2024:BHC-AUG:3146

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

FIRST APPEAL NO. 1502 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 } Deleted vide order
age major, occ. Driver } dated 28.09.2022.
r/o Padali, Tq. Khultabad }
Dist. Aurangabad. }

3. Raosaheb Dashrath Kadam
(Deceased) through
Tarabai Raosaheb Kadam
age 46 years, occ. Household
r/o Padali, Tq. Khultabad
Dist. Aurangabad. .. 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. 414/2012.

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

Karan, died on 22nd April, 2011 while he was travelling in tempo bearing registration No. MH 20 W 6985 with his mother. It is the case of the Claimants that due to rash and negligent driving of the tempo by its driver, deceased and his mother were thrown out of the running vehicle resulting into causing of their death. Claim for compensation is filed against 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 involving 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 23. 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. father of deceased minor lodged First Information Report (Exhibit 40) 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. 1,65,000/- 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 with mother. Thus, his risk was not covered by the terms and conditions of the insurance policy. In this regards reference is made to First Information Report (Exhibit 40) filed by husband of the deceased. According to him, it is stated therein in specific terms that the deceased along with his mother 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.

8. Learned counsel for claimants supported impugned judgment and award. According to him, in the facts and circumstances of the case, no interference is called in the same.

9. 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 his death. There is no challenge to the fact that vehicle is goods carriage vehicle. Admittedly, insured was covered with At

policy with additional premium being paid in respect of labour/employee of owner. Neither it was open for the owner to allow any passenger to be carried in the offending vehicle nor there is any contractual liability of the insurer to pay compensation to any such person except one labour. Neiher it is case of claimants nor owing to the age of deceased, he can be said to be labour employed by owner.

10. As regards contract policy, Section 147 speaks about the requirements of policy and limits of the liability. The liability of insurer is subject to sub-section (1) and (2) of Section 147 of the Act. In cases covered by sub-section (1) of Section 149 read with Section 147 insurer steps into shoes of insured and is bound pay compensation awarded to third party. In case of contractual policy or act policy, liability of insurer to satisfy the award qua third party is absolute. In the instant case, however, occupier of the vehicle with consent of owner could not be considered as third party, as he was gratuitous passenger.

11. According to Section 149(1) and (2), 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.

12. 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) & (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 could not avoid to do so, unless the breach of conditions is fundamental.

13. In case of Shamanna v. Divisional Manager and Others, **AIR 2018 SC 3726**, in the light of Section 147 and 149 has held that in case of third party award passed against the insured has to be paid by insurer and recovered from insured. 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 of the facts and circumstances of each case, but only in cases where there would be obligation of insurer to pay compensation in spite of breach of conditions of policy and to recover it from insured later on.

14. In the backdrop of aforesaid provisions of M.V. Act and settled law with regard to liability of insurer to satisfy award, the facts of present case are revisited. The deceased was travelling in tempo, a goods carrier, covered by Act Policy with additional premium for labour appointed by owner. The said occupation was with consent of owner, which is not permissible under contract of insurance. The deceased is not labour employed by owner to be covered by additional premium. The insurer, therefore, cannot be held statutorily or contractually liable either to pay compensation or

even to pay and recover the same from owner. The learned Tribunal, therefore, committed error in holding insurer jointly and severally liable to pay compensation to the claimants. The said order cannot sustain. Hence, appeal deserves to be allowed. Order dated 22nd December, 2017, passed by Motor Accident Claim Tribunal, Aurangabad in MACP No. 414/2012 stands set aside to the extent of Insurer/appellant. Rest of the order to remain unchanged.

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

(R. M. JOSHI)
Judge

dyb