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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO.223 OF 2015

United India Insurance Company Limited … Appellant

V/s.

Pradeep Sritejnaryan Chaudhary & Anr. … Respondents

Mr. Amol Gatne for the appellant.

CORAM : AMIT BORKAR, J.

DATED : JANUARY 23, 2023

P.C.:

1. The insurance company challenges judgment and award dated 20th April 2013 passed by the Motor Accident Claims Tribunal, Mumbai in Application No.3559 of 2004.

2. The Tribunal while recording a finding that the licence which the driver was carrying was fraudulent and directing the insurance company to first pay the amount and recover the same from the appellant. The facts relevant for the adjudication of appeal are as under.

3. The claim is filed by injured as regard accident occurred on 5th October, 2004 at about 17.10 hours on Andheri-Kurla Road. While travelling, he was sitting in his three wheeler motor tempo in a stationed condition when another tempo came from behind and dashed the tempo of the applicant resulting in injuries to the applicant.

4. The applicant sustained fracture of right superior pubic bone, pelvis, head injuries and other injuries. He was required to be admitted on 5th October, 2004 and discharged on 1st November, 2004. He, therefore, filed claim of Rs.3,50,000/- along with interest @12% per annum.

5. The insurance company contested the claim by filing written statement and submitted that the accident did not occurred due to rash and negligent driving of the opponent. It was because of the rash and negligent driving on the part of applicant himself. It is submitted that the licence filed by the applicant was fake. In support of the said contention, letter of licencing authority, Cuttak dated 27th February, 2000 was placed on record.

6. The learned Trial Court based on evidence on record held that the notional income of applicant at Rs.3000/- per month granting total compensation of Rs.61,010/- to the applicant.

7. While considering issue of holding valid and effective licence on the date of accident, the tribunal held that the case is of fraudulent licence and, therefore, liability of insurance company cannot cease. The Tribunal, therefore, held that the insurance company shall be primarily liable to pay the amount of compensation and recover the same from the appellant. This direction to pay and recover has been challenged by the insurance company along with other points.

8. Learned advocate for the appellant relied on the judgment of the Division Bench of this Court in the case of **Traders Pvt. Ltd. & Anr. Vs. Sunanda Krishna Machivale & Ors.,** reported in 2009 (Supp.) Bom.C.R. 587. wherein the Division Bench of this Court in paragraph 56 held that the direction to pay and recover cannot be issued in all cases directing insurance company to pay and recover when insurance company is not bound in law to pay such compensation.

9. At this stage, it is profitable to refer to the judgment of the Apex Court in the case of **Shamanna And Another Vs. The Divisional Manager, The Oriental Insurance Co. Ltd. And Others**, reported in 2018 9 SCC 650. In the facts of the said case, Tribunal awarded compensation of Rs.3,55,500/- along with interest at the rate of 6% to the claimant. The Tribunal recorded a finding that the driver was not holding valid licence resulting in violation of insurance policy. However, the Tribunal directed the insurance company to pay compensation to the claimant and granted liberty to recover the same from the owner of the offending vehicle. The High Court enhanced the compensation and set aside direction issued to the insurance company to "pay and recover".

10. The Apex Court in the facts of the said case set aside the order of the High Court modifying award of the Tribunal to the extent of direction to pay and recover.

11. Relying on the judgment of the Apex Court in the case of **Oriental Insurance Co. Ltd vs Shri Nanjappan And Ors.** reported in 2004 13 SCC 224, the Apex Court set aside the direction of the High Court modifying the award to the extent of set aside pay and recovery order. The Apex court in the said judgment directed the appellant/Insurance Company to pay the amount and recover the same from the owner of the vehicle.

12. In the facts of the present case, the amount involved is Rs.61,010/- along with interest at the rate of 7.5%, in my opinion, as is done by the Apex Court in the case of **Shamanna And Another** (supra), I am not inclined to interfere with clause 4 of the order dated 20th April, 2013.

13. However, it is made clear that this Court has not conclusively adjudicated upon the issue of “pay and recover” when the insurance company ex facie is not liable to pay such amount.

14. Keeping the said question open, the appeal is dismissed. No costs.

(AMIT BORKAR, J.)