2024:BHC-AUG:1227

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

FIRST APPEAL NO. 1429 OF 2019
WITH CIVIL APPLICATION NO. 10624 FO 2023

BHARTI AXA GENERAL INSURANCE COMPANY LTD THOUGH ITS MANAGER
VERSUS
SHESHABAI @ SHASHIKALA W/O PRAKASH PAWAR AND ANOTHER

Mr. S. S. Patil, Advocate and Mr. R. H. Dahat, Advocate for the appellant
Ms. Usha N. Jadhav, Advocate h/f Ms. P. J. Bharad, Advocate for respondent Nos. 1 to 4.

CORAM : R. M. JOSHI, J.
DATE : 15th JANUARY, 2024

P.C. :-

1. This appeal filed under Section 173 of Motor Vehicle Act (for short 'MV Act') takes exception to the judgment and award dated 27/11/2018 passed in MACP No. 74/2014.

2. The facts which led to the filing of present appeal can be narrated as under:

(i) On 06/05/2013 at about 5.30 pm deceased Prakash was discharging his duty as a driver on Tipper bearing registration No. MH-26 H 7443 and was proceeding from Karkheli Hotmix Plant to Umri. When his vehicle reached near Dhanora bridge, another vehicle Tipper bearing No. MH-26 AD 646 came from the back side and high and excessive speed and gave dash to the vehicle driven by the deceased from back side. As a result of the said dash the tipper turned turtle and Prakash sustained serious head injury. Though he was shifted to Yeshoda Hospital, Nanded for treatment, while being treated he died on 10/05/2013. Deceased was aged about 48 years at the time of accident and was earning Rs.15000/- per month in addition thereto Rs.75/- towards daily bhatta. It is stated that respondent No.1 is the owner of the tipper (offending vehicle) which is duly insured with respondent No.2 during the relevant period. Considering age, income and medical expenses incurred by deceased claimants claimed Rs.15 lakhs towards compensation.

(ii) In spite of service of summons respondent No.1 owner failed to appear and hence claim petition proceeded ex-parte against him. Respondent No.2 filed written statement at Exhibit 20 denying all the contentions and allegations raised by the claimants including age and income of the deceased. It is denied that the accident has occurred due to rash and negligent driving of the offending vehicle. It is also claimed that the driver of the said vehicle was not holding effective driving license and as such there is breach of terms and conditions of the insurance policy whereby the insurer is not liable to make payment of compensation.

(iii) The Tribunal framed issues at Exhibit 21. Claimants examined

Sheshabai @ Sheshikala claimant No.1 at Exhibit 22 and relied upon charge-sheet (Exhibit 26), spot panchanama (Exhibit 27), inquest panchanama (Exhibit 28), insurance policy (Exhibit 29), driving license (Exhibit 30), provisional postmortem report (Exhibit 32), copy of FIR (Exhibit 33) and statements of witnesses recorded under Section 161 of Cr.P.C. (Exhibits 35 and 36). In order to prove the employment and income of the deceased claimants examined Ghadling Govind Kadam (Exhibit 39). He proved salary certificate (Exhibit 40). Insurer did not adduce any oral or documentary evidence. The learned Tribunal after considering evidence on record allowed the claim to the extent of Rs.9,41,200/- holding respondent Nos.1 and 2 jointly and severally liable for the payment of compensation.

3. Being aggrieved by the said judgment and award insurer filed present appeal on the ground that the impugned award is contrary to the evidence on record and the provisions of law. It is claimed that the Tribunal has committed error in granting future prospects without there being any proof of regular source of income of the deceased. It is claimed that deceased was not in permanent employment and hence future prospects should not have been granted. Exception is taken the notional income of the deceased held to be at Rs.8000/- which according to the insurer could be at the most Rs.5000/- per month. It is further

claimed that the breach of terms and conditions of the policy is ignored by the Tribunal and that the insurer ought not to have been held liable for payment of compensation.

4. Learned counsel for the insurer submits that the Tribunal has erred in fastening the liability of payment of compensation on the insurer when the claimants to have failed to discharge their burden of proving that the driver of the vehicle was not holding valid and effective license. It is also sought to be argued that the vehicle was driven without permit. As regard the income of the deceased considered by the Tribunal it is argued that the Tribunal in absence of any reliable evidence ought not to have held that the deceased was earning regular income and in any case the amount of Rs. 8000/- considered as notional income is excessive. Learned counsel for the claimants supported the impugned judgment and award.

5. Initial burden was on the claimants to prove the factum of the accident and negligence on the part of the offending vehicle in occurrence thereof. Claimants examined claimant No.1 (Exhibit 22) and placed reliance on the documentary evidence as stated above. The said evidence shows that offence was registered against the driver of offending vehicle. The police papers placed on record clearly show that the driver of the offending vehicle was responsible for the occurrence of

the accident. Facts as they appear from the said record indicates that the offending vehicle gave dash to the vehicle driven by the deceased from the back side and as a result of which his vehicle turned turtle. The evidence placed on record by the claimants is more than sufficient to discharge the burden of proving that the accident has occurred due to the negligence of the driver of offending vehicle. The onus has shifted on owner and insurer to prove otherwise. Admittedly, both failed to lead any evidence in rebutting.

6. As far as the income of the deceased is concerned, the very fact that he was driving the vehicle of some other person indicates that he was employed for driving the said vehicle. Claimants have examined Ghadling Govind Kadam at Exhibit 39 who has deposed about the deceased being employed for the purpose of driving his vehicle he also proved salary certificate (Exhibit 40). During the cross-examination this witness has accepted that there is no registration of his business with any government authority nor even the certificate placed on record as inward or outward number. He further admitted that employees are not covered under the provident fund scheme nor any agreement was placed on record between the firm and the employees. Having regard to these facts, the Tribunal was of the view that the income of the deceased has claimed by the claimants cannot be accepted. Tribunal by observing that

since the deceased was working as a driver and considering the nature of work his income was considered at Rs.8000/-. Having regard to the nature of evidence placed before the Tribunal, the said findings cannot be called as perverse.

7. There is no dispute made by the parties with regard to the calculation done by the learned Tribunal while computing the amount of compensation by applying appropriate multiplayer having regard to the age of the deceased. The Tribunal has considered future prospects to the extent of 10% and having regard to the facts and circumstances of the case the order of grant of future prospects does not deserve any interference. As far as the contention of the learned counsel for the insurer about breach of terms and conditions of the policy, for want of any evidence no such finding could have been recorded by the Tribunal.

8. In the result, no case is made out by the appellants for causing any interference in the impugned judgment and award. Hence, appeal stands dismissed. Pending application, if any, stands disposed of.

(R. M. JOSHI, J.)

ssp