

(2004) 01 BOM CK 0009
In the Bombay High Court

Ajay Ramesh Bhior

APPELLANT

Vs

Avinash Shantaram Jadia and Another

RESPONDENT

Date of Decision : 13-01-2004

Acts Referred:

Motor Vehicles Act, 1988 — Section 140

Citation : (2004) 3 ACC 130

Hon'ble Judges : A.S. Oka, J;A.P. Shah, J

Bench : Division Bench

Judgement

A.P. Shah, J.—Rule. Respondent No. 1 is a formal party. Ms. Barve, learned Counsel, waives service for respondent No. 2. By consent rule is taken up for hearing.

2. On 7th September, 2002 the petitioner was travelling on pillion of motor cycle bearing No. MH-04-AV-7790 being driven by the respondent No. 1. The petitioner fell down from the motor cycle and sustained fracture of skull (right parietal) and fracture and dislocation of maxillary sigmoid joint. The motor cycle was owned by the respondent No. 1 which was insured with respondent No. 2 National Insurance Co. Ltd. The petitioner filed application u/s 140 of the Motor Vehicles Act, 1988 before the Motor Accident Claims Tribunal, Thane for interim compensation. In support of his claim the petitioner relied upon the liability certificate issued by Dr. Rakesh Chaturvedi showing that the petitioner has suffered 14% permanent partial disability due to the Accident. The petitioner, Accordingly prayed for interim award of Rs. 25,000/- towards no fault liability u/s 140. The application u/s 140 was contested by the respondents. The respondent No. 2 denied its liability, inter alia, on the ground that under the insurance policy the pillion rider was not covered. After hearing the parties, the Tribunal by its order dated 25th September; 2003 directed the respondent No. 1 to pay compensation of Rs. 25,000/- to the petitioner with interest at the rate of 9% p.a. but rejected the application as against the Insurance Company on the ground that the owner has not paid extra premium to cover the pillion rider and,

therefore, the petitioner cannot claim compensation under no fault liability against the Insurance Company. In coming to this conclusion the Tribunal has relied upon the decision of the learned Single Judge of this Court in *New India Assurance Co. Ltd. Vs. Sukhdev Shinde and Others*, .

3. In *Sukhdev*'s case the deceased was a pillion rider and the Accident occurred on 16th January, 1998, i.e., after the commencement of the new Motor Vehicles Act, 1988. The learned Single Judge following the decision of the Division Bench of this Court in *New India Assurance Company Ltd. Vs. Babasaheb Anna Mali and Others*, , held that expression "third party" would not cover a pillion rider and since the risk of pillion rider is not covered in the insurance policy even under no fault liability the Insurance Company cannot be saddled with the amount of compensation to be paid to the heirs of the deceased. We may mention that in the case of *New India Assurance Co. Ltd. v. Babasaheb Anna Mali (supra)* the Division Bench as dealing with a claim under the old Act i.e., M.V. Act, 1939 and it followed the decisions of the Apex Court in *Pushpabai Purshottam Udeshi v. Ranjit Ginning and Pressing Co.* 1977 A.C.J. 343, and *Smt. Mallawwa Etc. Vs. The Oriental Insurance Co. Ltd. and Others*, , which were also delivered under the M.V. Act, 1939. The said decisions were based upon Section 95 of the M.V. Act, 1939. Sections 95(a) and 95(b)(i) of the M.V. Act, 1939 adopted the provisions of the English Road Traffic Act, 1960 and excluded the liability of the Insurance Company regarding the risk to the passengers. The section provided that a policy of insurance must be policy which insures the person against any liability which may be incurred by him in respect of death or bodily injury to any person or damage to any property of a third party caused by or arising out of the use of the vehicle in a public place. The plea that the words "third party" are wide enough to cover 11 persons except the person and the insurer was negatived by the Apex Court in *Pushpabai Udeshi*'s case as the proviso to Sub-section (1) specifically provided that a policy shall not be required "except where the vehicle is a vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment, to cover liability in respect of the death of or bodily injury to persons being carried in or upon or entering or mounting or alighting from the vehicle at the time of the occurrence of the event out of which a claim arises."

4. The position has completely been changed when the new M.V, Act, 1988 came into force. In Section 147 of the new Act there is no limit in certain cases as contained in Clause (ii) of the old Act. The corresponding provision in the old Act contains three clauses whereas now there are only two clauses. What was dropped in the new Act is the clause which excluded the coverage for death or bodily injury to persons carried in or upon the vehicle. That means such liability cannot now be excluded from the policy. Therefore, when the policy of insurance is an "Act policy" the Insurance Company will not stand absolved from the liability in respect of the pillion rider of the motor cycle.

5. The issue is no more *res Integra*. In *New India Assurance Company Vs. Shri*

Satpal Singh and Others, , the Apex Court has categorically held that under the new Act the insurance policy covering third party risk is not required to exclude the gratuitous passenger in a vehicle. Therefore, the decisions rendered under the old Act pertaining to gratuitous passengers are of no assistance while considering the liability of the Insurance Company in respect of any Accident which has occurred after the commencement of the new Act. In Satpal Singh's case. Thomas, J. speaking for the Bench observed as under:

7. Proviso to Section 147(1) of the new Act shows that it is a recast provision by placing the erstwhile Clause (iii) as the present Clause (ii). In other words, Clause (ii) of the proviso to Section 95(1) of the old Act is totally non-existing in the proviso to Section 147(1) of the new Act.

8. u/s 147 of the new Act, the policy must be a policy which insures the person or classes of persons specified in the policy to the extent specified in Sub-section (2):

"(i) against any liability which may be incurred by him in respect of the death of or bodily (injury to any person, including owner of the goods or his authorized representative carried in the vehicle) or damage to any property of a third party caused by or arising out of the use of the vehicle in a public place;

(ii) against the death of or bodily injury to any passenger of a public service vehicle caused by or arising out of the use of the vehicle in a public place.

9. The proviso to the said sub-section is not relevant here as it pertains to death of or bodily injury to the employee mentioned therein. Sub-section (2) provides that a policy of insurance shall cover any liability incurred in respect of any Accident up to the following limits, namely:

(a) save as provided in Clause (b), the amount of liability incurred;

(b) in respect of damage to any property of a third party, a limit of rupees six thousand:

Provided that any policy of insurance issued with any limited liability and in force, immediately before the commencement of this Act, shall continue to be effective for a period of four months after such commencement or till the date of expiry of such policy whichever is earlier.

Hence, under Sub-section (2) there is no upper limitation for the insurer regarding the amount of compensation awarded in respect of death or bodily injury of a victim of the Accident. It is, therefore, apparent that the limit contained in the old Act has been removed and the policy should insure the liability incurred and cover injury to any person including owner of the goods or his authorized representative carried in the vehicle. The Legislature has also taken care of even the policies which were in force on the date of commencement of the Act by specifically providing that the policy of insurance containing any limit regarding insurer's liability shall continue to be effective for

a period of four months from commencement of the Act or till the date of expiry of such policy, whichever is earlier. This means, after the said period of four months, a new insurance policy consistent with the new Act is required to be obtained.

10. The result is that under the new Act an insurance policy covering third party risk is not required to exclude gratuitous passenger in a vehicle, no matter that vehicle is of any type or class. Hence decision rendered under the old Act vis-a-vis gratuitous passengers are of no avail while considering the liability of the Insurance Company in respect of any Accident which occurred or would occur after the new Act came into force.

(Emphasis supplied)

6. It is, therefore, clear that while rendering the judgment in *New India Assurance Co. Ltd. v. Sukhdev* (supra) the learned Single judge has failed to take into consideration vital distinction in the provision of the new Act and the old Act. In view of the decision of the Supreme Court in *Satpal Singh's* case it is not possible to agree with the view taken by the learned Single Judge and, therefore, the decision in *Sukhdev's* case is hereby overruled.

7. In the light of the above discussion, the impugned order of the Motor Accident Claims Tribunal insofar as it rejects the claim of the petitioner against the Insurance Company is set aside. It is directed that the Insurance Company shall be liable to pay the amount of interim award u/s 140 of the M.V. Act, 1988 with interest at the rate of 9% p.a. till date of realization.

Rule is made absolute Accordingly.