

(2019) 11 BOM CK 0115
In the Bombay High Court
Case No : First Appeal No. 804 Of 2013

New India Assurance Co. Ltd

APPELLANT

Vs

Mohd. Wasim Abdul Latif Shaikh And Anr

RESPONDENT

Date of Decision : 25-11-2019

Acts Referred:

Citation : (2019) 11 BOM CK 0115

Hon'ble Judges : R.D. Dhanuka, J

Bench : Single Bench

Advocate : D.R. Mahadik, T.J. Mendon

Final Decision : Allowed

Judgement

1. By this first appeal, the appellant (original respondent no.2) has impugned the judgment and order dated 2nd November, 2011 passed by the M.A.C.T., Mumbai allowing the Application No.3581 of 2005 filed by the respondent no.1 herein (original applicant) directing the appellant to pay a sum of Rs.90,000/- jointly with the owner of the offending vehicle to the applicant at the rate of 9.25% from the date of the claim till realization. By consent of parties, the first appeal is heard finally.

2. Learned counsel for the respondent no.1 tendered compilation of pleadings, documents and evidence forming part of the record before the M.A.C.T. Some of the relevant facts for the purpose of deciding this appeal are as under :-

3. On 11th July, 2004, the applicant was travelling as a passenger in a auto-rickshaw bearing no. MH-02-QA-9127 from Malvani to Bandra Linking Road when the said auto-rickshaw dashed against the divider of the road and as a result thereof, the accident took place. It was the case of the applicant before the Tribunal that the said auto-rickshaw was insured with the appellant insurance company. The said auto-rickshaw failed to apply the breaks effectively or on sufficient time. As a result of the said accident, the said applicant sustained injury and pain. It is the case of the applicant that he could not resume work.

The applicant apprehended permanent disability and/or defect and/or deformity to the affected limbs.

4. The applicant accordingly filed a claim for compensation before the M.A.C.T.Mumbai. The claim was resisted by the appellant by filing a written statement on 16th October, 2009. It was alleged in the written statement that the vehicle allegedly involved in the accident on 11th July, 2004 bearing registration no. MH-02-A-9127 was not insured with the appellant on the material date and time of the accident. Without prejudice to the said contention, it was alleged by the appellant that it was not aware of the correctness of the contents of the paragraphs 1 to 18 of the application made by the original applicant.

5. In paragraph (4) of the said written statement, it was alleged by the appellant that the RTO certificate dated 28th July, 2004 was in respect of the vehicle no. MH-02-QA-9127 which indicated that the number of the vehicle was MH-02-A-9127 as on 12th July, 2004 and also stating the insurance certificate number 14369 which was totally incomplete and vague. The appellant could not locate the Divisional office number or the regional office.

6. The original applicant examined himself as one of the witness and affidavit in lieu of examination of chief in support of his claim. He was cross examined by the learned counsel for the appellant. The original applicant also examined an orthopaedic surgeon in support of the quantification of claim made by the applicant. The applicant also examined Mr. Kedar Atmaram Lavekar as one of the witness who was junior clerk in the office of the R.T.O. He was cross examined by the applicant's advocate. The said witness also produced various documents. The appellant did not examine the witness.

7. Mr. Mahadik, learned counsel for the appellant invited my attention to various findings rendered by the M.A.C.T. Mumbai in the impugned judgment and order and also invited my attention to the certificate dated 28th July, 2004 issued by the RTO and would submit that the said certificate did not indicate any details of the alleged insurance policy taken by the owner of the auto-rickshaw. He submits that in view of such incomplete details furnished in the said certificate issued by the RTO Mumbai, the appellant could not verify the exact details of the policy alleged to have been taken by the owner of the auto-rickshaw i.e. the original opponent no.1. He submits that the certificate issued by the RTO is not conclusive on the issue whether the owner of the offending vehicle had availed of any insurance policy from the insurance company or not. In support of this submission, learned counsel placed reliance on the judgment of this Court in case of Oriental Fire & Insurance Company Limited vs. Dr. G.R. Purohit & Ors., I (1999) ACC 138 (Division Bench) and in particular paragraph (4).

8. Insofar as quantification of the claim awarded by the Tribunal is concerned, learned counsel states that there is no dispute about the quantification and accordingly did not address the said issue before this court.

9. Mr. Mendon learned counsel for the original applicant on the other hand invited

my attention to the averments made by his client in the application, affidavit in lieu of examination in chief, his cross examination, averments made by the appellant in the written statement and would submit that not only his client had entered the witness box but also examined an employee from the office of the RTO who produced various documents including Form 24 and certificate dated 28th July, 2004. He submits that in the said Form 24 produced by the said witness examined by the applicant, the name of the appellant insurance company, the details of the policy, details of the engine number, model, number, chassis number, period of such policy and vehicle number was clearly mentioned.

10. It is submitted that in the certificate issued by the RTO insurance certificate was mentioned as 14369, with the same engine number, chassis number, date of registration which was tallying with the details mentioned in Form 24 submitted by the owner of the offending vehicle. It is submitted by the learned counsel that though the applicant and the witness examined by the applicant had produced various details of the insurance policy, the appellant did not examine any witness and thus the Tribunal was justified in allowing the claims made by his client. He strongly placed reliance on the judgment of this court in case of *New India Assurance Co. Ltd. vs. Roshan Bi Magdum & Ors.*, 2005 ACJ 117 and in particular 8 to 11 and would submit that the RTO having been examined even in that matter, this court held that there was no reason to disbelieve the record of the RTO office and the report of Motor Vehicle Inspector.

11. Learned counsel placed reliance on the judgment of this court in case of *Oriental Fire and General Insurance Co.Ltd. vs. Bhiwa Shidawa Wayada & Ors.* I (2011) ACC 115 and in particular paragraphs 5 and 6 and would submit that in the similar facts, this court rejected the first appeal filed by the insurance company.

12. A perusal of the record indicates that in the application filed by the original applicant seeking the claim against the appellant, the applicant had furnished all details of the vehicle number, time and date of the accident, how the accident had occurred. A perusal of the written statement filed by the appellant indicates that though the appellant had raised a plea that a vehicle allegedly involved in the accident bearing registration no. MH-02-A-9127 was not insured with the appellant on the material date and time of the accident and though had alleged that the RTO certificate dated 28th July, 2004 was not complete in all respect, did not bother to examine any witness.

13. The applicant had examined an employee from the RTO office who was working as a junior clerk in the said office. He produced motor vehicle registration entry in respect of vehicle MH-02-QA-9127. A perusal of Form 24 dated 2nd July, 2002 produced by the said witness indicates the name of the owner of the vehicle, the details of the vehicle including engine number, chassis number, period of policy, the name of the insurer i.e. the New India Assurance Corporation Limited. It also indicates the certificate no.14369. The said certificate number tallies with the certificate issued by the RTO dated 20th July

2004. All the requisite details mentioned in Form 24 tallies with the certificate issued by the RTO.

14. The said employee working in the office of the RTO was cross examined by the appellant's advocate. In his cross examination, he confirmed that the record produced by him were from RTO Andheri. The number mentioned against the New India Assurance Company Limited was the number of the insurance certificate. He could not say whether the number mentioned in the record was complete or incomplete.

15. In my view, the details of the policy mentioned in Form 24 and certificate issued by the RTO dated 28th July, 2004 read with the evidence of the witness working in the office of the RTO who had produced the records such as motor vehicle register showing entry in respect of the vehicle MH-QA-9127 was sufficient to indicate that the offending vehicle was insured and had availed of the policy with the appellant. The applicant having examined the witness working in the office of the RTO who had produced the requisite details and proof, the burden of proof was shifted to the appellant. It is not the case of the appellant that no such policy was issued by the appellant to the owner of the offending vehicle. The appellant having failed to discharge the burden shifted upon the appellant thus cannot be allowed to urge that the documents produced from the office of the RTO by the witness examined by the applicant could not have been taken into consideration by the Tribunal.

16. The mere allegations in the written statement filed by the appellant would not prove the case of the appellant in absence of the oral evidence led by the appellant to prove the allegations made in the written statement. No cognizance of such statement made in the written statement thus could have been taken by the Tribunal or this court in this First Appeal.

17. Insofar as judgment of this court in case of Oriental Fire & Insurance Company Limited (supra) relied upon by Mr.Mahadik, learned counsel for the applicant is concerned, this court in the said judgment had held that the mere entry in the RTO books referring to insurance company does not establish the fact that the vehicle in question was in fact insured. In this case, the applicant had examined the witness working in the office of the RTO who had produced relevant documents which clearly indicates the name of the appellant, the details of policy including the insurance certificate.

18. My attention is rightly invited by the learned counsel for the original applicant to paragraphs 8 and 9 of the judgment of this court in case of New India Insurance Company Limited (supra) which has distinguished the judgment of this court in case of Oriental Fire & Insurance Company Limited (supra) relied upon by the learned counsel for the appellant. In the said judgment, relied upon by the learned counsel for the appellant, there was a dispute as to whether the person impleaded as owner of the offending vehicle was the real owner of the vehicle involved in the accident or not. The Division Bench of this court in the

said judgment held that the insurance company could have produced the original policy or the certificate of insurance. Considering those facts at hand, the Division Bench observed that the mere entry in the RTO book referring to the name of the insurance company does not establish the fact of the insurance. In my view, the facts before the Division Bench of this court in case of Oriental Fire & Insurance Company Limited (supra) are totally distinguishable in the facts of this case and would not assist the case of the appellant.

19. This court in the said judgment in case of New India Assurance Company (supra) relied upon by the learned counsel for the applicant considered identical facts and had dealt with the evidence produced by the RTO such as RTO certificate which mentioned validity period of the insurance policy. In that matter also RTO certificate was produced. The Insurance company had not contacted all the divisional offices to ascertain as to whether any such policy was issued. In the facts of this case also the applicants neither pleaded nor proved that any efforts were taken by the appellant to find out the correctness of the details furnished in Form 24 and the certificate issued by the RTO. The appellant also did not examine any witness to show the efforts taken by the appellant to verify the correctness of the details in the Form 24 and the certificate issued by the RTO.

20. In the facts and circumstances of this case, the Tribunal was thus justified in allowing the claims made by the original applicant. The law laid down by this court in the judgment of New India Assurance Co. Ltd. (supra) would apply to the facts of this case and would assist the case of the original applicants. I am respectfully bound by the said judgment.

21. This court in case of Oriental Fire and General Insurance Co. Ltd. vs. Bhiwa Shidawa Wayada & Ors. (supra) has held that the insurance company had not chosen to produce any copy of the policy. It was not the case of the insurance company that there was no policy bearing the details mentioned in the Form 24 and the certificate. In view of absence of such details furnished by the insurance company, this court did not interfere with the judgment and award rendered by the MACT. The principles of law laid down by this court in the said judgment applies to the facts of this case. I am respectfully bound by the said judgment.

22. In my view, the appellant was required to examine a witness to depose whether any efforts were taken by the appellants to find out the correctness of the details in Form 24 and RTO certificate and to prove that there was no such policy issued by the appellant. The appellant not having entered the witness box thus cannot be allowed to urge that no such policy details were made available by the original applicant for verifying the claims of the applicant. The Tribunal below has considered all those aspects in detail and rightly allowed the claims made by the original applicant.

23. Insofar as quantification by the Tribunal is concerned, since there is no dispute raised by the appellant, this court need not go into the issue of quantification. I do not find any infirmity in the findings rendered and the

conclusion drawn by the M.A.C.T., Mumbai in the Application No.3581 of 2005 and the appeal is accordingly dismissed.

24. Office is directed to transmit statutory deposit of Rs.25,000/-deposited by the appellant to the concerned M.A.C.T. expeditiously.

25. The original applicant would be at liberty to withdraw the entire amount with interest accrued on the amount deposited by the appellant before the MACT on production of authenticated copy of this order. The original applicant is also permitted to withdraw the amount of Rs.25,000/- once transmitted by this court to the MACT.

26. If there is any shortfall in the amount of deposit made by the appellant, the appellant would be entitled to execute the decree for the balance amount.

27. Appeal is allowed in aforesaid terms. No order as to costs.