

(2018) 08 BOM CK 0153
In the Bombay High Court
Case No : First Appeal No.171 of 2008

New India Assurance Co. Ltd. Thru. Its Reg. Manager	APPELLANT
Vs	
Yamunabai Wd/O Tulshiram Chavan & 7 Ors	RESPONDENT

Date of Decision : 30-08-2018

Acts Referred:

Motor Vehicles Act, 1988 — Section 166
Indian Penal Code, 1860 &mdash Section 304A
Code of Criminal Procedure, 1973 — Section 161

Citation : (2018) 08 BOM CK 0153

Hon'ble Judges : V. M. DESHPANDE, J

Bench : Single Bench

Advocate : M. B. Joshi, S. S. Bhalerao

Final Decision : Dismissed

Judgement

1. New India Assurance Company Limited, Yavatmal, through its Regional Manger is in this appeal challenging the judgment and award passed by

learned Chairman Motor Accident Claims Tribunal, Yavatmal dated 17.11.2007.Â By the said award, the learned Chairman has partly allowed the

claim petition filed on behalf respondent nos.1 to 6 under Section 166 of the Motor Vehicles Act and granted compensation of Rs.2,92,000/Â inclusive

of no fault liability claim along with interest at the rate of 9% per annum from the date of petition till the amount is deposited in the tribunal.

2. Respondent nos.1 to 6 were required to file claim petition since the person on whom they were depending, lost his life in vehicular accident dated

02.02.2000 near Kolambi fata. Respondent no.1 is widow, respondent nos. 2 to 4 are the minor son and minor daughters, who were aged about 7

years, 5 years and 3 years at the time of accident and the respondent nos.5 and 6 are the parents of the deceased.Â Deceased Tulshiram Chavan

was traveling in the ill fated vehicle having registration No.MH29/C406. Respondent no.7 Manohar Gotfode (his name is deleted from the array of respondents in this appeal on the application moved by the present appellant). When the said vehicle reached to Kolambi fata and when it was driven in very high and abnormal speed, due to sudden application of breaks, deceased Tulshiram was thrown out of vehicle and he received serious injuries all over his body as it could be seen from Exh.36, the post mortem report. He died due to those grievous injuries. On the report lodged by one Rameshwar Pawar, a crime was registered with Police Station Wadgaon, District Yavatmal for an offence punishable under Section 304A of the Indian Penal Code vide Crime No.14/2000 against Manohar Gotfode. The FIR is at Exh.33. Spot panchanama is at Exh.34. Respondent nos.1 to 6 filed the claim petition under Section 166 and claimed compensation against the non applicants therein including the present appellant, to the tune of Rs.4,00,000/.

3. The claim petition was hotly contested by the appellant insurance company by filing the written statement (Exh.24). In the written statement, a plea was taken by the appellant that though the offending vehicle was duly insured, it was insured as private vehicle and not as commercial vehicle. It was also pleaded in the written statement that after the accident, the insurance company has done investigation and in the said investigation, it was found that at the relevant time, in the vehicle in question, about 20 to 22 passengers were travelling by paying fare. Thus, according to the appellant, there was a breach of condition of the policy. It was also stated that the driver of the vehicle drove the vehicle in rash and negligent manner.

Therefore, the insurance company is not liable to pay the compensation.

4. After pleadings were completed, issues were framed. Yamunabai, the unfortunate widow, who was claimant no.1, entered into the witness box. She was cross examined by the learned counsel for the insurance company. Various documents were proved in her evidence. Claimants also examined one Ulhas Rathod as PW2. His evidence was also challenged in the cross examination at the behest of the insurance company. The insurance company also examined its witness Murlidhar Bhandarkar, Assistant Branch Manager and closed its case. The Court below, after appreciating the pleadings, documents and evidence brought on record, passed

the impugned judgment, thereby partly allowing the claim petition filed by the claimants. Under the said award, non applicant nos.1 to 3 in the said claim petition, including the appellant, were directed to pay jointly and severally Rs.2,92,000/-. Hence, this appeal.

5. After hearing Mr. Joshi, learned counsel for the appellant and Mr. Bhalerao, learned counsel for the original claimants, the only point that falls for my determination is as under:

(i) Whether the Court below has wrongly fastened the liability upon the appellant and whether to that extent the judgment and award passed by the

Court below required to be interfered with?

(ii) What order?

6. This appeal was taken up for hearing on 28.08.2018. On the said day, the learned counsel for the appellant made elaborate submissions in support

of the claim of the insurance company for setting aside the judgment and award passed by the Court below. On the said day, submission of the

learned counsel for the appellant was that the policy in question was an "Act Policy" and, therefore, since the deceased was occupant of the

vehicle, he cannot be termed as a "Third Party". Therefore, it was wrong on the part of the Court below to direct the insurance company to

pay and/or indemnify the owner of the vehicle. To buttress his submission, he relied on decision of this Court in *New India Assurance Co. Ltd. Vs.*

Ranglal Punju Nikam & Ors.; reported in 2007 (4) Mh.L.J.321 and the verdict of the Hon'ble Apex Court in *United India Assurance Co. Ltd. Shimla*

Vs. Tilak Singh & Ors.; reported in (2006) 4 SCC 404. The point, as to how it is an Act Policy, on the said day, learned counsel for the appellant

invited my attention to Exh.66 and invited my attention to the top of Exh.66, where there is a printing "Niji Car IX1". Therefore, it was his

submission that it was an Act Policy. On the said day, since the Court time was over, the matter was kept today for further hearing as a part heard

matter.

7. Today, when the matter was taken up for final hearing, at that time, Court pointed out the contents of Exh.38 and Exh.66. Therefore, the

learned counsel for the appellant accepted and conceded that policy Exh.66 and the cover note Exh.38 were not "Act Policy" but it was a

Comprehensive Policy.

8. Had it was an Act Policy then occupants of the said private vehicle were not third party. However, in view of the law laid down by the Hon'ble

Apex Court in National India Insurance Co.Ltd. Vs. Balkrishan and anr., reported in 2013 ACJ 199, risk of the occupant of the vehicle is covered

under comprehensive/package policy. It appears that only to give a go by to this law laid down by the Hon'ble Apex Court, the submissions were

made before me by the insurance company that it was an Act Policy.

9. It is the submission of the learned counsel for the appellant that the vehicle was insured as private vehicle. However, in the vehicle 20 to 22 persons

were travelling by paying fare. The written statement would show that this plea was taken by the insurance company on the basis of the

investigation done by the investigator appointed by the insurance company. Thus, according to the insurance company, there was a breach of

condition of policy and, therefore, the insurance company cannot be held liable to pay compensation.

10. Mere allegation and/or pleadings in the written statement about breach of the policy are not sufficient for the insurance company to get itself

absolved from the liability. The insurer is under obligation to prove before the tribunal the breach by adducing convincing evidence. Not only that,

the insurer is further under obligation to prove that the said was intentional.

11. Though burden was on the insurance company to prove its defence that at the relevant time, there was wilful breach on the part of the insurer by

accepting fare from the occupants of the vehicle including the deceased Tulshiram, it appears from the record that the said defence is not at all proved

by the insurance company.

Manohar Bhandarkar, Assistant Manager, the witness who was examined by the insurance company is totally silent in his evidence that the

passengers were travelling by making payment of fare. When the widow Yamunabai was under the cross-examination of the learned counsel for

the insurance company even at that time, such a suggestion was not given by the insurance company that her deceased husband paid fare either to the

driver or to the owner of the insured vehicle. Not only that, in order to prove that the driver was rash and negligent. The claimants themselves

examined one Ulhas Rathod, who was one of the occupants of the said vehicle.

When this best witness was available with the insurance company to prove its defence, even to this witness there was not even a remote suggestion that he or any of the occupant paid the fare.Â

In order to buttress his submission that the occupants paid the fare, the learned counsel for the appellant submitted that there are statements of occupants namely; Ramesh Pawar, Dhansing Pawar, Vasant Rathod and Kacharu Ramteke. Statements of these persons were recorded under Section 161 of the Code of Criminal Procedure by the investigating officer who investigated into Crime No.14/2000, which was registered against the driver of the ill fated vehicle.Â I am afraid that the statements recorded by the investigating officer during the course of investigation under Section 161 of the Code of Criminal Procedure can be an admissible piece of evidence even for the limited purpose.Â It was always open for the insurance company to summon either to the investigating officer, who has recorded their statements and/or those persons whose statements were recorded to prove the fact that they paid fare.Â Nothing that sort of was done by the insurance company.Â Not only that when one of the occupants Ulhas Ratod was available for crossÂexamination, as noted above there was no suggestion to him that he and/or the deceased paid any fare.Â Thus, it is clear that the said defence is taken only for the purpose of defeating claim of the claimants.

12. Insofar as another submission that liability of the insurance company was limited one since permissible capacity of the vehicle was 9+1, it is to be noted here that only one claim was filed arising out of the said accident.Â Therefore even the said defence was not available for the insurance company.Â This position is also clear from the judgment of the Hon'ble Apex Court in National Insurance Co. Ltd. Vs. Anjana Shyam & Ors.; reported in 2007 (5) All MR 436.Â Â

13. Thus, the learned Chairman of the tribunal below, in my view, has correctly assessed the income of the deceased and has granted the compensation.Â Be that as it may.Â In this appeal also, during the course of submissions, there was no whisper of challenge about the quantum of compensation that was awarded in favour of the original claimants.

14. The learned Chairman, in my view, on the aforesaid conspectus of the matter, correctly and rightly recorded a finding that the insurance company

was required to pay compensation as indicated in the impugned order.

Thus, in my view, there is no merit in the appeal and it is required to be dismissed.

15. Now, the question of costs. I am reminded of the observations of the then Hon'ble Chief Justice of India Mr. Y. V. Chandrachud in Motor

Owners' Insurance Co. Ltd Vs. Jadhavji Keshavji Modi, reported in 1981 ACJ 507, wherein his Hon'ble Lordship observed thus:

“The victims of road accidents or their dependents are driven to wage a long and unequal battle against the insurance companies, which deny their

liability on every conceivable variety of factual disputations from 'who was driving the vehicle' to 'whose negligence was the sine qua non of the

accident'. The delay in the final disposal of motor accident compensation cases, as in all other classes of litigation, takes the sting out of the laws of

compensation because, an infant child who seeks compensation as a dependent of his deceased father has often to await the attainment of majority in

order to see the colour of the money.”

16. In the present case, only after directions given by this Court, 50% of the amount of compensation was deposited. Even the application for

withdrawal of the said amount was also opposed and the application was rejected on 10.08.2009. Thus, even after lapse of 18 years, the minor son

and daughters who were aged about 3, 5 and 7 at the time of accident, have not seen the colour of money. Thus, in view of the discussion in the

foregoing paragraphs, in my view, this is a fit case wherein cost should be imposed on the insurance company and I quantify the costs at Rs.25,000/—

(Rs. Twenty Five Thousand Only).

The claimants will be entitled to withdraw 50% of the amount deposited by the insurance company before this Court, forthwith along with interest

accrued thereon.

The insurance company is hereby directed to deposit the remaining 50% of the amount within a period of one month from today, along with interest as

granted by the tribunal and also the amount of costs.

If this remaining 50% amount and costs is not deposited within one month then in that event the appellant will require to pay additional interest of 2%

in addition to the interest granted by the tribunal below till the amount is deposited.

As soon as the remaining 50% amount, along with interest and the amount of costs, is deposited by the appellant before this Court, the claimants will be entitled to withdraw the said amount, forthwith.

With this, the appeal dismissed.