2024:BHC-AUG:2747

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

FIRST APPEAL NO. 1501 OF 2018

New India Assurance Company Limited
Trough it's Authorized Signatory /
Senior Divisional Manager / Incharge Legal Hub,
Mahesh Compound, Adalat Road, Aurangabad
Dist. Aurnagabad. .. Appellant

Versus

1. Manoj Gangaram Narwade
age 36 years, occ. Labour
r/o Nidhona, Tq. Fulambri
Dist. Aurangabad.

2. Laxman Gavnaji Mali }
age major, occ. Driver } Deleted vide order
r/o Padali, Tq. Khultabad } dated 28.09.2022.
Dist. Aurangabad. }

3. Raosaheb Dashrath Kadam
(Deceased) through
Tarabai Raosaheb Kadam
age 46 years, occ. Household
r/o Padali, Tq. Khultabad
Dist. Aurangabad.

4. Pooja Manoj Narwade
age 22 years, occ. Student
r/o At Post Nidhona, Tq. Fulmabri
Dist. Aurangabad.

5. Vaishali d/o Manoj Narwade
age 17 years, occ. Student
r/o At Post Nidhona, Tq. Fulambri
Dist. Aurangabad
Under guardianship of
respondent No. 1. .. Respondents

Mr. M. R. Deshmukh, Advocate for the appellant.
Mr. A. D. Muley, Advocate for respondents No. 1 and 5.
Mr. D. K. Dagadkhair, Advocate for respondent No. 3.

CORAM : R. M. JOSHI, J.
RESERVED ON : 30th JANUARY, 2024.
PRONOUNCED ON : 7th FEBRUARY, 2024.

JUDGMENT :

1. This appeal is preferred by the insurer under Section 173 of Motor Vehicles Act (for short “M.V. Act”) against judgment and award dated 22nd December, 2017 passed in M.A.C.P. No. 416/2012.

2. Facts which led to filing of present appeal can be narrated in short as under :-

Rekha died on 22nd April, 2011 while she was travelling in tempo bearing registration No. MH 20 W 6985. It is the case of the Claimants that due to rash and negligent driving of the tempo by its driver, deceased and her minor son were thrown out of the running vehicle resulting into causing of their death. Claimants being dependent on deceased Rekha, compensation is sought from the owner, driver and insurer of the offending vehicle.

3. Owner and driver of the offending vehicle filed written statement at Exhibit 21 denying claim of the Claimants including the allegations of rashness and negligence on the part of the driver of the tempo. It is however, not disputed that the accident in question has occurred of offending vehicle, wherein the deceased died. Insurer filed written statement at Exhibit 20 wherein coverage of insurance of the tempo is admitted. Insurer however, claimed that the driver of the tempo was not holding valid and effective licence. It is also claimed that the deceased did not die on account of negligence on the part of the driver of the tempo. Specific contention is raised by the insurer that the offending vehicle was for carrying goods only and not for carrying passengers therein and as such, there is a breach of condition of policy and hence, the insurer is not liable for payment of compensation.

4. Issues were framed at Exhibit 24. Claimant No. 1 examined himself. He relied upon the First Information Report, inquest panchanama and Post Mortem report. There is no dispute about the fact that Claimant No. 1 i.e. husband of deceased Rekha lodged First Information Report (Exhibit 47) and pursuant thereto, offence came to be registered against the driver of the tempo. There

is no dispute made with regard to the genuineness of the police papers including spot panchanama, inquest panchanama, Post Mortem notes etc. Police papers also include driving licence of the driver.

5. Learned Tribunal allowed the claim and held owner, driver and insurer of the offending vehicle to jointly and severally liable to pay compensation of Rs. 6,14,000/- with interest.

6. The insurer seeks challenge to the said award mainly on the ground that the offending tempo is registered as goods vehicle and since at the time of the accident it was carrying passengers, and as the risk of the passengers is not covered under the policy and hence, the insurer is not liable to make payment of compensation.

7. Learned counsel for insurer submits that the evidence on record clearly demonstrates that the deceased was travelling in the tempo as passenger for the purpose of going to fare/market place. Thus, her risk was not covered by the terms and conditions of the insurance policy. In this regards reference is made to First Information Report (Exhibit 47) filed by husband of the deceased.

According to him, it is stated therein in specific terms that the deceased along with her son and others were proceeding in the tempo for going to market place. According to him, it is settled law that the First Information Report and Police Papers sought to be relied upon by the Claimants can be read in evidence. It is his submission that the First Information Report, therefore, is binding on him and now the Claimants are not permitted to state that the deceased was travelling in the tempo in the capacity of a labourer. It is submitted that even in the evidence of Claimant No. 1, there is no explanation forthcoming for taking different stand than the one taken in the First Information Report. To support his submission that once a document is proved, part thereof cannot be resiled later on, he placed reliance on judgment of Hon'ble Supreme Court in case of Oriental Insurance Company Limited vs. Premlata Shukla and others, **(2007) 13 Supreme Court Cases 476**. He also relied on judgment of this Court in First Appeal No. 2105/2014 dealing with the issue of liability of insurer. Similarly, reference is made to the judgment of Hon'ble Supreme Court in case of Amrit Paul Singh and another vs. Tata AIG General Insurance Company Limited and others, **(2018) 7 Supreme Court Cases 558** in order to canvas that there is evidence in order to indicate that the vehicle in question was plied without permit and hence this absolves the liability of the insurer to pay compensation to the Claimant on the ground of breach of conditions of policy. In this regard, it is his submission that during the pendency of the present appeal, Court Commissioner was appointed and evidence recorded by the Court Commissioner clearly shows that the offending vehicle was being plied without permit and as such breach of condition of policy has been proved by the insurer. It is his submission that once the insurer proves breach of condition of policy and where the person is not covered in the insurance policy, except in case of third party, there is no liability of insurance company to even satisfy the award and recover the same from the insured.

8. Learned counsel for Claimants opposed the said submission by drawing attention of the Court to the evidence of Claimant No. 1 and his cross examination conducted on behalf of the insurer. It is submitted that the insurer has failed to lead any evidence in order to rebut the evidence of Claimant No. 1 about deceased going in the offending vehicle for the purpose of loading and unloading of the bricks in the capacity of labourer employed by the owner. Thus, it is his submission that there is no reason or justification for causing interference in the findings recorded by the

Tribunal fastening joint and several liability against the owner, driver and insurer for payment of compensation. In response to the submission made on behalf of the insurer on the additional evidence being led in this appeal with regard to plying of tempo without permit, it is submitted that since this is not fundamental breach as contemplated by Section 149(2) of the M.V.Act, the insurer cannot be absolved from liability and that in any case order of pay and recover must be passed.

9. Claimants have filed separate claim petitions for death of Rekha and her minor son. Both petitions were heard and decided independently. Evidence is also recorded separately. Petitioners have not relied upon evidence led of one matter in another. Thus, this Court needs to decide present appeal solely relying upon evidence recorded in MACP No. 416/2012.

10. There is no dispute about the fact that on the fateful day deceased was travelling in offending tempo and met with an accident resulting into her death. Thus, there is no dispute about the fact that death of deceased is caused out of involvement of a motor vehicle. Perusal of record indicates that there is specific pleadings in

the claim petition in respect of deceased going in the offending vehicle in the capacity of labour for unloading of the bricks. Claimant No. 1 has examined himself at Exhibit 35. In his examination-in-chief, he reiterated the said claim. It is deposed that on 22nd April, 2011, his wife Rekha was travelling in the tempo for the purpose of unloading the bricks. He further claimed that in the said accident, left hand side door of the vehicle was open resulting into his wife and son being thrown away from the vehicle and his wife Rekha died consequently. He has relied upon First Information Report and other documents collected during the course of investigation in connection with Crime No. I-64/2011 registered with Khultabad Police Station. Since the First Information Report was relied upon by the claimants, it came to exhibited as Exhibit 47. Owner and driver of the vehicle did not cross-examine the Claimant. As such, there is no denial of the fact of employment of deceased as labour with owner of tempo. In the cross-examination conducted by the insurer, it has come on record that the owner of the vehicle also owns a brickkiln. There is no suggestion that deceased was never employed by him. It is further suggested that the tempo was goods carrying vehicle and that he is unable to give registration number, colour and driver's name etc. If the insurer wants to contradict the witness on his previous statement, such statement ought to have been brought to the notice/shown to the witness. Section 145 of Evidence Act mandates such requirement. Even accepting that strict rules of evidence are not applicable to the proceedings under M.V.Act, as it is in nature of summary proceedings, it can not be ignored that there is fundamental rule that a person needs to be given an opportunity to explain his previous statement. Previous admission is not complete estopple and it is open for the maker to explain the same. Since the previous statement was not referred to the witness, it is now not open for the insurer to claim it as contradiction.

11. Failure on the part of the insurer to cross-examine Claimant with regard to the relationship as employer and employee between the owner of the vehicle and deceased, indicates that said fact has not been challenged by the insurer. Apart from the ocular evidence of Claimant No. 1, Spot panchanama also indicates about the vehicle being carrying bricks at the relevant time. There is no explanation forthcoming from the owner as to what was the reason for carrying bricks in tempo if the vehicle was taken to fare/market with passengers. This material evidence cannot be ignored while ascertaining over all circumstances of the case. A possibility thus is

created that the tempo could have been taken for that purpose of unloading bricks as well as visiting market.

12. As observed herein above, there is no specific cross-examination conducted on behalf of the insurer challenging contention of Claimants about deceased being employed as labourer and travelling in the tempo for unloading of bricks. Moreover, neither owner or insurer have led any evidence to rebut the evidence led by Claimants in this regard. Unlike criminal trial, claimants are not required to prove their case strictly beyond doubt but on probabilities and in the facts of the case, claim of claimants in this regard is probable. In such circumstances, this Court finds no infirmity in the findings recorded by Tribunal on this issue.

13. Admittedly, additional premium has been accepted by the insurer covering the labour/employee of the owner. Thus, the factum of deceased travelling in the tempo in the capacity of labourer for the purpose of work of the employer covers her risk under the policy.

14. In this case, during the pendency of appeal, application was moved by the insurer for leading additional evidence which came

to be allowed by this Court. Pursuant to said order, Court Commissioner was appointed to examine witnesses. Insurer examined two witnesses i.e. Karbhari Indarshah Bahure (Exhibit R) and Avinash Acchyutrao Bugdani (Exhibit R-4). Perusal of their evidence shows that insurer was able to bring on record that the offending vehicle was plied without permit. Thus, the insurer has succeeded in proving breach of condition of policy by insured. In such circumstances, question would arise as to whether the insurer can be absolved from the liability completely or not.

15. According to Section 149(1) and (2) of M.V. Act, apart from the contract otherwise than legal requirements those conditions must be stipulated specifically to bind contracting parties. As per law of contract, in case of breach of condition of contract/policy by insured, there would be no liability of insurer to indemnify the injured. However, insurer can avoid such liability only on grounds mentioned under Section 149(2) of the Act. Section 149(5) covers a situation wherein pay and recover order can be issued. It enables insurer to recover the amount payable exceeds liability covered by policy from insured.

16. Hon'ble Apex Court in case of National Insurance Co. Ltd. v. Swaran Singh **2004(3) SCC 297**, has dealt in details above referred provisions and held that Tribunal has power under Section 165 read with Section 168 of the Act to decide not only claims between claimants on one hand and insured, driver and insurer on other, but has power to decide disputes interse between insurer and insured including the enforceability of award. When the insurer has proved its defence in accordance with Section 149(2) and (7) it is open for Tribunal to compel insurer to pay compensation to third party and recover the same from insured. Thus, insurer would be liable to pay compensation and cannot avoid to do so, unless the breach of conditions is fundamental in nature. Having regard to the relevant provisions of the Act and law settled by Hon'ble Apex Court an order of "pay and recover" can be passed even by Tribunal and High Court. However, such order must be passed taking into consideration the facts and circumstances of each case and only in cases where there would be statutory obligation of insurer to pay compensation in spite of breach of conditions of policy and to recover it from insured later on.

17. Having regard to the aforestated position of law, the insurer cannot be completely absolved from payment of compensation as the insurer has failed to prove fundamental breach of condition of policy as contemplated by Section 141(2) of M.V. Act. However, as the insurer has proved breach of condition of policy that the vehicle was plied without permit, it would be appropriate to pass order of pay and recover.

18. In view of aforestated discussion, appeal is partly allowed. Owner and driver to pay compensation as determined by the Tribunal, jointly and severally. The insurer to satisfy the said award. It is open for the insurer to recover the amount of compensation paid to the Claimants from the owner.

19. Pending application, if any, does not survive and stands disposed of.

(R. M. JOSHI)
Judge

dyb

LATER ON :

Learned counsel for claimants seeks leave to withdraw the amount deposited by insurer.

Leave granted to withdraw amount deposited by insurer/appellant by respondents with accrued interest, if any.

(R. M. JOSHI)
Judge

dyb