IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

FIRST APPEAL (STAMP) NO. 8126 OF 2024
WITH
INTERIM APPLICATION NO. 6952 OF 2024
WITH
INTERIM APPLICATION NO. 6953 OF 2024

Cholamandalam MS Insurance Co. Ltd.	]
Office at above BMW Showroom	]
Dr. Ambedkarr Road, Camp,	]
Pune – 411001	]… Appellant
vs.	
1) Narendra Vijayprakash Shukla	]
Age 30 years, Occu. Service	]
R/o. Flat No. 204, D wing, Oxy Valley	]
1, Gade Vasti, Bakori Phata,	]
Near BJS College, Wagholi, Pune 412207	]
2) Firoz Khan Gulam Mohd.	]
Age Adult, Occu. : Business	]
R/o. 180/7, Gram Choupati,	]
Gram Karon HOW, Dist. Indore,	]
Indore-452001	]
3) Mahendrapratap Sahadeo Upadyaya	]
Since deceased	]
Neeraj Mahendrapratap Upadhyaya	]
R/o. S. No. 95, Plot No. 4,	]
Sidhantwadi, jejurikar Colony, Wai,	]
Tal. Wai, Dist. Satara-412803	]
4) Oriental Insurance Company Ltd.	]
Office at R. O. First floor, Myfair Tower,	]
Wakdewadi, Bombay – Pune Road,	]
Pune-411005.	]… Respondents

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Adv. Rajendra Kanojia a/w. Adv. Deepika Prabhala, Adv. Prachi Pawar i/b. Res Juris :-	Advocates for Appellant.
Adv. Yogesh Pande :-	Advocate for Respondents.

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CORAM : S. M. MODAK, J.

DATE : 3rd SEPTEMBER 2024

ORAL JUDGMENT :-

1. Heard learned Advocate Mr. Kanojia for Appellant and learned Advocate Mr. Pande for Claimant. The Tribunal has saddled responsibility to pay compensation on this Appellant only. There was accident in between a Dumper [owned by Respondent No. 2 Firoz and it was insured with the present Appellant] and another vehicle is car [owned by Respondent No. 3 – Mahendra Pratap and it was insured with Respondent No. 4 Oriental Insurance Co. Ltd.] The deceased Neetu was driver of the car. The accident took place on 8th February 2016 when deceased was proceeding from Indore to Pune Maharashtra near village Bhondia. The deceased Neetu scummed to the injuries. The Claimant is the husband of the deceased.

2. Before the Tribunal the owner of the Dumper i.e. Respondent No. 1 contested the matter so also the insurer present Appellant. Even the Insurance Company of the car also contested the proceedings by filing Written Statement. The owner Insured and the Insurer of the Dumper were held jointly and severally responsible.

3. The Claimant has asked for withdrawal. However, considering the issue involved about the existence of the policy, the Appeal is taken up for final hearing at an admission stage. ADMIT.

Submissions

4. **Mr. Kanojia** has invited my attention to the evidence given by his representative Dipesh Kottawar and also invited my attention to the findings given in paragraph No. 39 of the impugned judgment. The Tribunal has referred about the two insurance policies at **Exhibit 68 and 69**. The period of the insurance is from 11th February 2016 to 10th February 2017. The Tribunal further observed that there is a receipt dated 6th February 2016 in respect of the premium of policy. The Tribunal observed the policy will be effective from the payment of premium. The date of accident is 8th February 2016 and accordingly held both of them responsible. According to Mr. Kanojia, the Tribunal has not dealt with the evidence and has not perused insurance policies properly. He made following submissions :-

(i) The issue of existence of insurance police is in between the insurer and insured.

(ii) The insured even though filed Written Statement has not produced policy or the premium receipt. Adverse inference has to be drawn against him.

5. He relied upon following judgments :-

(i) **Shriram General Insurance Co. Ltd. vs. Kamlesh Jha & Ors.**[1]

(ii) **Branch Manager, United India Insurance Co. Ltd. Vs. Mst. Munita Bai & Ors.**[2]

(iii) **Oriental Insurance Co. Ltd. Vs. Mst. Fazi & Ors.**[3]

(iv) **Anil Rishi vs. Gurbaksh Singh**[4]

(v) **Dedappa & Ors. Vs. The Branch Manager, National Insurance Company Ltd.**[5]

(vi) **Bharti Axa General Insurance Company Limited vs. Gayabai Devrao Weldode and Ors.**[6]

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1 2023 : DHC : 3467
2 2022 : CGHC : 18549
3 CNAM No. 04/2008 : 15th July 2020 : High Court of Jammu and Kashmir at Srinagar.
4 [2006] SUPP. 1 S.C.R.
5 [2007] 13 (Addl.) S. C. R.
6 First Appeal No. 4447 of 2016 : 25th March 2019 : Bombay High Court (Bench at Aurangabad)

(vii) **Kumarpal Shah Vs. M/s. Universal Mechanical Works Pvt. Ltd.**[7]

6. According to him, the Tribunal has referred to the order in **Oriental Insurance Co. Ltd. Vs. Dharmchand and Ors.** reported in 2010 ACJ 2659 in paragraph No. 20 of the said judgment. According him, "*the observations therein recording the payment of premium amount to be considered as a date of operation of the policy*" is on the basis of facts of that case and no law is laid down. He clarified the order in **Dharamchand** [supra] was passed on the basis of submissions made on behalf of the Insurance Company admitting the payment of premium amount that is why he submitted order in that proceeding is on the basis of these submissions. Even he prayed for remanding the matter in view of failure on the part of Tribunal to discuss the evidence.

7. As against this **Mr. Pande** for Claimant supported the award and made following submissions :-

(i) The policy number in two policies at Exhibit 68 and 69 relied upon by the Insurance Company on one hand and policy by the claimant is same.

(ii) According to him, even though the period of insurance is

7 Writ Petition No. 8764 of 2018 : 7th August 2019 : High Court of Bombay

mentioned as starting from 11th February 2016 at the bottom in both the policies at Exhibit 68 and 69 still in Exhibit 68 (Page No. 7) there is reference of receipt dated 6th February 2016 and as such, the insurance will be in operation from that date and the date of accident is covered.

(iii) In the policy relied by the Claimant (Article-A) the period of insurance starts from 5th February 2016 and the insurance date is 11th February 2016.

(iv) He invited my attention to the several variances in the policies at Exhibit 68 and 69 filed alongwith the compilation of documents. He has also filed written arguments showing the variances in between Exhibit 68 and 69.

(v) He invited my attention to these variances pointed out to the witnesses of the Insurance Company during cross-examination.

8. He relied upon following judgments to buttress the submission that the insurance policy will be in operation from the date of payment of premium.

(i) **Manager Arsu Auto Vs. Gladstone & Ors.**[8]

(ii) **Smt. Renuka Sethi Vs. Babu Sahu & Ors.**[9]

(iii) **National Insurance Vs. Raghuram & Ors.**[10]

(iv) **Oriental Insurance Co. Ltd. Vs. Dharmchand and Ors.**[11]

8 2023 ACJ 2615 : High Court of Madras
9 FAO No. 480 of 2012 : High Court of Orissa
10 2018 ACJ 523 : High Court of Chattisgarh.
11 2010 ACJ 2659

9. He also submitted that in the Written Statement filed by the Insurance Company of the dumper, no plea is taken that the policy was fake. Whereas Mr. Kanojia has invited my attention to the last line of paragraph No. 4 of the evidence of their witness Dipesh Kottawar. He has stated '*Policy produced by the Claimant on record is a forged policy*'.

10. Mr. Pande also read the provisions of Section **64(VB)** of the Insurance Act which deals with payment of premium so as to cover risk arising from the accident.

11. He also invited my attention to the written statement filed by the owner of the Dumper. I have read it. In the Written Statement he has not stated anything there challenging insurance policy. It is but natural, on the other hand he has requested Tribunal to cast the responsibility on the insurance company if the Tribunal will come to that conclusion.

CONSIDERATION

12. It is true that in a petition arising out of Motor Vehicles Act the test of proof beyound reasonable doubt is not applicable but the issues needs to be decided on the test of preponderance of probabilities. It is also true that the Claimant can also prove the insurance policy from the papers received from the Police. In this case the Claimant produced policy copy of Insurance Policy (Article-A). It was not exhibited as the Insurance Company has disputed its existence. It is also true that the owner of the offending vehicle can appear and explained about the existence of the policy. Many of the time the owner never appeared before the Tribunal and if appeared he never challenges the existence of the policy. It is but natural because he has to shift the responsibility from his shoulder to shoulder of Insurance Company. When insurance company appears, they may admit about the policy or they may deny existence of the policy or they may take a defence about breach of policy.

13. It is true that in case of **Anil Rishi** Hon'ble Supreme Court has dealt with difference in between the burden of proof and onus of proof. Certainly burden lies on the shoulder of the persons who pleads that fact. The person who is asking for relief is bound to prove the fact otherwise relief cannot be granted in his favour. It also happens that after initial burden is discharged what is shifted on the shoulders of rival parties is onus of proof. They can discharge it by giving evidence.

That is why it is stated that it is continuous process of shifting of onus of proof. It is very well true that the Court is empowered to draw inferences on the basis of proved facts and also on the basis of facts which are not proved.

14. It is also true that the petition under Motor Vehicle Act contemplates a summary inquiry. The evidence which is required in civil proceedings, same evidence is not expected in such a petition. Mr. Kanojia has vehemently argued that the owner has not produced the policy or premium documents even though he has contested and the adverse inference has to be drawn against the owner and the case pleaded by them needs to be accepted. It is true that in case of **Bharti Axa General Insurance Co. Ltd.** [supra] learned Single Judge of this Court has opined about conduct of claimants in not examining the owner of the offending vehicle and to prove receipt for payment of premium. It find place in paragraph No. 11. Each of the party produced policies but their period is different. This Court has not believed the policies produced by Claimant. The facts of present case are different. The said observations are also considered by the learned Single Judge of Delhi High Court in case of **Shriram General Insurance**

Company. They are reproduced in paragraph No. 9.

15. It is true that the is a difference in between breach of policy and absence of policy. There cannot be pay and recovery order when there is a plea of absence of policy and it is proved. In case of **Munita Bai** [supra] similar observations are there about absence of evidence from the owner (paragraph No. 13). Similarly, in case of **Fazi & Ors.** The High Court Jammu and Kashmir in paragraph No. 12 has commented upon the burden on the owner if he produces copy of policy, his burden is discharged and it shifts to the Insurance Company to show that there is no policy.

Case set up by Insurance Company

16. On this background the pleadings in the Written Statement and the evidence of representative of the Insurance Company needs to be perused. The relevant averments in the Written Statement find place in paragraph No. 3. The Insurance Company has pleaded :-

> "*The Appellant No. 2 submits that the vehicle involved in the incident is a Dumper bearing No. MP-09/HG/6440 and the police authorities has leveled charge sheet on the driver of the said Dumper. However the opponent categorically denies that*

the said Dumber was insured with Opponent No. 2 at the time of accident."

17. Here in this case the fact of insurance is denied. Paragraph No. 3 further states :-

"*Form-AA if perused it the said form is silent on the particulars of the policy. The interrogatory No. 11 read with Para H is also silent on the material particulars of the policy in view of this as no particulars of policy are appearing in the pleadings as well as no document of policy is received along with compilation, the present opponent denies the contentions of applicant that the vehicle is insured with present opponent. However present opponent craves leave to amend, modify, and alter the contention of these pleadings if original and genuine policy is produced on record coinciding the record of the opponent No.2 and covering date of accident.*"

18. If above version is perused, it is clear that there is no plea that the copy of policy produced by the Claimant is fake. This plea is not there either for not producing the genuine policy or for any other reason. So the contention raised during arguments by Mr. Kanojia that the policy is fake, cannot be accepted. Because basic Rule of pleading is applicable. One line reference by their witness that the policy is fake and forged, cannot be considered. There is lot of difference in between policy being fake and the relevant details of the insurance policy are not given by the Claimant.

19. Mr. Pande has invited my attention to the policy at Exhibit No. 68. It is produced by the Insurance Company. The policy number is 3379/01349669/000/00 period is from 11th February 2016 to 10th February 2017. It is important to note that in all three policies the same number is appearing. It is true that during evidence of the Claimant he has not referred about the insurance policy. According to Mr. Pande, the policy is marked as 'Article-A' in view of dispute raised about the fact. Neither Claimant nor the owner has taken any steps to prove either policy.

Evidence of Insurance Company

20. On this background the evidence of representative of the Insurance Company needs to be looked into. The following facts are deposed by him :-

(i) Vehicle Number MP/09/HG/6440 was insured with Appellant on the date of accident.

(ii) Policy document produced by the Claimant does not match with the record of the Company.

(iii) Their record shows that policy was effective from 11th February 2016 to 10th February 2017. It is Exhibit No. 68. (Date of accident is 8th February 2016).

(iv) There was a request by the insured on 11th February 2016 for change of address. Prior to effecting change vehicle was inspected because there was brake of policy.

21. Mr. Pande has invited my attention to the issue date of policy at Exhibit No. 68. It is 4th July 2016.

Cross Examination

22. During cross-examination various points were raised in order show the variance in Exhibit Nos. 68 and 69. Exhibit No. 69 was given as it was referred to the witness during cross-examination. It was produced by the Insurance Company itself. Exhibit No. 68 was certified by said witness whereas Exhibit No. 69 is certified by another officer Neha Hake. Logo is appearing on Exhibit No. 68 whereas there is no logo appearing on Exhibit No. 69. There is Aadhar number in Exhibit No. 68 but it is not there in Exhibit No. 69. Further, there is also difference in respect of discount. There was also difference about Part-E of Exhibit No. 68 and 69. Kerala flood cess was not in force in the year 2016.

23. Even the copy of policy relied upon by the Claimant Article-A was shown to this witness. He says it is not issued by them. Even the owner has cross-examined this witness. A suggestion was put about Article-A being issued by the Company. It was denied.

Observations about Exhibit 68 and 69

24. I have perused both those policies. Following are the facts disclosed :-

(i) Exhibit No. 68 was to be operational from 11th February 2016 to 10th February 2017. It was issued on 4th July 2016. There is reference of the receipt No. 1005194670 dated 6th February 2016. The Tribunal has referred about this receipt.

(ii) Exhibit No. 69 was issued on 12th February 2016. The period of insurance is from 11th February 2016 to 10th February 2017.

25. Now issue is whether it can be said that in such circumstances the Claimant has proved on the date of accident that is on 8th February 2016 insurance was in existence. The question is whether insurance is to be operational from 5th February 2016, 6th February 2016 or 11th February 2016. The Company's witnesses when confronted with the premium receipt he has expressed ignorance about receipt of premium on 6th February 2016 (Paragraph No. 10 of cross-examination). Only stand taken by the Insurance Company is the policy relied upon by the Claimant is not proved. There are two policies.

26. It is true that in the three judgments relied upon by Mr. Pande the Courts have consistently held that when the premium amount is collected at early stage and if the policy was issued subsequently and if the accident occurs in between these two dates, the Insurance Company cannot be exonerated. It is true that the owner has not produced either insurance police or the premium receipt. On this basis whether there can be inference drawn against the owner so as to non-suit the Claimant. It is true that owner when he has contested the proceeding ought to have produced copy of the insurance policy. So the Tribunal is having two versions. **One** by the Claimant and **another** by the Insurance Company. It is important to note that when the Insurance Company has produced two policies and Exhibit No. 68 contains the date of payment of premium as 6th February 2016, how their representative can express ignorance. That endorsement is there on their own document. They themselves have produced it. When they produced it, they were fully aware about it's contents. The policy number appearing in all the policies is same. So what I find is the said document makes a difference as in fact it supports claim of the Claimant otherwise the Claimant is not having satisfactory document to prove the insurance.

27. A party can certainly rely upon the documents of other side. Claimant is successful in proving that premium was paid on 6th February 2016. Though the Tribunal has not discussed about this evidence, I agree with the conclusion. The Tribunal gave it's finding in paragraph No. 40. It is not well reasoned. Reference of judgment of Hon'ble Supreme Court is not there. Learned Member should take care in future. There are observations relating to non-examination of owner / driver of the offending vehicle. However, the Insurance Company produced policy at Exhibit No. 68 which contains reference of payment of premium. The observations in the judgments referred by Mr. Pande will come into play. The date of payment of premium is earlier to date of policy. It is the date of payment of premium is important. The policy will be effective from that date. So the damage caused due to accident is covered. Insurance Company is bound to indemnify. I am not going into issue about variance in Exhibit Nos. 68

and 69. So I find no fault in the conclusion drawn by the Tribunal. Though Mr. Kanojia vehemently argued and requested to lay down certain guidelines for the consideration of the Tribunal in case of fake policies, I do not find this occasion to there can be guidelines. Because there is no pleading about fake policy. Hence, no interference is warranted in the impugned. Hence the order :-

ORDER

(i) Appeal stands dismissed.

(ii) If awarded amount with interest remained unpaid the Appellant to deposit with the Tribunal within four week.

(iii) Respondent No. 1 can withdraw full amount.

(iv) Parties to bear their own costs.

(iv) Decree be drawn up accordingly.

[S. M. MODAK, J.]

KISHOR VISHNU KAMBLE

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