IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO.684 OF 2022

Bajaj Allianz General Insurance Company Limited … Appellant
Vs.
Smt. Nanda Anant Waghe and ors. … Respondents

Ms.Yogita Deshmukh, Advocate for the Appellant.
Ms.Rina Kundu, Advocate for the Respondents No.1 and 2.

CORAM : ABHAY AHUJA, J.
DATE : 12 JULY, 2023.

P.C. :

1. This is an appeal preferred by the Bajaj Allianz General Insurance Company Limited, being the Appellant under section 173 of the Motor Vehicles Act, 1988 ("M.V. Act") being aggrieved and dissatisfied by the judgment and award dated 3rd March, 2015 passed by the Motor Accident Claim Tribunal, Thane in Motor Accident Claim Petition No.912 of 2008 whereby the Appellant as well as the owner of the insured vehicle have been held to be jointly and severally liable to pay compensation of Rs.6,53,339/- to Respondents No.1 and 2 who were the claimants in the claim petition alongwith interest at the rate of 7% p.a. if the payments are

made within two months failing which at the rate of 9% p.a.

2. On 8th September, 2008 at about 14.00 hours one Mr.Anant Waghe, was riding motor-cycle bearing No.MH-04-BL-9362 alongwith his friend and was proceeding towards Mumbai on Mumbai-Agra Road Highway. Mr.Waghe was riding the motor-cycle and when he reached near Bhadane village, Bhiwandi Taluka at that time motor cycle bearing No.MH-04-CH-6297 came from the opposite direction in high speed and dashed the vehicle of Mr.Anant Waghe, causing serious injuries to Mr.Anant Waghe. Mr.Waghe was moved to Civil Hospital, Thane, however he died on 9th September, 2008 while he was under treatment.

3. The widow of Anant Waghe and his minor son preferred an application under section 163A of the M.V. Act for grant of compensation.

4. A written statement was filed on behalf of the Appellant-insurance company being the insurer of the offending vehicle No.MH-04-CH-6297 denying that the said motor-cycle involved in the accident on 8th September, 2008 was insured under cover-note bearing distinctive No.BZ 0800166751 (the "said /subject cover note"). That the Appellant

had not received any amount of premium from the owner of the said motor-cycle for insurance under the said cover-note and therefore, the Appellant was not liable to pay compensation to the claimants for the date and time of accident. That as per the record of the Appellant, cover-note book containing cover-notes bearing the subject distinctive number had been issued to their insurance agent viz. S.R.Solutions and that the said insurance agent had reported to the Appellant that the cover-note book having the subject distinctive number had been misplaced/lost and the same was not traceable. That an irrevocable deed of indemnity dated 24th September, 2008 had been executed in favour of the Appellant by S.R.Solutions and the same had been filed with the Appellant Insurance Company. It was therefore submitted that the said cover-note claiming to be valid from 1st September, 2008 to 31st August, 2009 purportedly covering the date of the accident filed alongwith the claim petition was fake, fabricated and fraudulent and therefore, liable to be dismissed.

5. The Tribunal after considering the submissions on behalf of the claimants as well as the insurance company rejected the submissions on behalf of the Appellant-insurance company and held the Appellant insurance company and the owner of the offending vehicle jointly and

severally liable to pay the compensation to the Claimants.

6. I have heard Ms.Yogita Deshmukh, learned counsel for the Appellant and Ms. Rina Kundu, learned counsel for the Respondents No.1 and 2 at length and with their able assistance, I have perused the papers and proceedings in the matter and considered the rival contentions.

7. Ms. Yogita Deshmukh, learned counsel for the Appellant-insurance company would reiterate the submissions made on behalf of the Appellant in the written statement to the claim application before the Tribunal.

8. Learned counsel for the Appellant -Insurance Company at the outset submits that there is no proof to establish that the subject vehicle No.MH-04-CH-6297 was responsible for the accident. Learned counsel refers to the cross-examination of the claimant and submits that the claimant in her deposition has stated that she had not personally seen the accident; that vehicles speedily pass by the Mumbai-Agra Road and that is the road on which the accident occurred; that she had not filed any documents to show that her husband was 29 years old at the time of the accident and that he was earning Rs.40,000/- per annum, that she was

doing work in the house and had also not performed a second marriage; also that she did not know whether another vehicle bearing No.MH-04-CH- 6297 was insured with the Appellant or not; that she did not know whether her husband was at fault in causing the accident and that whether another vehicle was rash and negligent or not; that therefore there is no evidence that the said vehicle was even involved in the accident.

9. Learned counsel further submits that the subject cover-note had been issued by the Appellant to their insurance agent viz. S.R.Solutions and the said agent had reported that the cover-note book containing the subject distinctive numbers had been misplaced/lost and was not traceable and therefore the Appellant had obtained an irrevocable deed of indemnity in their favour from the said agent. Learned counsel draws the attention of this court to the Further Examination-in-chief on oath of the witness of the Appellant in support of her contention. Learned counsel also submits that the said evidence also testifies that the Appellant had issued public notice in respect of loss of cover-note of the Appellant which public notice was also produced at the time of examination-in-chief.

10. Learned counsel submits that no person from or partner of S.R.Solutions has been produced as witness and examined and therefore, the Appellant is not liable. Learned counsel would submit that it was for the claimants to produce the partner of S.R.Solutions and to examine him in order to establish the Appellant's liability but which has not been done and therefore since S.R.Solutions had already executed the indemnity in favour of the Appellant, the Appellant would not be liable. Learned counsel submits that the claimants ought to have made S.R. Solutions as a party to the claim petition which also they have not done and therefore, the claim must fail as the cover-note was fake, as the claimant has not been able to produce the original cover-note.

11. Learned counsel refers to paragraph No.17 of the impugned judgment to summarize her arguments. The said paragraph No.17 is quoted as under :-

> "17. Witness examined by the insurance company namely Irfan Shaikh, who is serving as a legal officer with opponent No.2-insurance company in his evidence tried to depose in support of the defence taken by the opponent No.2. As per his evidence, vehicle bearing No. MH-04-CH-6297 was not insured with opponent No.2 at the time of accident. However, at next moment he has deposed that cover note bearing No.BZ 0800166751 from the book No.16676 under which the offending vehicle alleged to be insured from 1.9.2008 to 31.8.2009 was illegal and unauthorised document.

> As per his evidence, above said cover note was lost/misplaced by the agent of insurance company, for which the insurer had published a public notice in DNA newspaper dated 14.12.2009. Thus, he has deposed that the public at large were informed about the illegal and unauthorised issuance of the cover note and the insurance company will not be liable for the same and consequences thereof. He has also deposed that irrevocable deed of indemnity was executed in between the insurer and the agent–S.R. Solutions who lost/misplaced the cover note in question. As per his evidence, the agent–S.R.Solutions assumes all responsibility for lost/misplaced cover note in question. He has also deposed that alleged cover note filed by the applicants is forged and fake one and the said cover note was never issued by opponent No.2 and opponent No.2 has not received any premium amount. He further deposed that the vehicle bearing No.MH-04-CH-6297 owned by Anil Jadhav was not at all insured at relevant time with opponent No.2."

12. On the other hand, Ms.Rina Kundu, learned counsel for the Respondents No.1 and 2, the original claimants would submit that the claim filed by the claimants is under section 163A of the M.V.Act and therefore, it is not necessary for the claimants to plead and prove whose negligence caused the accident and it would be sufficient for the claimants to prove involvement of the vehicle in the accident. She would submit that as along as it was proved that there was involvement of vehicle MH-04-CH-6297 insured by the Appellant in the accident which took place on 8th September, 2008 in which Mr.Anant Waghe died that would be sufficient to grant compensation. Learned counsel refers to paragraph No. 13 of the judgment in support.

13. With respect to the allegation of the cover-note being fake, learned counsel refers to paragraph No.19 of the impugned judgment and submits that the Tribunal has correctly found that the public notice issued by the insurance company in the newspaper dated 14th December, 2009 meant that the said notice had been issued after nearly 15 months of the occurring of the accident which took place on 8th September, 2008. She would submit that had it been a fact that the cover-note book was lost before issuance of any cover-note by the agent of the insurance company either the agent or the insurance company was expected to issue the said public notice immediately after the loss of the cover-note book and considering this aspect and as the insurance company had not examined the agent with whom the cover-note book was given, it would be difficult for the Tribunal to rely upon the evidence given by the officer of the insurance company about the loss of the cover-note book before issuing cover-note by the agent of the insurance company to the insured. Learned counsel would submit that the insurance company has not examined any partner or employee of S.R.Solutions-the agent and could have easily been asked to come and give evidence. Learned counsel would submit that it is upon the person alleging fraud or fabrication to prove the

allegation and not the other way round. Learned counsel submits that if it was a case of fake cover-note as alleged, then atleast an FIR should have been lodged by the Appellant against the agent or even against the claimants, which has not been done.

14. Learned counsel refers to paragraphs No.11 to 14 of the impugned judgment in support of her arguments.

15. Before proceeding further to examine the merits of this case, it would be useful to quote section 163A of the M.V.Act as applicable to this case:-

"163A. Special provisions as to payment of compensation on structured formula basis.—

> (1) Notwithstanding anything contained in this Act or in any other law for the time being in force or instrument having the force of law, the owner of the motor vehicle or the authorized insurer shall be liable to pay in the case of death or permanent disablement due to accident arising out of the use of motor vehicle, compensation, as indicated in the Second Schedule, to the legal heirs or the victim, as the case may be.
> Explanation.—For the purposes of this sub-section, "permanent disability" shall have the same meaning and extent as in the Workmen's Compensation Act, 1923 (8 of 1923).
>
> (2) In any claim for compensation under sub-section (1), the claimant shall not be required to plead or establish that the death or permanent disablement in respect of which the claim has been made was due to any wrongful act or neglect or default of the

> <u>owner of the vehicle or vehicles concerned or of any other person.</u>
>
> (3) The Central Government may, keeping in view the cost of living by notification in the Official Gazette, from time to time amend the Second Schedule."
>
> **(emphasis supplied)**

16. There is no dispute that the claim by the original claimants is under section 163A of the M.V.Act and it is settled law that for any claim made under this section it is not necessary for the claimants to plead and/or prove at whose negligence the accident has occurred and it would be sufficient if there is involvement of the vehicle in the accident.

17. The widow of deceased has in her evidence deposed although she has not seen the accident but on the basis of police papers she has stated that on 8.9.2008 at about 14.00 hours her husband Anant Waghe was riding the motorcycle bearing No.MH-04-BL-9362 by Mumbai–Agra road and when he reached within the vicinity of Bhadane village, at that time the motorcycle bearing No.MH-04-CH-6297 came from opposite direction in high and excessive speed, in rash and negligent manner and the said motorcycle gave dash to her husband's motorcycle. Due to impact of the accident her husband sustained serious injuries. He was immediately shifted to the Civil Hospital, Thane but was declared dead while

treatment was going on. In her cross examination, she has also admitted that the vehicles are speedily passing by on the Mumbai-Agra road. She has nowhere stated that motorcycle bearing No.MH-04-CH-6297 was not involved in an accident that occurred on 8.9.2008 and also there is no suggestion or any question put to her in cross-examination about non-involvement of the said motorcycle in the accident.

18. A perusal of the FIR and the spot Panchanama disclose that motorcycle bearing No.MH-04-CH-6297 was involved in said accident. The deceased was riding the motorcycle bearing No.MH-O4-BL-9362 and as per the case of the Claimants, the said motor-cycle was dashed by the motor-cycle bearing No.MH-04-CH-6297 and the police papers i.e. FIR and spot panchanama disclose the involvement of the vehicles in the accident that occurred on 8.9.2008. The Tribunal has and in my view, rightly so, based on the evidence at its disposal concluded about the involvement of the motor-cycle bearing No.MH-04-CH-6297 in the accident which occurred on 8th September, 2008. The FIR, police papers establish that the death of deceased Anant Waghe occurred on 9.9.2008 when he was taking treatment.

19. Considering the FIR and considering the oral evidence about the vehicular accidental death of deceased Anant Waghe supported by the inquest panchnama and postmortem report, I am in agreement with the finding of the Tribunal that the applicants have proved their case that deceased Anant Sukrya Waghe died in motor vehicle accident took place on 8.9.2008 and in said accident there was involvement of motorcycle bearing No.MH-04-CH-6297, insured by the Appellant Insurance Company.

20. Coming to the issue of fake cover-note, as alleged by the Appellant, there is no doubt that the subject cover-note was issued by the Appellant - insurance company to its authorized agent S.R.Solutions who then claimed that it had misplaced it. It has been argued on behalf of the Appellant that the Appellant had secured an indemnity from S.R.Solutions with respect to the misplacement/loss of the subject cover-note and therefore, the insurance company would not be liable. In this regard, it is observed that the irrevocable deed of indemnity executed by S.R. Solutions in favour of the Appellant is dated 24th September, 2008, which is much after the date of the accident which was on 8th September, 2008. The vehicle owner covered under the subject cover-note valid from 1st

September, 2008 to 31st August, 2009 was entitled to assume that he was protected or insured in as much as the indemnity is subsequent to the date of the accident i.e. 8th September 2008. Further, the subject indemnity is between the insurance company and S.R.Solutions and neither the owner of the subject vehicle nor anyone else is privy to the said contract. Moreover, as observed by the Tribunal, only a public notice with respect to the cover-note dated 14th December, 2009 was issued and that too after nearly 15 months of the accident; the Appellant has not even examined the agent in whose custody the cover-note book was and who was authorized to act on behalf of the insurance company. Merely obtaining an indemnity cannot absolve the insurance company of its liability. No evidence has been placed either before the Tribunal or this Court to demonstrate that the cover note or the policy was fake nor the indemnity in any manner proves that the cover note was fake. On the contrary, it clearly suggests that SR solutions was the authorised agent of the Insurance Company who was issued a cover note book containing the subject cover note which were stated to be misplaced. No police complainant or FIR in respect of the same has been brought to my notice which was filed before the accident. Also no evidence appears to be on record to demonstrate that the subject cover note was not paid for.

21. I also agree with the finding of the Tribunal when it says that the Appellant has not taken any steps to examine their own authorized agent S.R.Solutions and surely the learned counsel for the Appellant cannot be heard to say that it was for the claimants to do the same. The allegation that the cover-note was fake or fabricated or fraudulent was made by the Appellant and it was for the Appellant to prove the same and the Appellant cannot be heard to say that it was for the claimants to disprove that the same was not fake or fabricated or fraudulent. Allegations of fraud, fabrication, fake have to be proved by the person alleging and cannot be by way of mere allegations, insinuations or implication. There is a presumption of innocence in law. There is no presumption of guilt. Guilt has to be proved, which the insurance company has miserably failed to do. In fact the irrevocable indemnity bond dated 24th September, 2008 clearly demonstrates that the agent S.R.Solutions was an authorized agent of an insurance company who was assigned with the subject cover-note and because the cover-note including the subject cover-note was purportedly misplaced or lost, the insurance company took the indemnity from the insurance company and that too after the date of the accident. The insurance company therefore cannot absolve itself of the liability which

has occurred prior to the discovery that the subject cover-note was lost. In fact if that was the case, it was the duty of the Appellant to lodge an FIR or a police complaint or have an investigation instituted in this regard which the insurance company does not appear to have done. I therefore do not find any error or illegality in Tribunal's rejection of the submission of fake policy on behalf of the Appellant.

22. I also do not find any illegality or perversity in the finding of the Tribunal with respect to the compensation awarded on the basis of the oral evidence of the Applicant who submitted that the deceased was working as a brick-maker at Bhiwandi and earning Rs.40,000/- per annum. The insurance company has not brought any contrary evidence in this regard. I also do not find any error or illegality or perversity in the Tribunal's order in computing the loss of dependency after adopting the multiplier of 17 based on the age of the deceased at 30 years (on the basis of the police papers) or on the award of amount towards loss of consortium, funeral expenses, loss of estate and loss of love and affection and finally holding that the Applicants would be entitled for compensation of Rs.6,53,339/- with interest.

23. Therefore, there is no merit in the appeal and the appeal deserves to be dismissed.

24. However, considering that the Respondent No.1 has not appeared in the matter either before the Tribunal or before this court despite service and considering that the widow and the child of the deceased have been waiting for a closure with respect to the compensation in an a case leading to the death of husband and father respectively and so that they are not made to run from period to post between the Insurance Company and the owner of the vehicle, the order dated 3rd March, 2015 is modified to the extent that the Appellant-insurance company to pay the compensation of Rs.6,53,339/- with interest as contained in clause (ii) of the order dated 3rd March, 2015 and thereafter may recover the same from the owner of the vehicle being Respondent No.3 as it may be advised.

25. Subject to the above, let the payments of the amounts be made to the Applicants in the proportion and in the manner specified in the order dated 3rd March, 2015, after deducting the payments already withdrawn by the Respondents claimants.

26. The appeal is disposed as above. No order as to costs.

(ABHAY AHUJA, J.)