
(2014) 02 BOM CK 0290
In the Bombay High Court
Case No : First Appeal No. 449 of 1999

Sujata

APPELLANT

Vs

National Insurance Co. Ltd.

RESPONDENT

Date of Decision : 27-02-2014

Acts Referred:

Motor Vehicles Act, 1988 — Section 92(a), 95

Citation : (2014) 02 BOM CK 0290

Hon'ble Judges : S.B. Shukre, J

Bench : Single Bench

Advocate : Rohan Chhabra, Advocate for the Appellant

Final Decision : Allowed

Judgement

S.B. Shukre, J.—Being aggrieved by the judgment and award passed on 27th August, 1999 in Claim Petition No. 177 of 1992 by the Member, Motor Accident Claims Tribunal, Nagpur, that the present appeal has been preferred by the appellants.

2. In an accident, which occurred at about 1.00 p.m. on 12.2.1992 husband of appellant No. 1 and father of appellant No. 2 died on spot when Jeep bearing registration No. MUK 7979 by which he was travelling dashed against a stationary truck parked on the road, which had registration No. WB-23-1458. The jeep was insured with respondent No. 1 and it was being driven by respondent No. 2, who was its owner as well. The truck involved in the accident was owned by respondent No. 4 and insured with respondent No. 5, while respondent No. 3 was its driver. Since there was rashness and negligence on the part of the drivers of both these vehicles, the appellants preferred petition claiming compensation from all the respondents.

3. The petition was resisted by respondent No. 1, respondent No. 2 and respondent No. 5, each of whom filed their separate written statement. All of them submitted that there was no rashness and negligence on the part of drivers

of the respective vehicles with which they were concerned and thus were not liable to pay any compensation to the appellants. The driver and owner of the truck involved in the accident remained absent throughout and the claim petition proceeded against them *exparte*.

4. Upon consideration of the evidence brought on record by the appellants and respondent No. 1, and hearing rival parties, the learned Member of the Tribunal found that the accident occurred only due to rash and negligent driving of the Jeep by its driver and it was also in breach of conditions of the insurance policy and, therefore, learned Member partly allowed the petition and granted compensation of Rs. 3,13,700/- inclusive of compensation on account of no fault liability to the appellants. The learned Member fastened the liability to pay compensation only upon owner-cum-driver of the Jeep i.e. respondent No. 2 and exonerated respondent No. 1, insurer of the Jeep as well as remaining respondents from any liability in this case. Not satisfied with the same, the appellants are now before this Court in this first appeal.

5. I have heard Mr. Rohan Chhabra, learned counsel for the appellants. None has appears for the respondent, though duly served.

6. Now, following points arise for my determination:

i) Whether Motor Accident Claims Tribunal, Nagpur fell in serious error in exonerating respondent No. 1, insurer of the offending Jeep, from its liability to pay compensation to the appellants ?

ii) What order ?

7. The learned counsel for the appellants has submitted that in this case learned Member of the Tribunal has relied upon some so-called admissions given by the appellant No. 1 in her evidence, vide Exhibit-38, to draw an erroneous conclusion that the Insurance Company-respondent No. 1 has proved its defence that there was a breach of conditions of the policy caused by use of the offending jeep for plying fare paying passengers, with deceased Ambardas being also one of the fare paying passengers at the time of accident. He has pointed out from the evidence of PW 1-Smt. Sujata (Exhibit-38) that what she has admittedly is only a fact which she has learnt from the newspaper and nothing more. He submits that when PW 1, Smt. Sujata, admits that the Jeep owner was not the friend of her husband, it would not necessarily and conclusively mean that her husband was travelling by Jeep at the relevant time on paying fare to the owner or driver of the Jeep. He submits that whenever a defence of breach of conditions of the policy, although in the written statement no such defence is seen to be raised by the respondent No. 1, is taken by the Insurance Company, the burden to prove such defence squarely lies upon the Insurance Company. In support, he places his reliance upon the law laid down by the Hon'ble Apex Court in the case of Kamala Mangalal Vayani and Others Vs. United India Insurance Co. Ltd. and Others, He further submits that the respondent No. 1 did not adduce any other evidence to show that the deceased was travelling by the offending Jeep as a

fare paying passenger and, therefore, the conclusion reached in this regard by the Tribunal is erroneous and cannot be sustained in law.

8. It is seen from the impugned judgment and award that in order to draw an inference that the deceased Ambardas was travelling by offending Jeep as a fare paying passenger, learned Member of the Tribunal has simply relied upon a few admissions, and these admissions, I must say, do not constitute admissible pieces of evidence.

9. PW 1, Smt. Sujata, has admitted in her cross-examination taken on behalf of respondent No. 1 that she learnt that in all 9 to 10 passengers were travelling. She has further admitted that the owner of the offending Jeep was not the friend of her husband, Ambardas. So far as the fact stated by Smt. Sujata about travelling of 9 to 10 passengers is concerned, it is a hearsay evidence, because she was neither an eye witness to the accident nor a co-passenger of the Jeep nor had any occasion to acquire personal knowledge about travelling of so many persons by the offending Jeep. Therefore, this fact should not have been considered at all in drawing an inference about the use of the Jeep for carriage of fare paying passengers. Next admission is that the owner of the offending jeep was not the friend of her husband. A person who is not a friend need not necessarily be a businessman so as to do favour only upon receipt of a reciprocal consideration from the person to whom he is doing the favour. It is quite possible that social relationships are built between persons spontaneously and out of those relationships, an owner or driver of the vehicle may agree to carry the person to whom he has been just introduced without receiving any reward or fare from him. Simply because a person was not the friend earlier would not mean that he cannot be a friend on forging the friendship on the spur of the moment. Therefore, it was absolutely necessary on the part of the Insurance Company to have produced independent evidence to establish its case that the deceased was travelling by the offending Jeep upon payment of fare.

10. The Insurance Company, however, has not adduced any evidence to prove its case as regards breach of policy conditions relating from carrying of deceased Ambardas on payment of fare by the offending Jeep. There is one witness DW 1 Balkrushna (Exhibit-51) an employee of respondent No. 1, who has been examined by respondent No. 1. Even he does not say anywhere in his evidence in so many words that the deceased Ambardas was travelling by offending Jeep on payment of fare to the Jeep driver or its owner. He only says that the Insurance Company is not liable to pay compensation as per Section 92(a) and Section 95 of the Motor Vehicles Act, 1988. By quoting sections only a person cannot be held to have discharged burden of proof placed upon him by law. For relieving himself of that burden, he must lead positive evidence to bring his case within the purview of provisions of law. In the case of Kamala (*supra*) referred to me by the learned counsel for the appellants, the Hon"ble Supreme Court has categorically held that once a comprehensive Insurance with the Company is admitted, which has been admitted in this case also, onus of proving any breach

of insurance conditions is upon the insurer and not the claimants. I must say, this burden of proof which lay upon the respondent No. 1, has not been discharged by respondent No. 1 in any manner. Learned Member of the Tribunal has reached his conclusion in this regard without there being any evidence to support the same. Nowhere there has been an admission given by the appellants that deceased Ambardas was travelling by the offending jeep upon payment of fare.

11. In the circumstances, I hold that the finding recorded by the Tribunal that the deceased Ambardas was travelling by the offending Jeep as a fare paying passenger being not based upon any evidence available on record is perverse and absolutely erroneous. Such a finding cannot be sustained in law. It needs to be quashed and set aside. Resultantly, the liability to pay compensation as already fixed by the Tribunal about which no dispute has been raised by the appellants, would have to be also fastened upon the respondent No. 1 and it would be in joint and several terms. Point No. 1 is, therefore, answered as in the affirmatively.

12. For the reasons stated above, this appeal deserves to be allowed. As such, Point No. 2 is answered in terms that the appeal stands allowed with costs with direction that the compensation of Rs. 3,13,700/- inclusive of no fault liability amount of Rs. 25,000/- shall be paid to the appellants at the rate of 12% per annum from the date of petition till final payment by respondent No. 1 also in addition to respondent No. 2. The liability of respondent Nos. 1 and 2 to pay said amount of compensation would be joint and several. The impugned judgment and award stand modified in these terms.

13. The decree be drawn up accordingly.