(2015) 05 BOM CK 0085

In the Bombay High Court

Case No : First Appeal No. 220 of 2002

Ramkumar Devikisan Bhotada and Others — APPELLANT

Vs

Baby and Others — RESPONDENT

Date of Decision : 06-05-2015

Acts Referred:

Motor Vehicles Act, 1988 — Section 166, 173

Citation : (2015) 05 BOM CK 0085

Hon'ble Judges : A.S. Chandurkar, J

Bench : Single Bench

Advocate : Shri Agrawal, N.R. Saboo and Sagar Katkar, for the Appellant; P.P. Kothari and S. Nerkar, Advocates for the Respondent

Final Decision : Allowed

Judgement

A.S. Chandurkar, J.—This appeal filed under Section 173 of the Motor Vehicles Act, 1988 takes exception to the judgment dated 16/02/2002 passed by the Motor Accident Claims Tribunal, Akola thereby holding the present appellants liable to pay compensation to the claimants.

2. On 19/04/1990, when the husband of respondent No. 1 and the father of respondent Nos. 2 to 4 was travelling in a jeep that was owned by appellant No. 1 and was being driven by appellant No. 2, same met with an accident resulting in serious injuries and subsequent death of said person. On that basis the claimants filed proceedings under Section 166 of the said Act seeking compensation of an amount of Rs. 1,50,000/-.

3. The present appellant No. 1 filed his written statement vide Exhibit-23. He took a plea that the deceased along with two other persons forcibly occupied the seats in the jeep and started their journey. It was further pleaded that vehicle developed some mechanical fault and the driver of the vehicle told the passengers to take care of themselves. The head of the deceased hit a neem tree resulting in serious injuries that turned to be fatal. Similar stand was taken by

appellant No. 2 in his written statement/reply vide Exhibit-17.

4. The Insurance Company filed its written statement vide Exhibit-34 in which it pleaded that the deceased had paid an amount of Rs. 10/-for travelling in the jeep though it was not meant for carrying passengers. It was also pleaded that the driver was not holding a valid driving license.

5. The respondent No. 1 examined herself in support of the claim vide Exhibit-44. She however stated that she was not aware about the manner in which the accident took place. She also stated that she was not aware whether charges of Rs. 10 had been paid for travelling. The driver was examined vide Exhibit-51 and he placed his driving license on record vide Exhibit-52. Said driving license was in respect of heavy vehicles. In his cross examination, he denied that fare of Rs. 10 had been taken from the deceased. The present appellants also examined one Narayan vide Exhibit-53 who had also travelled in the said jeep. He also stated that he had not paid any fare charges to the driver.

On behalf of the Insurance Company, a pursis came to be filed vide Exhibit-55 stating that it did not desire to lead evidence on merits.

6. The learned Member of the Claims Tribunal after considering the evidence on record held the claimants entitled to an amount of compensation of Rs. 1,50,000/-. It was further held on the basis of the evidence on record that an inference could be drawn that the deceased had paid an amount of Rs. 10/-while travelling in the vehicle. Holding the same to be a breach of the terms and conditions of the policy, the Insurance Company was exonerated. Accordingly the present appellants and respondent No. 6 herein were held jointly and severally liable.

7. Shri Agrawal, learned counsel for the appellants submitted that the Claims Tribunal erred in exonerating the Insurance Company. It was submitted that there was no evidence whatsoever regarding breach of any policy condition and hence the Insurance Company could not have been exonerated. Neither was there any evidence regarding payment of Rs. 10/-by the deceased nor was it proved that as the appellant No. 2 was holding a license for heavy vehicle the accident had taken place. The learned counsel for the appellants relied upon the judgment of the Supreme Court in National Insurance Co. Ltd. Vs. Swaran Singh and Others, (2004) 1 ACC 1 : (2004) ACJ 1 : AIR 2004 SC 1531 : (2004) 118 CompCas 396 : (2004) 1 JT 109 : (2004) 136 PLR 510 : (2004) 1 SCALE 180 : (2004) 3 SCC 297 : (2004) 1 SCR 180 : (2004) AIRSCW 663 : (2004) 1 Supreme 243 and submitted that unless it was specifically pleaded and proved by the Insurance Company that there was a breach of any material term of the policy, the Insurance Company could not be exonerated. He also relied upon the judgments in The New India Assurance Company Limited Vs. Wahida Bano and Others, (2014) 2 ACC 8 : (2013) 6 ALLMR 145 and National Insurance Company Ltd. Vs. Mrs. Seems Ramdas Telhande and Others, (2014) 2 ABR 128 : (2013) 6 ALLMR 71 : (2014) 1 BomCR 162 : (2013) 6 MhLj 890 . He further urged that

the Insurance Company had not led any evidence to justify its defence regarding breach of policy conditions. He therefore submitted that the Insurance Company be held liable to pay the compensation.

8. Shri A.M. Quazi, learned counsel appearing for respondent No. 5 supported the impugned judgment. According to him, the claimants had specifically pleaded in the claim application that the deceased had paid a sum of Rs. 10/-as fare charges. Similarly the driver had admitted that he was having a license in respect of a heavy vehicle while he was actually driving a jeep. The learned counsel relied upon the decision in National Insurance Company (supra) to urge that the breach as alleged had been clearly proved and hence the respondent No. 5 was rightly exonerated. He also submitted that the appellant No. 2 who was the driver had been prosecuted in criminal proceedings and the owner had not examined himself before the Claims Tribunal.

Shri P.P. Kothari, learned counsel appearing for respondent Nos. 1 to 4 submitted that the claim as made had been rightly allowed by the Tribunal. According to him, having insured the vehicle, the Insurance Company was liable to satisfy the claim.

9. The following point arises for consideration :

Whether the respondent No. 5 is liable to satisfy the award of compensation ?

10. I have carefully considered the respective submissions and I have gone through the records of the case. In so far as occurrence of the accident and the entitlement of the claimants'' compensation is concerned, said fact is not in dispute. The question is only as regards liability of the appellants or that of the Insurance Company. In the written statement filed by the respondent No. 5, a stand has been taken that as per the averments made in the claim petition, the driver of the jeep had accepted an amount of Rs. 10 from the deceased. It was also specifically pleaded that the driver was not possessing a valid driving license. It is on the basis of these two pleas that the Insurance Company sought to exonerate itself from the liability to answer the claim.

11. As regards payment of Rs. 10/-by the deceased is concerned, it has been so stated in paragraph 3 of the claim petition. However, in the deposition of respondent No. 1, it was stated that said respondent No. 1 was not aware whether her husband had paid Rs. 10/-as fare charges to the driver. Admittedly, the respondent No. 1 was not travelling with the deceased in the said vehicle when the accident took place. The fact regarding payment of Rs. 10/-as fare charges was put to the driver in his cross examination which fact was infact denied. Similarly, suggestion given to a co-passenger Narayan was also denied by him. Besides these suggestions, there is no other evidence on record to indicate payment of fare of Rs. 10/-. It is to be noted that by filing a pursis at Exhibit-55, the Insurance Company declined to lead evidence on merits.

12. As regards the defense in respect of validity of license of appellant No. 2,

plea in that regard was specifically taken by the Insurance Company. The appellant No. 2 in his deposition at Exhibit-51 admitted that he was having a driving license for a heavy vehicle. It is therefore proved that the appellant No. 2 was holding a driving license for heavy vehicle and he had driven a jeep which met with an accident.

13. In National Insurance Company (supra), the Supreme Court has considered the manner in which the grievance on behalf of the insurer in respect of breach of policy condition should be considered. It was observed therein that even where the insurer is able to prove breach on the part of the insured, the insurer cannot be allowed to avoid its liability unless the breach in question is so fundamental which is found to have contributed to the cause of action. It has also been observed that the defence regarding breach of the insurer has to be specifically pleaded and proved. It is further observed that in each case the Tribunal before whom the evidence is led has to consider whether the fact of the driver possessing license for one type of vehicle but was driving another type of vehicle was the main or contributory cause of accident. Further in case of unforeseen or intervening cause like mechanical failure or similar other causes having no nexus with the driver not possessing requisite type of license, the insurer would not be allowed to avoid its liability merely for technical breach of conditions.

14. In New India Assurance Company (supra), learned Single Judge has observed that in absence of any evidence regarding breach of insurance contract, the Insurance Company cannot escape its liability. Similar view has taken in New India Company Ltd. (supra).

15. In Manager, United India Insurance Co. Ltd. Vs. Kamalabai Mukunda Kumare and others, (2012) ACJ 1011 which was relied upon by the learned counsel for respondent No. 5, it was held that in case of a fundamental breach of policy condition, the Insurance Company would stand relieved of its liability to reimburse the insured. In the facts of said case, a finding had been recorded by the Tribunal that the motorcycle was being driven in a rash and negligent manner and the driver was possessing a license for light motor vehicle.

16. In so far as the breach regarding acceptance of fare of Rs. 10/-is concerned, except the plea taken in the written statement by the respondent No. 5, same has not been substantiated by evidence. Though the claimant had pleaded in the claim application that the deceased had paid Rs. 10/-as fare, in her cross examination, it was stated by respondent No. 1 that she was not aware of said fact. The other two witnesses who were examined, denied the suggestions given to them in that regard. Merely on the basis of the averments made in the claim petition, a finding cannot be recorded that the deceased had paid fare of Rs. 10/- thereby resulting in breach of policy condition. As noted above, no evidence was led by the Insurance Company and it has merely relied upon the evidence led by the claimants and other opponents. The Tribunal proceeded to draw an inference in that regard and hence held that there was breach of policy conditions.

Considering the evidence which is available on record, the Tribunal was not justified in drawing such inference.

17. As regards breach of policy condition in relation to the driving license, it is to be noted that the appellant No. 2 was holding a license for a heavy vehicle and the vehicle which met with an accident was a jeep. While its the stand of the appellants that the vehicle in question developed some mechanical fault resulting in big noise after which the vehicle dashed a neem tree, liability had been denied by the Insurance Company by pleading absence of valid driving license. As observed by the Supreme Court in National Insurance Company Ltd. (supra), on the basis of the evidence available, a decision has to be taken whether the fact of the driver possessing license for one type of vehicle but found driving another type of vehicle was the main or contributory cause of action. In the cross examination of appellant No. 2, the suggestion that he was deposing falsely that the accident took place due to fault in the engine was also denied. Except this evidence, there is no other evidence on record to hold that as the appellant No. 2 was possessing license of a heavy vehicle and he was instead driving a jeep, the same was the main cause of accident. As noted in National Insurance Company Ltd. (supra), decision for the purpose of avoiding the liability, the defence as raised must be established and the burden of proof in that regard is on the Insurance Company. The evidence available on record is insufficient to hold that such breach in respect of driving license resulted in causing the accident.

18. Hence considering the law as laid down, the defence as raised by respondent No. 5 has not been proved to record a finding that the breach on the part of the insured is resulted in the Insurance Company avoiding its liability. The point as framed therefore stands answered accordingly.

19. In view of aforesaid, the following order is passed.

i) The judgment dated 16/02/2002 passed by the Claims Tribunal is partly modified and it is held that the original non-applicant Nos. 1 to 4 are jointly and severally liable to pay the amount of compensation.

ii) During pendency of the appeal the claimants have withdrawn an amount of Rs. 1,25,000/- on furnishing security. It is further stated that amount of Rs. 25,000/-towards no fault liability along with interest is payable to the respondent No. 1. Said amount shall be duly paid to the respondent No. 1 with accrued interest. In terms of this judgment, the respondent No. 5 would be liable to pay an amount of Rs. 1,25,000/-to the appellants.

iii) First appeal is allowed in aforesaid terms with no order as to costs.