(1990) 02 BOM CK 0018

In the Bombay High Court

Alvito Dias APPELLANT

Vs

National Insurance Co. Ltd. and others RESPONDENT

Date of Decision : 09-02-1990

Acts Referred:

Motor Vehicles Act, 1939 — Section 95(2)

Citation : (1991) 70 CompCas 444

Hon'ble Judges : G.D. Kamat, J

Bench : Single Bench

Advocate : A.F. Diniz, Ad'', for the Appellant; J.P. Mulgaonkar, for the Respondent

Judgement

G.D. Kamat, J.—This appeal u/s 110D of the Motor Vehicles Act, 1939, by the owner of the bus bearing registration No.GDT-2388 is against the award dated December 30, 1988, made in Claim Petition No.167 of 1985. The CLAIM petition had been filed by the present respondents Nos. 2 and 3 in respect of the accident which arose on May 27, 1985, in which their son Esso Narayan Naik, a young man of 26 years of age died on the spot. The claim petition prayed for a total compensation of Rs.1,50,000. The first respondent, the insurer, strangely took the defence that, on the relevant date of the accident,l the insurer had not covered the risk as the appellant had failed to renew the policy. The Tribunal, on absolving the insurer, directed the present appellant (owner) and respondent No.4, the driver, to jointly an severally pay a total compensation of Rs.40,000 together with interest at the rate of 10 per cent. per annum from the date of filing of the petition till payment. The no-fault liability in the amount of Rs.15,000 awarded to the original claimants u/s 92A of theAct, admittedly paid by the insurer, was directed to be adjusted against the compensation granted.

2. Though several challenges have been taken in this appeal, Shri Diniz, learned counsel appearing for the appellant, has, however, restricted his challenge to one sole ground that the insurer could not have been absolved as, on the relevant date, the bus No.GDT-2388 was covered by insurance as the old policy had been duly transferred in favour of the appellant and the policy was in full force.

3. Shri Mulgaonkar, counsel for the insurer, has fairly mentioned that the defence initially adopted by the insurer was not true and that the insurance policy originally issued in favour of one Smt. Usha R. Kuwelkar covered the risk for the period from June 30, 1984, to June 29, 1985, and duly stood transferred in favour of the appellant as from May 1, 1985, once the bus changed hands. Admittedly, the accident took place on May 27, 1985, and, therefore, this matter need not detain the court any further.

4. It is , however, required to be mentioned that, on the basis of the written statement filed by the insurer, the Tribunal framed the issue as to whether the bus was covered for liability with the insurer and answered it in the affirmative. But the fact remains that, at the end of the trial on the date on which the matter was posted for final argument after evidence was recorded, by an application dated December 15,1988, the insurer sought to place on record a document styled as "transfer of interest" and a copy of the cover note of insurance favouring Smt. Usha R. Kuwelkar in respect of the very but strangely covering the period from June 28, 1981, to June June 27, 1982. Though the award was made on December 30, 1988,the fact remains that no notice of these two documents produced by the insurer was taken and the Tribunal proceeded to make the award on basis that the vehicle had not been insured and, therefore, had not covered the risk in relation to the accident and that is how the liability was totally foisted on the appellant and respondent No.4. It is not known as to why the counsel appearing for the insurer did not obtain an order from the Tribunal to prove the documents on records as exhibits or some order in that behalf and merely remained content by filing that application. The fact nevertheless now remains that those documents, sought to be produced by virtue of the application some time before the award was made, are not before the court as legal evidence.

5. Shri Diniz now says that though the statutory liability of a passenger carried for hire and reward is limited to Rs.15,000 for each individual passenger u/s 95(2)(b)(ii) of the Motor Vehicles Act, 1939, it is not possible to restrict the liability of the insurer to the statutory liability of Rs.15,000 because the insurer failed to produce on record the insurance policy and, what is more, and on top of it, the insurer took the defence that, on the relevant date, the risk was not covered by the insurer. He, therefore, says that, in the absence of production, there is nothing to indicate that the risk covered and liability per passenger had not been in excess of the statutory liability per passenger. He, therefore, says that once it is common ground that there was in existence the policy, the entire compensation is liable to be paid by the insurer and, in that view of the matter, the appeal be allowed.

6. The controversy centering round section 95 of the Motor Vehicles Act, 1939, with regard to the liability of the insurer qua individual passenger under original clauses 2(a)and 2(b) of section 95 has finally put to rest by the decision of M.K. Kunhimohammed v. P.A. Ahmedkutty [1988] 64 Comp Cas 7; [1987] ACJ 872.

For that matter, even the cleavage in the decisions of the Supreme Court itself were once for all settled in the decision more particularly relying upon the interpretation of that section is Sheikhupura Transport Co. Ltd. v. Northern India Transporters'' Insurance Co. [1971] ACJ 206.

7. In 1982, section 95 underwent a change with the result that the statutory liability of the insurer per passenger carried for hire and reward or by reason of, or in pursuance of, a contract is now a minimum of Rs.15,000 for each individual passenger. The result of the authority of the Supreme Court cited and the section as it stands needless to say, is that in an accident, the insurer is bound to pay Rs.15,000 for each passenger where the terms of policy otherwise do not cover the risk in excess of and in addition to such amount.

8. The sole question, therefore, in this case is whether the insurer is to be restricted to the payment of Rs.15,000 on the so-called statutory liability mentioned in section 95(2)(b)(ii) or for failure of the insurer to place the policy document on record and in the absence of the plea that the liability covered is not in excess of Rs.15,000.

9. Shri Diniz says that the Supreme Court has decried the attitude of the insurers in raising pleas and yet not placing policy on record. For that matter, several High Courts have held otherwise and foisted liability on the insurers much in excess of the statutory liability on the failure of the insurers to place the concerned insurance policy on record.

10. It is true that, in several decisions of the High Courts, in the absence of policy being placed on record, awards are made in favour of the victims or their relatives much in excess of the statutory liability of Rs.15,000 per individual passenger. To name a few, such decisions are Tejinder Singh Gujral Vs. Inderjit Singh and Another, .

11. This is how the Supreme Court decried the attitude of the insurers while holding that it is open to the insurer to issue a policy covering a higher risk in National Insurance Co. Ltd., New Delhi Vs. Jugal Kishore and Others, .

"Before parting with the case, we consider it necessary to refer to the attitude often adopted by the insurance companies, as was adopted even in this case, of not filing a copy of the policy before the Tribunal or even before the High Court in appeal. In this connection what is of significance is that the claimants for compensation under the Act are invariably not possessed of either the policy or a copy thereof. This court has consistently emphasized that it is the duty of the party which is in possession of a document which would be helpful in doing justice in the cause to produce the said document and such party should not be permitted to take shelter behind the abstract doctrine of burden of proof. This duty is greater in the case of instrumentalities of the State such as the appellant who are under an obligation to act fairly. In may cases the owner of the vehicle, for reasons known to him does not choose to produce the policy or a copy thereof. We accordingly wish to emphasise that in all such cases where the insurance company concerned wishes to take a defence in a claim petition that its liability is not in excess of the statutory liability it should file a copy of the insurance policy along with its defence."

12. What is pertinent to notice is that the Supreme Court has clearly said that, when the insurance company wishes to take the defence that its liability is not is excess of the statutory liability, then it should file a copy of the insurance policy along with its defence.

13. Shri Mulgaonkar, learned counsel appearing for the insurer, however, submitted that, in any case, before the award was made, the insurer has placed on record a document of transfer of interest from the name of Smt. Usha R. Kuwelkar to the name of the appellant and this was done no sooner than the mistake was realise. He now says that when it is the case of the appellant himself that, at the relevant time, there had been transfer of the then existing policy in his favour and in the absence of anything more, when there is nothing to show that the liability covered was in excess of the statutory liability as mentioned in section 95(2)(b)(ii), the insurer cannot be saddled with liability in excess of Rs.15,000 at the most together with costs and interest and, therefore, the difference between the awarded amount and the statutory liability shall have to met only be the appellant and respondent No.4. He now says that there is nothing wrong if the court even at this stage looks at the cover note or the insurance policy and finds out for itself as to whether the relevant policy covered the passenger for hire and reward in excess of the statutory liability of Rs.15,000. Relying upon the same authority of National Insurance Co. Ltd., New Delhi Vs. Jugal Kishore and Others, , he says that despite the observation made in paragraph 10 thereof requiring insurance companies to produce the policy of insurance along with the defences, the liability finally fixed was in an amount commensurate with the amount of statutory liability.

14. As a fact, it is no doubt true but, however, the total payment of Rs.1 lakhs paid to the victim by way of compensation in that case allowed to be retained by the victim and the insurance company was not permitted any refund from that amount.

15. Perhaps, a different view could have been taken in this matter as urged by Shri Mulgaonkar but I am not prepared to do so for the simple reason that the insurer did not come with its defence in a straightforward manner stating that there was in existence a policy as on the date of the accident and there had been a transfer and vesting of the same on the appellant. On the contrary, it came out with a very indifferent, callous defence, if not wilfully false, that no risk was covered based on which an issue was tried and what is more answered in its favour. It is true that before the award was made, a document styled as cover note of insurance was produced but relation to the period 1981-82, another classic example of indifference. If the record was to suggest that that cover note was of 1984-85, perhaps a different view might have been taken. In my judgment, therefore, the action of the insurer cannot be condoned and, on its

failure to produce the concerned policy and in the absence of material that the liability was restricted to the statutory liability per individual passenger, it is not possible to exonerate the insurer. Nothing prevents the owner from covering a higher risk and in excess of the statutory liability of Rs.15,000 per passenger. This apart, there is no plea of the insurer in that behalf. I see no other course open to me but to confirm the award made by the Tribunal with the modification that it is payable jointly and severally by the appellant, respondent No.1, the insurer, and respondent No.4, the driver.

16. Before parting with this case, I must observe that, in the accident, a young life was lost. The parents of the deceased could not produce worthwhile evidence in support of their dependency, in the absence of which a paltry sum of Rs.40,000 was awarded though the claim was in the sum of Rs.1,50,000. Admittedly, Rs.40,000 by way of an award as against the life of a young man of 26 years is a pittance. I only regret that counsel appearing for the original claimants was unable to make out a case for enhanced compensation, as no appeal was filed.

17. In this view of the matter, the appeal partly succeeds. The award dated December 30, 1988, shall stand modified to the extend that the same shall be paid by the appellant, respondent No.1, insurer, and respondent No.4 jointly and severally along with costs and interest as awarded by the Tribunal. After deduction the compensation paid under section92A, the insurer is directed to pay/ deposit the balance within eight weeks from today. The amount Rs.25,000 deposited by the appellant shall be allowed to be withdrawn by the appellant only after the award is fully satisfied. Order accordingly. No costs.