(2020) 08 GUJ CK 0315

In the Gujarat High Court

Case No : R/First Appeal No. 415 Of 2020, Civil Application (For Stay) No. 1 Of 2019 In R/First Appeal No. 415 Of 2020

Hdfc Ergo General Insurance Co Ltd APPELLANT

Vs

Rysingbhai Ramlabhai Harijan RESPONDENT

Date of Decision : 26-08-2020

Acts Referred:

Motor Vehicles Act, 1988 — Section 3, 4, 5, 10, 66, 74(2), 96(4), 147(1), 149(1), 149(2), 149(2)(b), 149(4), 149(6), 149(7), 149(5)

Citation : (2020) 08 GUJ CK 0315

Hon'ble Judges : Bhargav D. Karia, J

Bench : Single Bench

Advocate : Rathin P Raval, Chetankumar K Shah

Final Decision : Disposed Of

Judgement

Bhargav D. Karia, J

1. Heard Learned advocate Mr. Rathin P. Raval for the appellant and learned advocate Mr. Chetan K. Shah for the respondent no.1 - claimant through video conference, though served no one appears for respondents no. 2 and 3 who are driver and owner of the offending vehicle rickshaw.

2. Brief facts of the case are that on 10th January, 2010 at 17: 00 hours in the evening, the respondent no.1 -original claimant along with his wife were coming in rickshaw bearing registration no.GJ 23 T 3999 after visiting temple at Pethapur Balendiya village and at that time while they were on Zhalod-Limkheda road at the turning of old Vadiya village, suddenly one cow crossed the road and due to excessive speed and negligent driving by the driver of the rickshaw, the rickshaw turned turtle when he applied brake. As a result, respondent no.1 and his wife received severe injuries including fracture and were shifted to hospital and remained as indoor patient for a long time. For the said incident, complaint being Janva Jog Entry No. 65/2010 was lodged before the Limkheda police station .

3. The question of negligence and amount of compensation determined by the Tribunal is not under challenge in this appeal.

4. Learned advocate Mr. Rathin P. Raval for the appellant- insurance company submitted that the appellant insurance company is required to be exonerated from liability to pay compensation as there is breach of section 3 of the Motor Vehicles Act, 1988 ('the Act" for short) committed by the driver of rickshaw inasmuch as the said section provides that no person shall drive a motor vehicle in any public place unless he holds a effective driving license issued to him authorising him to drive the vehicle and no person shall so drive a transport vehicle (other than a motorcab or motorcycle) hired for his own use or rented under any scheme made under sub-section(2) of section 74 unless his driving license specifically entitles him to do so. Therefore on this ground alone the claim petition ought to have been dismissed by the Claims Tribunal qua the insurance company.

5. Learned advocate further submitted that as per the provisions of law the owner of the vehicle has the full responsibility to ensure that the driver has a valid and effective license. He submitted that as per section 5 of the Act, no owner or person in charge of a motor vehicle shall cause or permit any person who does not satisfy the provisions of section 3 and 4 to drive the vehicle. He submitted that the learned Tribunal ought to have applied the law relating to section 66 of the Act which provides for necessity for permits. He submitted that though the owner of the vehicle was served, he has not produced copy of permit during the trial and hence, adverse inference is required to be drawn. Learned advocate further submitted that though judgment in case of Amrit Paul Singh v. Tata AIG General Insurance Co., Ltd in Civil Appeal No.2253/2018 (Arising out of SLP (Civil) No.7692 of 2017, wherein the Apex Court has laid down the principle of pay and recover on basis of judgment in case of National Insurance Co. Ltd. v. Swaran Singh, [(2004) 3 SCC 297] and other such judgments was cited before the Tribunal, the learned Tribunal brushed aside the same and ordered the insurance company to pay the compensation to the claimant. Therefore, considering the ratio laid down in the said judgment, the appellant-insurance company is required to be exonerated from the liability for making payment of compensation to the claimant.

6. Considering the submissions made on behalf of the appellant, so far as the question of negligence and amount of compensation determined by the Tribunal is concerned, same is not under challenge and therefore, the only question that arises in this appeal is that as the driver of rickshaw bearing registration no. GJ 23 T 3999 was not holding valid driving license to drive the transport vehicle on the date of the accident and he was held solely negligent in causing the accident, whether the insurance company can be held liable for payment of compensation to the claimant or whether the appellant is required to be exonerated from the liability for making payment of compensation?

7. However, the issue is no more res integra in view of the decision of the Apex

Court in case of New India Assurance Co. Ltd. vs. Roshanben Rahemansha Fakir & ors reported in 2008 (8) SCC 253 as well as the decision of this Court in case of United Insurance Company Ltd. v. Bhikhubhai Amarsinhbhai Parmar and others reported in 2014(4) GLR 3353. It is not in dispute that in facts of the case the driver of the rickshaw was not holding effective license and possession of effective license is necessary in terms of section 10 of the Act and therefore, there is a breach of condition of contract of insurance policy resulting into exoneration of the insurance company from the liability of payment of compensation.

8. In facts of the case as there is a direct nexus between the occurrence of the accident and the driver not having the license to drive a transport vehicle and therefore, in view of the provisions of sub-section (2) of section 149 of the Act read with sub-section (7) thereof, the appellant-insurance company is entitled to avoid its liability under the policy.

9. The next question therefore, arises for consideration is once having held that the appellant-insurance company is entitled to avoid its liability under the insurance policy, whether any direction to pay and recover is required to be issued or not ?

10. This Court in the decision in case of United Insurance Company Ltd. v. Bhikhubhai Amarsinhbhai Parmar and others (supra) has held as under :

"20. In this regard, reference may be made to the decision of the Supreme Court in the case of National Insurance Co. Ltd. v. Swaran Singh (supra), wherein it was contended that sub-section (4) of section 149 of the Act deals with a situation where the insurer in the policy purports to restrict the insurance of the persons insured thereby by reference to any condition other than those in section 149(2)(b), and in that view of the matter, no liability is covered for driving of a vehicle without a licence or a fake licence. The court observed that the said submission ignores the plain and unequivocal expression used in section 149(2) as well as the proviso appended thereto. That with a view to construe a statute the scheme of the Act has to be taken into consideration. For the said purpose, the entire Act has to be read as a whole and then chapter by chapter, section by section and word by word. The court held that the proviso appended to sub-section (4) of section 149 is referable only to sub- section (2) of section 149 of the Act. It is an independent provision and must be read in the context of section 96(4) of the Motor Vehicles Act, 1939. Furthermore, it is one thing to say that the insurer will be entitled to avoid its liability owning to breach of terms of a contract of insurance, but it is another thing to say that the vehicle is not insured at all. The court was of the view that if the submission of the learned counsel for the petitioner therein is accepted, the same would render the proviso to sub-section (4) as well as sub-section (5) of section 149 of the Act otiose; nor can any effective meaning be attributed to the liability clause of the insurance company contained in sub-section (1) of section 149. The court held that sub-section (5) of section 149 which imposes a liability on the insurer must also be given its full effect. The insurance company may not be liable to satisfy the decree and, therefore, its liability may be zero but it does not mean that it did not have initial liability at all. Thus, if the insurance company is made liable to pay any amount, it can recover the entire amount paid to the third party on behalf of the assured. The court expressed the view that if this interpretation was not given to the beneficent provisions of the Act having regard to its purport and object, it failed to see a situation where beneficent provisions can be given effect to. The court observed that sub-section (7) of section 149 of the Act must be read with sub-section (1) thereof. The court was of the view that the right to avoid liability in terms of sub-section (2) of section 149 is restricted. It is one thing to say that the insurance companies are entitled to raise a defence but it is another thing to say that despite the fact that its defence has been accepted having regard to the facts and circumstances of the case, the Tribunal has power to direct them to satisfy the decree at the first instance and then direct recovery of the same from the owner. These two matters stand apart and require contextual reading.

21. This court in the case of United India Insurance Co. Ltd. v. Minor Mahesh Kanubhai and others rendered in First Appeal No.710 of 2007 and other cognate matters on 7th April, 2014, has in a case where the victims were gratuitous passengers travelling in goods and other vehicles has with reference to the provisions of sub-section (6) of section 149 which defines the expressions "material fact", "material particular" and "liability covered by the terms of the policy", held that the expression "liability covered by the terms of the policy" is defined to mean 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 same would still be a "liability in terms of the policy" within the meaning of the said expression as envisaged in the said section. The court took note of the fact that the expression "liability in terms of the policy" appears only in subsection (1) of section 149 of the Act and held that thus, subsection (6) of section 149 of the Act delineates the scope of the expression "liability in terms of the policy" as contained in sub-section (1) thereof. In other words when sub-section (1) of section 149 of the Act says that when a judgment or award is obtained against any person in whose favour a certificate of insurance has been issued in respect of a liability which is required to be covered by a policy under clause (b) of subsection (1) of section 147 being a "liability covered by the terms of the policy" the insurer is liable to pay the person entitled to the benefit of the decree any sum not exceeding the sum assured payable thereunder, as if he were a judgment debtor in respect of such liability, what it means is notwithstanding that such policy may be one which the insurer is entitled to avoid or cancel or has avoided or cancelled, nonetheless it would still be a liability in terms of the policy and the insurer would be liable to pay the person who is entitled to the benefit of the decree the sum assured as if he were a judgment debtor. The court observed that as held by the Supreme Court in the case of National Insurance Co. Ltd. v. Nicolletta Rohatgi (2002 ACJ 1950), the

insurance company cannot avoid its liability to any person entitled to the benefit of any judgment or award referred to in sub-section (1) except in the manner provided in sub-section (2) of the Act. Therefore, if an insurer wants to avoid his liability to any person, who is entitled to the benefit of the judgment or award, he can do so only by raising the defence provided under sub-section (2) of section 149. If he is not successful in his defence, he will have to satisfy the decree. If he succeeds in his defence, even then, in view of the provisions of subsection (1) of section 149, he would still remain a judgment debtor and would be liable to pay the amount to the claimant and recover the amount from the owner as envisaged in subsection (4) and sub- section (5) of section 149.

22. In the facts of the present case, it is not as if the risk of the third party is not covered under the policy of insurance. The case of appellant insurance company is that there is a breach of the conditions of the policy, inasmuch as, the driver of the offending vehicle did not have a valid driving licence to drive the vehicle of the class which he was driving, viz. A licence to drive an LCV-transport vehicle. Therefore, the present case would fall within the ambit of sub- section (4) of section 149 of the Act and hence, the insurance company though entitled to avoid its liability qua the insured, would be liable to first satisfy the award and thereafter, recover the same from the owner and driver of the offending vehicle.

23. At this juncture it may be apposite to refer to the decision of the Supreme Court in the case of Oriental Insurance Co. Ltd. v. Nanjappan (supra), wherein it has been held thus :

"8. Therefore, while setting aside the judgement of the High Court, we direct in terms of what has been stated in Baljit Kaur case that the insurer shall pay the quantum of compensation fixed by the Tribunal, about which there was no dispute raised, to the respondent claimants within three months from today. For the purpose of recovering the same from the insured, the insurer shall not be required to file a suit. It may initiate a proceeding before the executing court concerned as if the dispute between the insurer and the owner was the subject-matter of determination before the Tribunal and the issue is decided against the owner and in favour of the insurer. Before release of the amount to the claimants, owner of the vehicle shall be issued a notice and he shall be required to furnish security for the entire amount which the insurer will pay to the claimants. The offending vehicle shall be attached as a part of the security. If necessity arises, the executing court shall take assistance of the Regional Transport Office concerned. The executing court shall pass appropriate orders in accordance with law as to the manner in which the insured, owner of the vehicle shall make payment to the insurer. In case there is any default, it shall be open to the executing court to direct realization by disposal of the securities to be furnished or from any other property or properties of the owner of the vehicle, the insured."

24. In the opinion of this court, while holding that the insurance company is liable to first satisfy the award and then recover the same from the owner, the

course of action adopted in the above decision of the Supreme Court is required to be followed so as to secure the interests of the appellant insurance company. Accordingly, for the purpose of recovering the amount of compensation from the insured, the insurer shall not be required to file a suit. It may initiate a proceeding before the executing court concerned as if the dispute between the insurer and the owner was the subject- matter of determination before the Tribunal and the issue is decided against the owner and in favour of the insurer. Pursuant to the order dated 07.01.2014 made by this court in the Civil Application No.13535 of 2013 which had been filed seeking stay of the impugned award, the appellant insurance company has deposited the entire decreetal amount with the Tribunal. Before release of the amount to the claimants, owner of the vehicle shall be issued a notice and he shall be required to furnish security for the entire amount which the insurer will pay to the claimants. The offending vehicle shall be attached as a part of the security. If necessity arises, the executing court shall take assistance of the Regional Transport Office concerned. The executing court shall pass appropriate orders in accordance with law as to the manner in which the insured, owner of the vehicle shall make payment to the insurer. In case there is any default, it shall be open to the executing court to direct realization by disposal of the securities to be furnished or from any other property or properties of the owner of the vehicle, the insured."

11. In view of the above decision of this Court, the appellant insurance company is therefore, liable to first satisfy the award and then recover the same from the owner. In order to secure the interest of the appellant-insurance company, the insurance company may initiate proceedings before the executing court without filing a suit for recovery of the amount deposited by the insurance company pursuant to order passed by this Court in Civil Application (for stay) No.1 of 2019 in R/First Appeal No.415 of 2020. Before release of the amount to the claimant, owner of the vehicle shall be issued a notice and the owner shall be required to furnish security for the entire amount which the insurer will pay to the claimant. The offending vehicle shall be attached as a part of the security. If necessity arises, the executing court shall take assistance of the Regional Transport Office concerned. The executing court shall pass appropriate orders in accordance with law as to the manner in which the insured, owner of the vehicle shall make payment to the insurer. In case there is any default, it shall be open to the executing court to direct realization by disposal of the securities to be furnished or from any other property or properties of the owner of the vehicle, the insured.

12. First Appeal is accordingly disposed of. Civil Application also stands disposed of in above terms. No order as to costs.