
(2010) 04 GAU CK 0038
In the Gauhati High Court
Case No : Misc Appeal No. 1 (SH) of 2004

Darilian Passah

APPELLANT

Vs

Batriti Lyngdoh and Others

RESPONDENT

Date of Decision : 26-04-2010

Acts Referred:

Motor Vehicles Act, 1988 — Section 101, 101(2), 102, 173

Citation : (2010) 4 GLR 599 : (2010) 3 GLT 717 : (2011) 2 TAC 786

Hon'ble Judges : T. Vaiphei, J

Bench : Single Bench

Advocate : S.K. Deb Purkayastha and S.S. Das, for the Appellant; V.K. Jindal, S. Jindal and P.D.B. Baruah, for the Respondent

Final Decision : Dismissed

Judgement

T. Vaiphei, J.—This miscellaneous appeal u/s 173, Motor Vehicles Act, 1988 ("the Act") is directed against the judgment dated 19.7.2004 passed by the Motor Accident Claim Tribunal, Shillong in M.A.C. No. 18 of 1999 awarding a compensation of Rs. 5,40,000 with interest at the rate of 6% per annum in favour of the claimant-respondent for the death of her sister due to a vehicular accident.

2. The facts leading to the filing of this appeal are that on 10.11.1998 at about 6.10 p.m., one local taxi bearing registration number ML-05-A-9688 was proceeding from Laitumkhrah to lewduh and on reaching near N.E.C. Secretariat, it collided with a truck bearing registration number AS-25-A-3479. As a result of the accident, three occupants of the taxi, namely, Md. Lamer Sohtun, the driver of the taxi, Smt. Lovely Passah and Shri Ferdinand Sohtun, co-passengers, were grievously injured. The said Lovely Passah died instantaneously on the spot. The surviving victims were then taken to Civil Hospital, Shillong for medical treatment. The claimant accordingly filed a claim petition before the Tribunal for compensation by impleading the owner and driver of the taxi, the insurer of the taxi owner and driver of the truck as well as the insurer of the truck party-

respondents. The owner of the taxi as well as the insurer of the taxi contested the claim petition by filing their respective written statements. The insurer of the truck also contested the claim petition by filing its written statement. It appears that the remaining respondents did not contest the claim petition. On the pleadings of the contesting parties, the Tribunal framed the following issues:

1. Whether the claim petition is maintainable in its present form?
2. Whether the insurance policy of the truck No. AS-25-A-3479 is a fake policy?
3. Whether the Insurance Co. of the Taxi ML-05-9688 is liable to pay compensation?
4. What are the relief/reliefs the claimant is entitled to?

3. To prove her case, the claimant examined four witnesses including herself as CW1 while the insurer-respondent No. 6 examined one witness to defend its case. At the conclusion of the trial, the Tribunal passed the impugned judgment. On Issue No. 2, the Tribunal held that the insurance policy marked "X" is not a genuine document as the record produced by the insurer-respondent No. 6 clearly disproved its genuineness. On Issue No. 3, the finding of the Tribunal is that the vehicular accident was caused by the rash and negligent driving of the driver of the truck and not due to the driver of the taxi and that the owner of the taxi was not liable to pay the compensation. On Issue No. 4, the Tribunal took the view that as the National Insurance Co. and owner of the taxi are not liable to pay the compensation, the compensation awarded should be satisfied by the owner of the offending truck. The finding recorded by the Tribunal that the driver of the taxi was not responsible for the accident, is not called into question by the appellant. None of the contesting parties also dispute the quantum of compensation so awarded. The only question which falls for consideration is whether the Tribunal is correct in holding that the insurance policy in respect of the offending truck produced by the claimant-appellant is a fake policy.

4. It is contended by Mr. S.K. Deb Purkayastha that the Tribunal grossly erred in law in holding that the certificate of insurance issued by the respondent No. 6 is a fake policy only on the basis of the evidence of one of the witnesses from their Guwahati Office when the Certificate of Insurance had been issued from their Kolkata Office: they ought to have examined the officials of their Kolkata Branch and produced there from documentary evidence to prove that the said Certificate was duly insured there. According to the learned Counsel, the Tribunal has completely overlooked the evidence of the Investigating Officer, who was examined as CW No. (3), that he had seized the original policy. The learned Counsel finally submits that the Tribunal has acted contrary to the law laid down by the Apex Court by not directing the respondent No. 6 to satisfy the award and thereafter recover the same from the owner of the offending truck. Mrs. P.D.B. Baruah, the learned Counsel for the respondent No. 6, submits that the findings of the Tribunal exonerating the respondent No. 6 from the liability to satisfy the award are fully justified on the facts and circumstances of the case. She

maintains that as the respondent No. 6, on the evidence of the official of the Guwahati Branch supported by documentary evidence, has successfully created a high degree of probability that the Certificate of Insurance relied on by the appellant is a fake policy, the onus has shifted back to her to rebut the evidence of the respondent No. 6, but she is unable to do so. The learned Counsel contends that no attempt was made thereafter by the appellant to examine the officials of the Kolkata Branch of the respondent No. 6 to rebut the evidence of the respondent No. 6 by summoning them through the Tribunal or otherwise, for which the respondent No. 6 could not be faulted with. The learned Counsel presses into service the decision of this Court in *Moslem Mondal and Ors. v. Union of India and Ors.* (2010) 2 GLT 1 : (2010) 3 GLR 393 in support of her contention. On the question of pay first and then recover, the learned Counsel vehemently submits that this principle cannot be invoked in this case where it has been proved to be a case of fake license, which is non-est.

5. The stance taken by the respondent No. 6, which founds favour with the Tribunal, is that in the policy number of the insurance in respect of the offending truck, i.e., 200110/62/31/98/7479 valid up to 21.10.1999 relied on by the appellant, the first set relates to a number assigned to a particular Branch. For example, the serial number 200100 would refer to the Branch Office of the insurer at Shillong or Calcutta. The next set numbers, namely, 62, would indicate the type of vehicle so insured, for instance, whether the vehicle is a two wheeler or a commercial vehicle. Then comes the last set of numbers, i.e., 7479, which would identify the serial number of the particular Branch of the Insurer. In the instant case, the first set of number, i.e., 200100 happens to be the code number for Beltola Branch, Guwahati of the insurer-respondent No. 6. Likewise, the next set of number, which is 62, referred to a two wheeler vehicle: for a commercial vehicle like trucks the code number should only be 63 and not 62, which appeared in the insurance policy relied on by the appellant. This is as prescribed by in the Insurance Premium Guide, a booklet, which is exhibited as Ext. A and used as a set of guidelines and to be followed by all the Branches of the insurer throughout the country. According to the insurer-respondent No. 6, the code number 62 found in the said insurance policy is demonstrably the code number for a two wheeler and cannot be the code number for the offending truck. It is the further case of the insurer that in the register for showing the serial numbers of the insurance policies issued by them for the year 1998, which is at Ext. "B", the first number against dated 2.1.1998 is 200110/34/97/61/01746 and the last set of numbers therein, i.e., 01746 referred to the starting number at the beginning of the year whereas the last one for the year was 63/ 04177. According to the answering insurer, in the policy submitted by the appellant vide Ext. "X", the serial number shown as 7479 does not tally with the number of the insurance policy issued by them for the year 1998, which started from 01746 and ended at 04177. From the aforesaid evidence, according to the insurer, it has been proved to the hilt that the insurance policy produced and relied on by the appellant is a fake policy and that they are not, therefore, liable to satisfy the

award.

6. On considering the stance taken by the insurer as projected above, I do not find any reason to disagree with the conclusion of the Tribunal that the insurance policy is a fake policy. The question ultimately boils down to this: on whom the burden of proof that the offending truck is validly insured or not lies? The phrase "burden of proof" is not defined in the Evidence Act, 1872. It has two distinct and frequently confused meanings: (i) the burden of proof as a matter of law and pleading the burden the burden as it has been called of establishing a case. This burden rests upon the party, whether plaintiff or defendant, who substantially asserts the affirmative of the issue. It is fixed at the beginning of the trial by the state of pleadings, or their equivalent, and it is settled as a question of law, remaining unchanged under any circumstances whatsoever. This rule is embodied in Section 101(2) The burden of proof as a matter of adducing evidence. The burden of proof in this sense is always unstable and may shift constantly, throughout the trial, according as one scale of evidence or the other preponderates. This burden of proof in the second sense is embodied in Section 102. This burden or onus of proof at first lies at first on that party who would be unsuccessful if No. evidence at all was given on either side. This being the test, this burden of proof cannot remain constant but must shift as soon as he produces evidence which prima facie gives rise to a presumption in his favour. It may again shift back on him if the rebutting evidence produced by his opponent preponderates/weights heavier. This being the position, "the question as to onus of proof is only a rule for deciding on whom the obligation rests of going further, if he wishes to win". It is not always easy to determine at what particular point the onus shifts from the plaintiff to the defendant and then again from the defendant to the plaintiff and then once again from the latter to the former and so on; the more so in contested proceedings as evidence gradually continues to be adduced, but at the conclusion of the trial when the issues come to be judged it has to be seen, whether the initial onus which Section 101 casts on the plaintiff has been discharged, or not. The evidence required to shift the burden need not necessarily be direct evidence, i.e., oral or documentary or admission of opposite party; it may comprise circumstantial evidence or presumption of law or fact. The amount of evidence required to shift the burden of proof also depends on the circumstances of each case. (See Sarkar's Law of Evidence, 16th edn., at pp. 1592-94)

7. Having understood the true legal position on the burden of proof and the onus of proof, let me proceed to decide the controversy involved in this case. The appellant has apparently discharged the onus of proof that the offending truck was insured with the respondent No. 6 by producing the policy of insurance marked as "X". As the plea set up by the respondent No. 6 was that the policy in question is a fake document, the onus of proving that the same is a fake policy squarely lies upon it. As already noticed, the insurer has adduced sufficient evidence to rebut the case of the appellant. The policy relied upon by the insurer has clearly established that though the policy was alleged to have been taken

from their Calcutta Branch, the Code number, i.e., 200100 therein is the Code for their Beltola Branch, Guwahati. Similarly, it has been clearly demonstrated by the insurer based on Ext. "A" that the code number 62 shown in the sets of serial numbers is meant only for a two wheeler whereas the offending vehicle is a commercial truck, which should have the code number of 63. Similarly, the insurer has prima facie shown vide Ext. "B" that the serial number 7479 did not tally with the number of insurance policies issued by them during the year 1998, which started from 01746 and ended at 04177. In my judgment, the evidence so led by the insurer-respondent No. 6 has preponderated the prima facie evidence of the appellant supported by Ext. "X" that the offending vehicle had been insured with the former. In the light of this rebuttal evidence by the insurer, I am of the view that the onus of proof has now shifted back to the appellant. This duty cast upon the appellant was apparently not discharged by her. However, it is the contention of the learned Counsel for the appellant that the onus of proving fraud heavily lies upon the insurer: who ought to have discharged this burden by producing both oral and documentary evidence from their Branch at Calcutta and not from their Guwahati Branch where it was never claimed to be insured having failed to do this, the Tribunal placed wrong burden on the appellant and has in the process grossly erred in law. In my opinion, this contention has no merit for more than one reason. In the first place, the insurer has no duty to produce all the evidence available with them, more so, when they have led sufficient evidence which probalized the case set up by them, the law does not expect them to go further. Secondly, when a highly probable case has been made out by the insurer, no attempt was made by the appellant to procure evidence from the Calcutta Branch of insurer with the assistance of the Tribunal to rebut the evidence of the insurer. As already noticed, the insurer, based on sufficient evidence, has demonstrated with a high degree of probability that the offending truck could not have been insured at Calcutta with their code number for Guwahati Branch; that a commercial vehicle like the offending truck could not have the code number for a two wheeler vehicle and that the policy having serial numbers 7479 was never issued from their company during the year 1998. How could the insurer produce a policy of insurance the very existence of which is denied by them? In the view that I have taken, I hold that the Tribunal does not commit any infirmity in its findings warranting the interference of this Court.

8. Coming now to the contention of Mr. S.K. Deb Purkayastha, the learned Counsel for the appellant that the insurer is bound to pay the compensation amount awarded by the Tribunal and then recover the same from the insurer in accordance with the law laid down by the Apex Court in National Insurance Co. Ltd. Vs. Swaran Singh and Others, , I have carefully gone through the decision, but I am unable to persuade myself to apply the same in this case. In that case, the Apex Court was considering the cases of the driver (a) holding no driving license, (b) holding a fake driving license, (c) holding a driving license but the validity thereof has expired (d) holding a driving license but not for the type of the vehicle driven by him and, finally, holding a learner's driving license. In my

opinion, it is in the context of the five situations that the principle of pay first and then recover can be invoked. It should be noted that in those five situations, there is at least a valid contract between the insurer and the insured, but there is breach of policy conditions, for which a third party should not be allowed to suffer. It is a settled principle of law that judgments are not to be construed as statutes, nor words or phrases in judgments to be interpreted like provisions of statute. Some words used in a judgment should be read and understood contextually and are not intended to be taken literally. In *Sarva Shramik Sanghatana (K.V), Mumbai Vs. State of Maharashtra and Others*, the Apex Court quoted with approval the following observations made in *Quinn v. Leatham* 1901 AC 495:

...every judgment must be read as applicable to the particular facts proved or assumed to be proved, since the generality of the expression which may be found there are not intended to be expositions of the whole law, but are governed and qualified by the particular facts of the case in which such expressions are to be found...a case is only an authority for what it actually decides.... It cannot be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all.

So understood, in my judgment, the attempt made by the learned Counsel to apply the principle of pay first and recover later appears to be misconceived as well as unwarranted. In the instant case, it is a case of fake insurance policy and not a case of fake driving license. There is not even a semblance of contract of insurance between the insurer and the insured. The owner of the vehicle is apparently guilty of fraud. There is absolutely no basis for insisting the insurer to first pay the appellant and then recover the same from the owner of the vehicle.

9. Resultantly, this appeal is hereby dismissed. It is accordingly declared that the insurer has not the liability to satisfy the impugned award nor has it the duty to pay, the compensation to the claimant-respondent. Order accordingly. However, on the facts and in the circumstances of the case, I direct the parties to bear their respective costs.