
(2022) 02 BOM CK 0063

In the Bombay High Court

Case No : First Appeal No.1202 Of 2019, Cross Objection St. No.1525 Of 2021

Reliance General Insurance Company Ltd And Others

APPELLANT

Vs

Shaikh Sadik Shaikh Rafique And Others

RESPONDENT

Date of Decision : 26-02-2022

Acts Referred:

Code Of Civil Procedure, 1908 — Order 41 Rule 22
Motor Vehicles Act, 1988 — Section 147(1)(b), 166, 173

Citation : (2022) 02 BOM CK 0063

Hon'ble Judges : Anuja Prabhudessai, J

Bench : Single Bench

Advocate : H.N. Verma, P.R. Agrawal, Vidya Umale

Final Decision : Dismissed/Partly Allowed

Judgement

Anuja Prabhudessai, J

01] This is an Appeal under Section 173 of the Motor Vehicles Act, 1988 (hereinafter referred to as "the said Act") challenging the judgment and Award dated 13/03/2018 in Claim Petition No.213/2015. By the impugned judgment, the Claims Tribunal has partly allowed the Petition under Section 166 of the said Act and directed the Appellant and the Respondent Nos.2 and 3 to pay to the Claimant compensation of Rs.16,00,000/-/- with interest @ 8% per annum from the date of the petition till final realization.

02] The brief facts necessary to decide this Appeal are as under:

The Respondent No.1 (hereinafter referred to as "the Claimant"), had filed Petition under Section 166 of the said Act alleging that he along with other labourers was returning to village Nerpinglai by Tata 407 Truck bearing No.MH-11/AG-2161. The said truck was driven by the Respondent No.2 at excessive speed and in a rash and negligent manner. When they reached near Talani Phata on Morshi-Amravati Road, one Tata Ex Vehicle bearing No.MH-27/X-4621 came from the opposite direction, in a rash and negligent manner,

resulting in collision between both the vehicles. As a result, the Claimant sustained grievous injuries resulting in permanent disablement.

03] The Claimant claimed that at the time of the accident, he was 25 years of age and was earning Rs.9,000/- per month as a labourer. The Claimant further claimed that he is unable to work due to the injuries sustained in the said accident. The Claimant further claimed that he had incurred medical expenses of Rs.4,00,000/-. The Claimant claimed total compensation of Rs.68,44,000/- under pecuniary and non-pecuniary heads.

04] The Respondent No.2 denied that he had driven the Tata 407 Truck bearing No.MH-11/AG-2161 in a rash and negligent manner. The Respondent Nos.2 and 3 claimed that the accident was caused due to rash and negligent driving by the driver of the Tata Ex Vehicle bearing No.MH-27/ X-4621. The Respondent Nos.2 and 3 also denied the age, occupation and income of the Claimant and contended that the Claimant is not entitled for compensation as claimed. The Respondent No.2 stated that the vehicle was duly registered with the Appellant – Insurance Company.

05] The Appellant – Insurance Company, the insurer of the Tata 407 Truck bearing No.MH-11/AG-2161, claimed that said truck was driven without a valid driving licence. It was also averred that the vehicle was driven without fitness certificate, permit and PUC certificate. The Appellant – Insurance Company also claimed that the Claimant was travelling in a goods carriage vehicle as a gratuitous passenger and hence denied its liability to indemnify the insured for breach of terms and conditions of the policy.

06] The driver and the owner of the Tata Ex Vehicle bearing No.MH-27/X-4621 also filed their written statement denying the mode and manner of the accident as well as the age, occupation and income of the Claimant. They claimed that the accident was caused due to rash and negligent driving by the Respondent No.2 - driver of the Tata 407 Truck bearing No.MH-11/AG-2161.

07] The Tribunal, after considering the evidence on record, held that the accident was caused due to rash and negligent driving by the Respondent No.2 - driver of the Tata 407 Truck bearing No.MH-11/AG-2161. The Tribunal has also recorded a finding that the Claimant had suffered 100% disability.

The Claimant was 25 years of age and considered his notional income as Rs.4,500/- per month and on applying multiplier of 17, the Tribunal assessed future loss of income at Rs.9,18,000/-. The Tribunal has also awarded compensation on other heads such as medical expenses, attendance charges, permanent disability etc. and awarded total compensation of Rs.16,00,000/-. Being aggrieved by the judgment, the Appellant – Insurance Company has filed this Appeal and not being satisfied with the quantum of compensation awarded by the Tribunal, the Claimant has filed Cross-objection under Order XLI Rule 22 CPC.

08] Shri Verma, learned counsel for the Appellant – Insurance Company submits that the Claimant was travelling on a goods carriage vehicle, whose risk is not covered under the insurance policy. He therefore contends that the Insurance Company is not liable to indemnify the insured.

09] Per contra, Shri Agrawal, learned counsel for the Claimant submits that the Appellant – Insurance Company has neither pleaded nor proved breach of terms and conditions of the policy or that the risk was not covered under the policy. He submits that in the absence of separate pleading and proof, the Appellant – Insurance Company cannot be absolved of its liability to indemnify the insured. In support, he relied upon the decision of this Court in *The New India Assurance Co. Ltd. Vs. Smt. Rukhmabai wd/o Laxman Charde & Ors.* reported in 2009(4) ALL MR 575. He further submits that the insurer is liable to compulsorily cover all the risks arising out any motor vehicle and liability of the insurer is co-extensive with that of the insured, subject to the limitation contemplated under Section 147(1)(b) of the said Act. He submits that the employees carriage in goods vehicles are compulsorily covered under Section 147(1)(b) of the said Act. In support, he relied upon the decision of the Karnataka High Court in *United India Assurance Co. Ltd., Mandya Vs. Neelaiah Giriyaiah and Another* reported in 2017(3) ALL MR 67. He further submits that the Claimant had suffered 100% functional disability. He is leading almost a vegetative life. He submits that the Tribunal has erred in considering the notional income as Rs.4,500/- per month. The Tribunal has also not considered the future prospects and further awarded meager compensation on other conventional heads. He therefore submits that the compensation awarded by the Tribunal is not just and reasonable.

10] I have perused the records and considered the submissions advanced by learned counsel for the respective parties. The questions for consideration are whether the compensation awarded by the Tribunal is just and reasonable and whether the Appellant – Insurance Company is liable to indemnify the insured.

11] The record reveals that the Claimant as on the date of the accident was 25 years of age. The Claimant claimed that he was working as a labourer and earning Rs.9,000/- per month. The evidence on record also reveals that the Claimant had suffered multiple injuries i.e. a fracture through right half of vertebral body and right lateral mass of C2, with narrow edema extending along the left lateral mass of C2 and 1dt facet with additional fracture involving the left C3 paras interatclaries. There is compression fracture of the C6 vertebral body without significant vertebral height loss. Approximately 30% compression of the C7 vertebral body with mild posterior retroplusion causes moderate canal stenosis and indents the cord with mild cord edema at this level. Small prevetebal hematoma from C2 to C4. That with the fracture C7 vertebral body, there is a paraplegia with Cord Constitution. Thime was a trama to chest with multiple ribes fracture of left side with pemothorx with Haemothorax.

12] The evidence of PW-2 Dr. Vishwaveshar Kurtkoti reveals that the Claimant is unable to walk. He is totally paralised. He cannot move without support of others

and is unable to perform his routine work without aid. PW-2 Dr. Vishwaveshar Kurtkoti has certified that the Claimant has 100% disability and that he is unable to do any kind of work. He further submitted that said disability shall create further complications in future.

13] The evidence on record thus reveals that a young boy of 25 years of age is now bedridden and is in a vegetative state in view of the injuries sustained in the said accident. The Claimant had deposed that he was earning Rs.9,000/- per month. The Tribunal has considered notional income of Rs.4,500/- per month. Considering the nature of the employment, it would be difficult to expect the Claimant to produce any documentary evidence in proof of his income. However, considering the age of the Claimant, in my considered view, Rs.6,000/-, being the minimum wage at the relevant time, can be taken as notional income. Adding 40% towards future prospects, the annual income works out to Rs.1,00,800/-. Applying multiplier of 17, as per the judgment of the Hon'ble Supreme Court in the case of Sarla Verma (Smt) & Others Vs. Delhi Transport Corporation & Another reported in (2009) 6 SCC 121, loss of future income works out to Rs.17,13,600/-.

14] The evidence on record indicates that the Claimant was initially taken to General Hospital, Amravati, but due to lack of proper facilities, on the very next day, he was shifted to Dr. Sawdekar Hospital, Amravati. On the very next day, he was shifted to Indira Gandhi Medical College, Nagpur. He was admitted in the said hospital from 25.01.2015 to 29.01.2015. Thereafter he was admitted in Neuron Hospital Nagpur till 11.02.2015. The Claimant had produced medical bills to the tune of Rs.2,70,000/-. The Tribunal has awarded the entire amount of Rs.2,70,000/- towards medical expenses.

15] The Tribunal has also awarded Rs.4,00,000/- towards pain and sufferings, loss of amenities, marital prospects and future treatment. Considering the nature of injuries and the extent of the disability, the compensation awarded on the non-pecuniary heads needs to be enhanced to Rs.6,00,000/-. Hence, the Claimant is entitled for compensation of Rs.25,83,600/-, which is rounded up to Rs.26,00,000/- with interest @ 6% per annum from the date of the petition till final realization.

16] The Appellant – Insurance Company has denied its liability to indemnify the insured on the ground that the Claimant was a gratuitous passenger. The evidence on record indicates that the Claimant was not a gratuitous passenger, but he was the employee of the owner's vehicle, which was a goods carrier. Though learned counsel for the Appellant – Insurance Company has submitted that the employee is not covered under the policy, no such defence was raised. The Appellant – Insurance Company has not placed on record terms and conditions of the policy. Suffice it to say that the facts which are not pleaded, even if there is evidence in support, cannot be examined because the insured had no notice of it and entertaining such plea would tantamount to granting unfair advantage to the Insurance Company. This is based on the rules of fair

play that demand that where a party seeks to establish a contention which if proved would be sufficient to deny relief to the opposite side, such contention has to be specifically pleaded and then proved. But, if there is no pleadings there is no question of proving something which is not pleaded. Reliance is placed on the decision of the Hon'ble Apex Court in *Tin Printers (Pvt.) Ltd. Vs. Industrial Tribunal* reported in 1968 (18) FLR

61. This principle is reiterated by this Court in *Smt. Rukhmabai (supra)*, wherein it is held that the question of exclusion of liability has to be proved in terms of the policy. It cannot be read from the policy document that by any permutations and combinations, the amount of premium paid is for a restricted liability, i.e., excluding one of the classes of claimants. This Court has observed that an oral submission or a pleading for that matter that the premium paid did not cover the liability of the class of passengers of the present nature is, thus, a "pleading and argument" without proof of facts. It is held that the cases are decided on evidence, and not on bare pleadings and oral arguments. In the present case, the Insurance Company has not specifically pleaded or proved that the insurance policy did not cover the case of the present nature. In the absence of such pleading and proof, in my considered view, the Appellant – Insurance Company cannot be absolved of its liability to indemnify the insured.

17] Under the circumstances and in view of the discussion *supra*, the Appeal is dismissed and the Cross-objection is partly allowed. The Claimant is entitled for enhanced compensation of Rs.26,00,000/- with interest @ 6% per annum from the date of the petition till final realization.

18] The Appellant – Insurance Company to deposit the enhanced compensation within three months. The Claimant is entitled to withdraw the balance amount as well as the enhanced amount with interest accrued thereon.