and not upon the owner or driver. Unfortunately, the Tribunal, in this case, has missed this legal position and examined the issue on the premise that the burden was on the owner or the driver of the Maruti car. This is a significant error in the reasoning of the Tribunal.

19. The Tribunal relied upon the evidence of Yeshwant Naik Raisaikar (RW3), Divisional Manager of the company. RW3 deposed to the letters addressed to the owner and the driver and the absence of a response from either on the issue of driving licence, RW3 however, RW3 candidly accepted that he was deposing based on the record available to him with the Panaji office. This evidence hardly suffices to discharge the burden that the law casts on the insurance company in such matters.

20. In *Narchinva V. Kamat* (supra), a question was posed to the driver, and he was asked to produce the driving licence during the cross-examination. The driver failed to produce a driving licence. Still, the Hon'ble Supreme Court held that the burden to prove that there was a breach of contract of the insurance squarely placed on the shoulders of the insurance company could not be said to have been discharged by a mere question in the cross-examination. The driver was under no obligation to furnish evidence to enable the insurance company to wriggle out of its liability under the insurance contract.

Therefore, the Tribunal's reasoning conflicts with the law in *Narchinva V. Kamat* (supra).

21. The Tribunal discarded the evidence of AW7 without giving good reasons. AW7, who investigated the accident, deposed that he had seen the driving licence of Tulshidas at the time of investigations into the accident. However, he admitted that such a driving licence was not a part of his record before him in the police investigation papers. Based upon such deposition, the Tribunal was not justified in concluding that AW7 had tried to protect the Maruti car's owner and driver.

22. The Tribunal, based upon evidence of RW3 and AW7, concluded that the only inference that could be drawn was that the driver had no valid driving licence. Consequently, there was a breach of the terms and conditions of the insurance policy. With respect, such an inference could not have been legitimately drawn considering the position of the evidence on record and the legal status that the burden to prove the breach was on the insurance company.

23. The testimony of Prakash Azavedo, an RTO official, is also not conclusive but highly tentative. Based upon the same, the insurance company cannot be said to have discharged the burden the law had placed upon it. Prakash Azavedo deposed that the records of the Panaji office are partly computerized from 2004-2005 onwards. He deposed that he could not trace any licence in favour of Tulshidas from the computer records. Such deposition concerns only one aspect of the matter. Nothing is on record to rule out the possibility of the driver obtaining his licence prior to 2004-2005 or obtaining his licence from the RTO office not located in Panaji. As it is, there is some issue with Tulshidas's correct address. In the main claim petition, there is a record that Tulsidas was served by affixation at Merces address. On the other hand, there is a record that Tulshidas was served at Porvorim address in the appeal. Therefore, merely because no record was found about Tulshidas's licence for post-2004-2005, it cannot be said that Tulshidas had no licence at the time of the accident. *Sardari (supra)* does not support the proposition advanced by Mr Netravalkar. In that case, there was an admission that the driver had no licence.

24. Thus, the finding about Tulshidas's having no licence, and consequently a fundamental breach of the terms of the insurance policy cannot be sustained. Moreover, this finding also ignores the law in *Swaran Singh and others* (supra). Therefore, this finding about a breach of the insurance policy's terms and consequent exoneration of the insurance company will have to be reversed.

25. This appeal is, therefore, partly allowed. Accordingly, the compensation amount is reduced from ₹72,500/- to ₹67,500/-. Further, the exoneration of the insurance company is set aside. The compensation amount will now have to be paid jointly and severally by the Appellant, Tulshidas, and Respondent No.3-Insurance company. The impugned award is modified accordingly. The directions for interest and adjustment of the amount paid under Section 140 of the M. V. Act are maintained.

26. Accordingly, the Appellant, Tulshidas and Respondent No.3-insurance company, including in particular Respondent No.3-insurance company, is directed to deposit the above compensation amount together with interest and costs in this Court within eight weeks from today. Upon such amount being deposited, the registry and/or the Goa State Legal Services Authority should contact the heirs of the deceased Vinayak [Respondent Nos. 1(a) to 1(e)] and see that they receive the compensation amount at the earliest. The compensation amount should be paid to them through bank transfer or by issuing cheques. However, the interests of justice will be met if the entire compensation amount is paid to Vinayak's wife, Vinanti Naik, i.e. Respondent No.1(a). Registry to pay the compensation amount to Vinanti Naik -Respondent No.1(a) accordingly. The appeal is partly allowed in the above terms.

M. S. SONAK, J.