
(2010) 12 AHC CK 0173

In the Allahabad High Court

Case No : First Appeal From Order No. 1885 of 2010

Cholamandalam General Insurance Company Ltd.

APPELLANT

Vs

Smt. Archana Singh and Others

RESPONDENT

Date of Decision : 14-12-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 13

Motor Vehicles Act, 1988 — Section 147(1), 147(2), 147(3), 149(2), 163A

Citation : (2011) 2 ADJ 424 : (2011) 2 TAC 647

Hon'ble Judges : S.P. Mehrotra, J;Ashok Kumar Roopanwal, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

1. The present appeal has been filed u/s 173 of the Motor Vehicles Act, 1988 (in short "the Act") against the judgment and order/award dated 17.4.2010 passed by the Motor Accidents Claims Tribunal, Jaunpur in Motor Accident Claim Petition No. 84 of 2009 filed by the claimant-Respondent Nos. 1 to 5 on account of the death of Sunil Kumar Singh in an accident, which took place on 26.9.2008 at about 8.30 a.m.

2. It was, inter alia, averred in the Claim Petition that on 26.9.2008 at about 8.30 a.m. the said Sunil Kumar Singh alongwith his father Amar Bahadur Singh (claimant-Respondent No. 4) was going for worship on Motor Cycle bearing Registration No. UP 62G-9137; and that when they were going on National Highway No. 56 near village Mirsadpur, Police Station Badlapur, an Innova Car bearing Registration No. UP 32 CH-6426, which was being driven rashly and negligently by its driver, dashed the said Sunil Kumar Singh and Amar Bahadur Singh from rear side; and that in the accident the said Amar Bahadur Singh (father of the said Sunil Kumar Singh) received grievous injuries, which resulted in 40% disability, while the said Sunil Kumar Singh was squeezed off, upto 200 yards on road by the said Car driver; and that the said Sunil Kumar Singh was badly injured and was brought to Private Health Centre, Badiapur for treatment;

and that having seen the need for prompt and intensive treatment, the Doctor referred the said Sunil Kumar Singh to Banaras Hindu University; and that without any further delay, the said Sunil Kumar Singh was taken to Banaras Hindu University but he died on the way on account of the injuries sustained by him in the said accident; and that a Report in this regard was lodged against the driver of the said Innova Car at Badiapur Police Station; and that the said Sunil Kumar Singh was a Teacher in the district Chandauli. The said Innova Car has hereinafter also been referred to as "the vehicle in question".

3. Copy of the Claim Petition has been filed as Annexure-1 to the affidavit accompanying the stay application filed with the Appeal.

4. The Appellant-Insurance Company filed its Written Statement, inter alia, denying that any accident took place on 26.9.2008 by the vehicle in question, or that the said Sunil Kumar Singh died in such accident, or that the alleged accident took place due to rash and negligent driving by the driver of the vehicle in question. However, in paragraph 7 of the Written Statement, the Appellant-Insurance Company admitted that it was the insurer of the vehicle in question by the Policy for the period 4.2.2008 to 3.2.2009. It was, however, averred that the liability of the Appellant-Insurance Company was subject to the terms and conditions under the Insurance Policy.

5. Copy of the Written Statement filed on behalf of the Appellant-Insurance Company has been filed as Annexure-2 to the affidavit accompanying the stay application filed with the Appeal.

6. Bhagwan Pathak (Respondent No. 6 herein), who was the owner of the vehicle in question, filed his Written Statement, inter alia, denying that the vehicle in question was involved in the alleged accident. It was further averred in the Written Statement that the said Sunil Kumar Singh was driving the Motor Cycle bearing Registration No. UP 62G-9137 rashly and negligently, and the alleged accident took place on account of rash and negligent driving of the Motor Cycle, by the said Sunil Kumar Singh. It was further averred in the said Written Statement that the driver of the vehicle in question was having valid and effective Driving Licence at the time of the alleged accident, and the vehicle in question was insured with the Appellant-Insurance Company for the period with effect from 4.2.2008 to 3.2.2009, and the vehicle in question was being driven in accordance with the provisions of the Act.

7. The Tribunal framed six Issues in the case.

Issue No. 1 was regarding factum of the accident having taken place on 26.9.2008 at about 8.30 a.m. on account of rash and negligent driving by the driver of the vehicle in question resulting in serious injuries to the said Sunil Kumar Singh, and his consequent death.

Issue No. 3 was as to whether accident took place on account of carelessness and negligence on the part of the driver of the Motor Cycle bearing Registration

No. UP 62G-9137, and if yes, its effect.

Issue No. 4 was as to whether the vehicle in question was not insured with the Appellant-Insurance Company at the time of the accident.

Issue No. 5 was as to whether the vehicle in question was being driven in violation of the terms of the Insurance Policy.

Issue No. 6 was as to whether the Claim Petition was bad for non-joinder of necessary parties.

Issue No. 2 was as to whether the claimant-Respondent Nos. 1 to 5 were entitled to get any compensation, and if yes, the quantum of such compensation and against which opposite party in the Claim Petition.

The parties led evidence in support of their respective cases.

8. On consideration of the material on record, the Tribunal recorded its findings on various Issues.

Issue Nos. 1 and 3 were decided together by the Tribunal. The Tribunal held that the accident in question took place on account of rash and negligent driving by the driver of the vehicle in question, and that there was no carelessness or negligence on the part of the driver of the Motor Cycle bearing Registration No. UP 62G-9137. Accordingly, Issue No. 1 was decided in the affirmative, while Issue No. 3 was decided in the negative.

As regards Issue No. 4, the Tribunal held that the vehicle in question was insured with the Appellant-Insurance Company at the time of the accident. Issue No. 4 was accordingly decided in the negative.

As regards Issue No. 5, the Tribunal held that the Appellant-Insurance Company had not disclosed as to which term of the Insurance Policy had been violated while driving the vehicle in question nor had the Appellant-Insurance Company produced any document or evidence in this regard. Accordingly, the Tribunal decided Issue No. 5 in the negative.

As regards Issue No. 6, the Tribunal held that it was not necessary to implead the driver of the Motor Cycle bearing Registration No. UP 62G-9137 or the insurer of the said Motor Cycle. Issue No. 6 was accordingly decided in the negative.

As regards Issue No. 2, the Tribunal held that the claimant-Respondent Nos. 1 to 5 were entitled to get compensation amounting to Rs. 26,95,000/- with interest @ 6% per annum.

9. On the basis of the above findings, the Tribunal gave the impugned Award awarding Rs. 26,95,000/- as compensation to the claimant-Respondent Nos. 1 to 5 with simple interest @ 6% per annum with effect from the date of presentation of the Claim Petition till the date of final payment.

10. The Appellant-Insurance Company has filed the present Appeal against the said Award.

11. We have heard Shri K.S. Amist, learned Counsel for the Appellant-Insurance Company, and perused the record filed with the Appeal.

12. From a perusal of the record, it is evident that an application u/s 170 of the Act was filed on behalf of the Appellant-Insurance Company. However, by the order dated 26.11.2009, the Tribunal rejected the said application on the ground that the owner of the vehicle in question (Respondent No. 6 herein) was contesting the Claim Petition filed by the claimant-Respondent Nos. 1 to 5, and, therefore, there was no justification to grant permission u/s 170 of the Act to the Appellant-Insurance Company.

13. Section 170 of the Act lays down as under:

170. Impleading insurer in certain cases. Where in the course of any inquiry, the Claims Tribunal is satisfied that:

(a) there is collusion between the person making the claim and the person, against whom the claim is made, or

(b) the person against whom the claim is made has failed to contest the claim, it may, for reasons to be recorded in writing, direct that the insurer who may be liable in respect of such claim, shall be impleaded as a party to the proceeding and the insurer so impleaded shall thereupon have, without prejudice to the provisions contained in Sub-section (2) of Section 149, the right to contest the claim on all or any of the grounds that are available to the person against whom the claim has been made.

14. Section 149 of the Act referred to in Section 170 of the said Act is reproduced below:

149. Duty of insurers to satisfy judgments and awards against persons insured in respect of third party risks.- (1) If, after a certificate of insurance has been issued under Sub-section (3) of Section 147 in favour of the person by whom a policy has been effected, judgment or award in respect of any such liability as is required to be covered by a policy under Clause (b) of Sub-section (1) of Section 147 (being a liability covered by the terms of the policy) [or under the provisions of Section 163A] is obtained against any person insured by the policy, then, notwithstanding that the insurer may be entitled to avoid or cancel or may have avoided or cancelled the policy, the insurer shall, subject to the provisions of this Section, pay to the person entitled to the benefit of the decree any sum not exceeding the sum assured payable thereunder, as if he were the judgment debtor, in respect of the liability, together with any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments.

(2) No sum shall be payable by an insurer under Sub-section (1) in respect of

any judgment or award unless, before the commencement of the proceedings in which the judgment or award is given the insurer had notice through the Court or, as the case may be, the Claims Tribunal of the bringing of the proceedings, or in respect of such judgment or award so long as execution is stayed thereon pending an appeal; and an insurer to whom notice of the bringing of any such proceedings is so given shall be entitled to be made a party thereto and to defend the action on any of the following grounds, namely:

(a) that there has been a breach of a specified condition of the policy, being one of the following conditions, namely:

(i) a condition excluding the use of the vehicle-

(a) for hire or reward, where the vehicle is on the date of the contract of insurance a vehicle not covered by a permit to ply for hire or reward, or

(b) for organised racing and speed testing, or

(c) for a purpose not allowed by the permit under which the vehicle is used, where the vehicle is a transport vehicle, or

(d) without side-car being attached where the vehicle is a motor cycle; or

(ii) a condition excluding driving by a named person or persons or by any person who is not duly licensed, or by any person who has been disqualified for holding or obtaining a driving licence during the period of disqualification; or

(iii) a condition excluding liability for injury caused or contributed to by conditions of war, civil war, riot or civil commotion; or

(b) that the policy is void on the ground that it was obtained by the nondisclosure of a material fact or by a representation of fact which was false in some material particular.

(3) Where any such judgment as is referred to in Sub-section (1) is obtained from a Court in a reciprocating country and in the case of a foreign judgment is, by virtue of the provisions of Section 13 of the Code of Civil Procedure, 1908 (5 of 1908) conclusive as to any matter adjudicated upon by it, the insurer (being an insurer registered under the Insurance Act 1938 (4 of 1938) and whether or not he is registered under the corresponding law of the reciprocating country) shall be liable to the person entitled to the benefit of the decree in the manner and to the extent specified in Sub-section (1), as if the judgment were given by a Court in India:

Provided that no sum shall be payable by the insurer in respect of any such judgment unless, before the commencement of the proceedings in which the judgment is given, the insurer had notice through the Court concerned of the bringing of the proceedings and the insurer to whom notice is so given is entitled under the corresponding law of the reciprocating country, to be made a party to the proceedings and to defend the action on grounds similar to those specified in

Sub-section (2).

(4) Where a certificate of insurance has been issued under Sub-section (3) of Section 147 to the person by whom a policy has been effected, so much of the policy as purports to restrict the insurance of the persons insured thereby by reference to any condition other than those in Clause (b) of Sub-section (2) shall, as respects such liabilities as are required to be covered by a policy under Clause (b) of Sub-section (1) of Section 147, be of no effect:

Provided that any sum paid by the insurer in or towards the discharge of any liability of any person which is covered by the policy by virtue only of this sub-section shall be recoverable by the insurer from that person.

(5) If the amount which an insurer becomes liable under this section to pay in respect of a liability incurred by a person insured by a policy exceeds the amount for which the insurer would apart from the provisions of this section be liable under the policy in respect of that liability, the insurer shall be entitled to recover the excess from that person.

(6) In this section the expression "material fact" and "material particular" means, respectively a fact or particular of such a nature as to influence the judgment of a prudent insurer in determining whether he will take the risk and, if so, at what premium and on what conditions, and the expression "liability covered by the terms of the policy" means a liability which is covered by the policy or which would be so covered but for the fact that the insurer is entitled to avoid or cancel or has avoided or cancelled the policy.

(7) No insurer to whom the notice referred to in Sub-section (2) or Sub-section (3) has been given shall be entitled to avoid his liability to any person entitled to the benefit of any such judgment or award as is referred to in Sub-section (1) or in such judgment as is referred to in Sub-section (3) otherwise than in the manner provided for in Sub-section (2) or in the corresponding law of the reciprocating country, as the case may be.

Explanation. - For the purposes of this section, "Claims Tribunal" means a Claims Tribunal constituted u/s 165 and "award" means an award made by that Tribunal u/s 168.

15. Reading Sections 170 and 149(2) of the Act together, it is evident that in case the Tribunal grants permission to the insurer u/s 170, the insurer will get right to contest the Claim Petition on all or any of the grounds that are available to the person against whom the claim has been made. However, if such permission is not granted by the Tribunal, then the insurer will be entitled to contest the Claim Petition on the limited grounds mentioned in Sub-section (2) of Section 149 of the Act. It follows, therefore, that in case an appeal is filed by the insurer against an award in a case where its application u/s 170 of the Act was rejected by the Tribunal, it (insurer) will be able to challenge the award only on the limited grounds mentioned in Sub-section (2) of Section 149 of the said Act.

16. The first question to be considered is as to whether the Tribunal was right in passing the order dated 26.11.2009 rejecting the said application u/s 170 of the Act filed on behalf of the Appellant-Insurance Company.

17. Section 170 of the Act contemplates the following two situations where the insurer may be given, without prejudice to the provisions contained in Sub-section (2) of Section 149, the right to contest the claim on all or any of the grounds that are available to the person against whom the claim has been made:

(a) where there is collusion between the person making the claim and the person against whom the claim is made, or

(b) where the person against whom the claim is made has failed to contest the claim.

18. In the present case, no collusion has been shown between the claimant-Respondent Nos. 1 to 5 and the owner of the vehicle in question namely, Bhagwan Pathak (Respondent No. 6 herein). Therefore, situation (a), mentioned above, has not been shown to exist in the present case.

19. As is evident from the impugned Award, the said Bhagwan Pathak (Respondent No. 6 herein) filed his Written Statement denying the averments made in the Claim Petition. Further, various documents including photostat copy of the Insurance Document, photostat copy of the Driving Licence, the original Insurance Document and Receipt were filed on behalf of the opposite parties in the Claim Petition.

20. The Tribunal in the said order dated 26.11.2009, inter alia, observed that the owner of the vehicle in question (Respondent No. 6 herein) was effectively contesting the Claim Petition. Nothing has been shown on behalf of the Appellant-Insurance Company that the said observation made in the order dated 26.11.2009 was not correct.

21. Therefore, situation (b), mentioned above, does not exist in the present case.

22. In view of the above, we are of the opinion that the application u/s 170 of the Act, filed on behalf of the Appellant-Insurance Company, was rightly rejected by the order dated 26.11.2009.

23. The next question to be considered is as to on what grounds, the Appellant-Insurance Company can challenge the impugned Award, and as to whether such challenge is valid.

24. As noted above, in the present case, the Tribunal rejected the application of the Appellant-Insurance Company for permission u/s 170 of the Act.

25. In view of the rejection of the said application u/s 170 of the Act, it is evident that the Appellant-Insurance Company can challenge the impugned Award only on the grounds mentioned in Sub-section (2) of Section 149 of the Act. Such grounds are evidently in respect of Issue Nos. 4 and 5.

26. As noted above, in regard to Issue No. 4, the Tribunal has recorded finding of fact that at the time of the accident, the the vehicle in question was insured with the Appellant-Insurance Company. In this regard, it is noteworthy that the relevant insurance document was brought on record which showed that the vehicle in question was insured with the Appellant-Insurance Company for the period with effect from 4.2.2008 to 3.2.2009, and, thus, the vehicle in question was insured with Appellant-Insurance Company on the date of the accident, namely, 26.9.2008. It is further noteworthy that in paragraph 7 of its Written Statement the Appellant-Insurance Company admitted that it was the insurer of the vehicle in question by Policy for the period with effect from 4.2.2008 to 3.2.2009.

27. As regard Issue No. 5, the Tribunal has decided the said issue in the negative. The Tribunal has pointed-out that the Appellant-Insurance Company did not disclose as to which term of the Insurance Police had been violated while driving the vehicle in question nor had the Appellant-Insurance Company filed any document or evidence in this regard.

28. Shri K.S. Amist, learned Counsel for the Appellant-Insurance Company has not been able to show any error or infirmity or illegality in the aforesaid findings recorded by the Tribunal on Issue Nos. 4 and 5.

29. Having perused the record filed with the Appeal, we are of the opinion that the findings recorded by the Tribunal on the aforesaid Issues were correct, and the same do not suffer from any error or infirmity or illegality.

30. Therefore, we are of the view that the Appellant-Insurance Company has failed to establish any error or infirmity or illegality in the impugned Award on the grounds open to the Appellant-Insurance Company to raise in view of the provisions of Sub-section (2) of Section 149 of the Act.

31. Shri K.S. Amist, learned Counsel for the Appellant-Insurance Company submits that the Tribunal erred in rejecting the plea of contributory negligence on the part of the driver of the Motor Cycle, and the findings recorded by the Tribunal on Issue Nos. 1 and 3 are not correct.

32. Shri K.S. Amist, learned Counsel for the Appellant-Insurance Company further submits that the quantum of compensation as determined by the Tribunal in deciding Issue No. 2 is not correct.

33. In our opinion, as the application of the Appellant-Insurance Company " u/s 170 of the Act was rejected by the Tribunal, it is not open to the Appellant-Insurance Company to raise the question of contributory negligence or the question of quantum of compensation awarded by the Tribunal in the impugned Award. The pleas raised in this regard by Shri K.S. Amist, learned Counsel for the Appellant-Insurance Company, cannot, therefore, be considered.

34. In view of the above, we are of the opinion that the Appeal filed by the Appellant-Insurance Company lacks merits, and the same is liable to be

dismissed.

35. The Appeal is accordingly dismissed.

36. However, on the facts and in the circumstances of the case, there will be no order as to costs.

37. The amount of Rs. 25,000/- deposited by the Appellant-Insurance Company while filing the present Appeal will be remitted to the Tribunal for being adjusted towards the amount payable under the impugned Award.