

Amrut

IN THE HIGH COURT OF BOMBAY AT GOA
FIRST APPEAL NO.84 OF 2016

National Insurance Co. Ltd.,
Through its Manager,
Having Office at Magiedada Mansion, Ponda Goa. ... Appellant

Versus

1. Iqbal Subhani Sakali
Son of Shri Subhani Sakali,
Major in age,
R/o H.No.14, Nr. GPS. Nagzar, Curti,
Ponda Goa, 403 401.
2. Shri Tauheed Sangoli,
(Since deceased represented by his legal heir)
Mr. Abdul Khader Sangoli,
R/o Old Dandeli, Lamani Chawl,
Dandeli, Modern, MDS Belgaum,
Karnataka-590016 (Driver of Truck Reg.
No. KA-25-B-1394).
3. Shri Anil Prasa Shah,
Son of Shri Birachand Shah,
R/o 54/B, Township, Dandeli,
Uttara Kannada, Karnataka-581325 (Owner
of Truck Reg. No.KA-25-B-1394) ...Respondents

Mr. U. R. Timble and Ms. Y. Mandrekar, Advocates for the Appellant-
insurance company.

Mr. Shailesh Redkar, Advocate for respondent No.1.

CORAM: M. S. SONAK, J

DATE : 28th April 2022

ORAL JUDGMENT :

1. Heard the learned counsel for the parties.
2. This appeal is directed against the judgment and award dated 09.10.2015 in Claim Petition No.176/2014, by which the Motor Accident Claims Tribunal (Tribunal) awarded the respondent No.1(claimant) the compensation of ₹5,03,840/- for the damages sustained by the claimant to his vehicle and for the loss of income and payment of salary to the driver, during the period the claimant's vehicle could not be repaired and made roadworthy.
3. The record bears out that on 02.01.2014, an accident took place between the claimant's truck bearing registration No. GA-05-T-7714 and another truck (insured truck) bearing registration No. KA-25-B-1394. The claimant's case is that this accident not only damaged his truck but affected his income.
4. The record also bears out that the claimant has himself deposed that initially, he claimed damages with his own insurance company and not the Appellant- insurance company that had insured the truck bearing registration No. KA-25-B-1394. The claimant deposed that the claim was not settled because his insurer held that the cleaner without an effective license was driving the truck. This evidence is

found in paragraph 13 of the affidavit in lieu of examination-in-chief of the claimant (page 38 of the paper book). This evidence is backed by a letter dated 22.05.2014 from the claimant's insurer, "*Universal Sompo General Insurance Co. Ltd.*" which confirms this position. Admittedly, the claimant did not pursue the matter further with his own insurer. Mr. Timble submits that this indicates that the claimant admitted that his truck was not being driven by a driver holding an effective driving license.

5. The evidence on record also bears out that the claimant did not give any intimation of the accident to the Appellant – insurance company or require the Appellant- insurance company to appoint an approved surveyor or loss assessor as contemplated by Section 64 U.M. (4) of the Insurance Act, 1938 or Section 64UM (2) of the Insurance Act, 1938. Therefore, the Appellant – insurance company had no opportunity to get the claimant's truck surveyed or assessed. Moreover, this claim petition was filed on 02.12.2014, i.e., almost 11 months after the accident. Furthermore, the claim petition was filed after the claimant himself carried out repairs through a mechanic/garage without the involvement of any approved surveyor or loss assessor.

6. The claimant had claimed damages/compensation under the following distinct heads:

(a) an amount of ₹5,82,950/- for the actual damage to the truck, i.e., for repairs to the truck;

(b) an amount of ₹4,80,000/- towards loss of income during ten months when the truck was under repairs;

(c) an amount of ₹2,28,000/- towards the salary paid to his driver during 12 months when the truck was under repairs or could not be used.

7. The tribunal has awarded the claimant an amount of ₹1,55,000/- towards the actual repairs, ₹38,840/- towards the purchase of spare parts, and ₹10,000/- towards towing charges. The tribunal had also awarded compensation of ₹2,40,000/- towards the income loss for six months when the truck was under repair. The tribunal has also awarded compensation of ₹60,000/- towards the driver's salary for six months.

8. Mr. Timble learned counsel for the Appellant-insurance company did make some submissions about how the award of any compensation in this matter was not proper. However, he made it clear that he would not object to sustaining the award to the extent of ₹2,03,840/- towards actual repairs, spares, and towing charges. He submitted that though the objections based on Section 64UM would apply to this claim, going by the sketch attached to the panchanama, the Appellant-insurance company will not object to award to

₹2,03,840/- because this would represent the component of "*damage to property*" that was covered by the insurance policy.

9. However, Mr. Timble submitted that the claim to the balance compensation was neither established by the evidence on record nor permissible in law. He pointed out discrepancies in the evidence or lack of evidence on record. He submitted that the term "*damage to property*" finds a place in the insurance policy or the phrase "*damage to any property of a third party*" in Section 147(1)(b) of the Motor Vehicles Act, 1988 does not include damages allegedly sustained by a vehicle owner on account of loss of income or salary paid by a vehicle owner during the time the vehicle involved in the accident was under repairs. He submits that such liability was not covered under the insurance policy. He relied on *Suba Transport Co. and another Vs Phiroze Sethane Pvt. Ltd.*¹, *General Manager, Kerala State Road Transport Corporation, Trivandrum Vs K. P. Saradamma*² and *Rajkumar Vs Mahendra Singh and others*³ in support of his contentions.

10. Based on the above contentions, Mr. Timble submits that the amount awarded over and above the amount of ₹2,03,840/- warrants interference.

1 1993 ACJ 77 (Bom)

2 AIR 1989 Kerala 23

3 1985 ACJ 103 (MP)

11. Mr. Redkar, learned counsel for the claimant, defends the impugned award based on the reasoning reflected therein. He pointed out that the tribunal should have awarded additional amounts, and now the same should be awarded by this Court. He points out that the contentions now raised find no reflection in the cross-examination of the witnesses for the claimant or the claimant himself. He pointed out that the evidence on record is more than sufficient to sustain findings recorded by the tribunal. He pointed out that the damages suffered by the claimant are on account of an accident. Therefore, the insurance company must pay such damages and satisfy the award. He relied on Section 149 of the Motor Vehicles Act, 1988. He submitted that the insurance policy and the provisions of Section 147 contemplate damages on account of loss of income or payment of salary to an idle driver.

12. Mr. Redkar pointed out how there was no challenge to the statements of the claimant and his witnesses in the course of the cross-examination. He pointed out how the truck had to be towed on two occasions and how the tribunal erred in awarding compensation of only ₹10,000/-. He pointed out how the truck remained idle for ten months, and the tribunal erred in restricting the amount of compensation. He submitted that Section 64UM would not apply in case of a third-party claim. He submitted that nothing prevented the insurance company from appointing its surveyor to verify whether the repairs undertaken by the claimant were disproportionate. Mr. Redkar

submitted that the appeal may be dismissed but only after enhancing the compensation amount for all these reasons.

13. Mr. Redkar, without prejudice, submitted that this is a fit case where a pay and recover order could be made should the Court conclude that the insurance company was not liable to pay compensation over and above ₹2,03,840/-. He relied on *Shri Pankaj G. Naik and another Vs Smt. Ranjana R. Mandrekar & others (First Appeal No.52/2017 decided on 11.03.2022)* to support this principle.

14. The rival contentions now fall for my determination.

15. Since the Appellant-insurance company has not objected to the payment of compensation/damages to the extent of ₹2,03,840/- towards the actual damages to the truck, i.e. property of a third party, I do not propose to go into the issues of breach of the provisions of Section 64UM of the Insurance Act in the present matter though, at least *prima facie* I must observe that in the absence of any intimation to the Appellant-insurance company, and the fact that the claim petition was filed almost ten months after the accident and particularly after the claimant carried out repairs through a mechanic/garage without the involvement of approved surveyor or loss assessor, some issues could be raised about the compliances with the provisions of Section 64UM(2) as then applied.

16. Therefore, the main issue that arises for determination is whether the tribunal on facts and law was justified in awarding any compensation for loss of income when the truck was under repairs or idle and towards the salaries paid by the claimant to the idled driver. This amount comes to ₹3,00,000/-.

17. On facts, the tribunal has not accepted the claimant's explanation about his requiring ten months to repair the truck allegedly because the spare parts were not available. The tribunal, in paragraph 22 of the impugned award, has observed thus:-

"22. AW5 has stated that it took 10 months to repair the truck as the spare parts were not available. However, this statement of his cannot be accepted, as it is the claimant who has purchased the spare parts. He has not made mention of the fact that the spare parts were not available. No explanation is given by the claimant for the delay in purchasing of the spare parts. However, considering the fact that the claimant had stated that he had purchased the spare parts from shops and different scrap dealers and also considering the fact that the truck of the claimant was totally damaged on its front side, I am of the opinion that the period required for repairs was six months."

18. After making the above observations, which, in my view, are quite well-founded, the tribunal, virtually on an ad-hoc basis, determined that the period of six months may have been required to undertake repairs and, based thereon, proceeded to award an amount of ₹2,40,000/- to the claimant towards loss of income. The tribunal

took the monthly income from the truck at ₹40,000/-, relying solely upon Exhibit 28, which again does not support such a conclusion.

19. The finding of six months, to my mind, is vitiated by perversity. The tribunal has itself, in the very same paragraph, disbelieved, quite correctly, the evidence of AW5. Even the claimant's evidence is by no means sufficient to sustain the finding that it took so long to get the truck repaired. The tribunal has wholly glossed over evidence about how the claimant had made a claim to his own insurer and the circumstances in which such claim came to be rejected. The estoppel issue need not be gone into at this stage, but this aspect was required to be considered by the tribunal. Therefore, the compensation based on this delay that the claimant does not explain is not sustainable.

20. Even if the evidence were to be construed liberally, there is again no evidence to sustain the finding of the claimant earning ₹40,000/- per month from the truck business. Exhibit 28 is only a bank statement that reveals some bank entries for one year before the accident. From the entries, no inference was possible that the claimant was earning ₹40,000/- per month out of this truck. Though some guesswork is always permissible, some primary evidence has to be there on record from which some legitimate inference could be drawn. Thus factually, no case was made out for grant of compensation of ₹2,40,000/- towards loss of income.

21. The position is the same regarding the payment allegedly made to the driver at ₹10,000/- per month. The evidence of the driver inspires no confidence whatsoever. The receipts issued by the driver on its face appear to have been collectively made for production as evidence. There is no explanation for why the driver was retained. There is no explanation about the driver's salary except a bare claim. This finding, therefore, is also not entirely sustainable on facts.

22. The facts apart even in law, it is doubtful whether the claimant could have imposed the liability of ₹3,00,000/- on the Appellant-insurance company. Section 147(1)(b) deals with requirements of policies and limits of liability. This provision refers to an insurance policy against any liability that any person may incur, *inter alia*, in respect of damage to any property of a third party caused by or arising out of the use of the vehicle in a public place. Therefore, the expression used is "*damage to any property of a third party*".

23. Similarly, the insurance policy is on record on pages 127 to 134 of the paper book. Section II dealing with liability to third parties, *inter alia*, provides that policy covers "*damage to property caused by the use (including the loading and/or unloading) of the vehicle*". Thus, the crucial expression is "*damage to property*".

24. In *General Manager, Kerala State Road Transport Corporation, Trivandrum* (supra), the Division Bench of Kerala High Court comprising K. John Mathew and K. G. Balakrishnan, JJ, in the

context of similar statutory provisions or clauses in the insurance policy, held that the term "*damage to property*" will not include damages towards loss of income as a result of the accident. The Court held that the language of the section is plain and admits to only one meaning, namely that the power conferred on the tribunal is restricted to deciding claims of damages 'to' property. The meaning of the word 'to' which is the preposition used, as per the Concise Oxford Dictionary is '*in the direction of*'. "*A preposition is a word placed before a noun or a pronoun to show in what relation the person or thing denoted by it stands in regard to something else. (English Grammar and Composition by Wren & Martin, 75th Edn. Page 182)*". The Court ruled that the words ' damages take the direct damage to the property alone to property.'

25. A similar view is taken in *Suba Transport Co.* (supra) by the learned Single Judge of this Court, M. L. Dudhat J. The Court held that the expression refers to damage to property and not other losses that the vehicle owner may have sustained on account of the accident.

26. In *Rajkumar* (supra), the Division Bench of M.P. High Court also took a similar view. Accordingly, it declined compensation when the truck was idle during repairs, or the truck owner suffered some business losses.

27. Since, on facts, I already held that the claim towards damages other than damages to property was not established, I do not propose

to decide finally the issue raised by Mr. Timble. Suffice to note, however, that at least three decisions cited by Mr. Timble support the view canvassed by him.

28. The issue of even pay and recovery will not arise now that the findings based on which the claim to the extent of ₹3,00,000/- is held to be unsustainable. The principle in *Pankaj Naik* (supra) will therefore not apply.

29. The accident, in this case, took place in the year 2014. In addition, the claim petition was filed almost ten months after the accident. Considering these two factors, the award of interest at the rate of 9% per annum is excessive which must be brought down to 7% per annum.

30. The appeal is accordingly partly allowed. Therefore, the impugned award is modified and reduced to ₹2,03,840/-. The interest amount is also reduced from 9% per annum to 7%.

31. The insurance company has already deposited awarded amount in this Court, out of which the claimant has withdrawn approximately 50% of compensation, i.e., ₹2,50,000/- (vide order dated 05.03.2019). The claimant has also furnished an undertaking to this Court that should the amount of compensation be reduced, the claimant will bring back the amount to this Court along with interest. Now that the amount is reduced, the claimant is directed to bring

back the excess amount together with interest thereon at the rate of 5% per annum within eight weeks from today.

32. The claimant should give necessary intimation to the learned counsel for the Appellant-insurance company. If the amount is not brought back, the registry will place the matter on board for directions because there is an issue with the claimant's undertaking that must be obeyed.

33. The Appellant-insurance company is now at liberty to withdraw the balance amount based on the modification.

34. The appeal is disposed of without any order for costs.

M. S. SONAK, J

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