
(2011) 04 CHH CK 0028
In the Chhattisgarh High Court
Case No : Misc Appeal (C) No. 181 of 2010

ICICI Lombard General Insurance Co. Ltd.	APPELLANT
Vs	
Phuleshwari and Others	RESPONDENT

Date of Decision : 21-04-2011

Acts Referred:

Contract Act, 1872 — Section 25, 65
Motor Vehicles Act, 1988 — Section 147, 149

Citation : (2011) 1 CGBCLJ 272

Hon'ble Judges : Prashant Kumar Mishra, J; I.M. Quddusi, J

Bench : Full Bench

Advocate : Amrito Das, for the Appellant; Goutam Bhaduri and Shri Santosh Kumar Tiwari, counsel and None for Other Respondents Nos. 1 to 3, for the Respondent

Final Decision : Allowed

Judgement

Prashant Kumar Mishra, J.—The insurer of dumper/tipper bearing registration No. CG 13 A 7141 has preferred this appeal challenging the award dated 30-11-2009 passed by the 4th Additional Motor Accidents Claims Tribunal (F.T.C.), Raigarh awarding compensation of Rs. 3,02,000/- in favour of the claimants/respondents No. 1 to 3 and fastening liability of payment of compensation on the appellant/insurance company. Deceased Ajay Sahu was working as a helper in the offending dumper and while he was working as such in the said vehicle inside the Jindal Power Plant, the accident took place when the vehicle ran across his body causing grievous injuries resulting in his death on spot. The vehicle was being driven rashly and negligently by its driver, respondent No. 4 Jalsanram. The claimants claimed compensation of Rs. 13,04,000/- on the submission that they have lost the sole bread winner of the family on account of the accident and they deserve to be compensated adequately.

2. Non-claimant No. 1/respondent No. 4 Jalsanram, the driver of the vehicle filed his reply and denied the averments made in the claim petition inter alia stating

that he was driving the vehicle in a rash and negligent manner.

3. The appellant/insurer, which was arrayed as non-claimant No. 3 before the Claims Tribunal, denied its liability on the ground that there was no existence of any insurance cover for the said vehicle for the fact that the cover note was cancelled on 29-8-2006, which was duly informed/intimated to the insured on 29-8-2006, whereas the alleged accident took place on" 16-6-2007, i.e., after about 10 months from the date when the information was sent.

4. The Claims Tribunal has fastened the liability on the appellant/insurance company for the reason that the deceased being a third party, the insurance company cannot be exonerated of its liability notwithstanding the cancellation of the policy of insurance.

5. Shri Amrito Das, learned counsel appearing for the appellant/insurance company has vehemently argued that the present is a case where the policy of insurance was not in existence as the same was cancelled and was duly informed to the insured on 29-8-2006 and the accident took place 10 months thereafter, i.e. on 16-6-2007. He has relied on the judgments of the Hon'ble Supreme Court in Deddappa and Others Vs. The Branch Manager, National Insurance Co. Ltd., and National Insurance Co. Ltd. Vs. Yellamma and Another,

6. Per contra, Shri Goutam Bhaduri and Shri Santosh Kumar Tiwari, learned counsel appearing for respondents No. 1 to 3 have argued that the appellant/insurance company has failed to establish that the intimation regarding cancellation of cover note/policy of insurance was duly sent to and received by the owner, therefore, the insurance company would be liable to satisfy the award qua the third party.

7. We have heard learned counsel appearing for the parties at length and perused the record.

8. Admittedly, the subject vehicle was involved in the accident, which took place on 16-6-2007. A cover note was issued in favour of the insured on 5-8-2006 for the period from 5-8-2006 to the midnight of 4-8-2007. The owner paid the premium by a cheque, which was dishonoured by the banker on 24-8-2006 and the banker informed the appellant/insurance company about dishonour of the cheque on 25-8-2006. The appellant cancelled the cover note by its communication dated 29-8-2006 (Ex. NA-1) addressed to the owner on his address mentioned in the claim petition and the cover note.

9. In the reply filed by the insurance company, a plea has been raised that the cover note having already been cancelled and information thereof having already been sent to the insured on 29-8-2006, the insurance company is not liable to indemnify the insured as no policy of insurance was in existence-on the date of accident. The owner of the vehicle neither amended his reply filed before the Claims Tribunal nor entered the witness box to deny this fact that he has never received any communication sent by the insurance company informing

cancellation of the cover note. Thus, the contention of the appellant/insurance company that the intimation regarding cancellation of the cover note was duly informed to the insured/owner of the vehicle has remained uncontroverted. The said fact could have been denied and controverted only by the owner and respondents No. 1 to 3, who have vehemently argued that no such intimation was sent to the owner, may not be in a position to ascertain and categorically make this statement because the intimation regarding cancellation had nothing to do with them. It was the duty of the owner to have made this averment in his reply and enter the witness-box to depose that he was never informed about the cancellation of the insurance policy.

10. Law regarding liability of the insurance company qua third party after issuance of the cover note has been settled by the Hon''ble Supreme Court in number of cases. In National Insurance Company Limited vs. Yellamma and another (supra), the Hon''ble Supreme Court, after referring its earlier decisions in Deddappa and others vs. Branch Manager, National Insurance Co. Ltd. (supra), New India Assurance Co. Ltd. Vs. Rula and Others, and National Insurance Co. Ltd. Vs. Seema Malhotra and Others, has held in paragraphs 13, 14, 15 and 16 thus:

13. The question came up for consideration recently before this Court in Deddappa and Others Vs. The Branch Manager, National Insurance Co. Ltd., wherein upon noticing the precedents which were operating in the field, it was clearly held: (SCC pp. 599-600, paras 18-20)

18. The ratio of the said decision was, however, noticed by this Court in New India Assurance Co. Ltd. Vs. Rula and Others, It was held that ordinarily a liability under the contract of insurance would arise only on payment of premium, if such payment was made a condition precedent for taking effect of the insurance policy but such a condition which is intended for the benefit of the insurer can be waived by it. It was opined: (SCC p. 200, para 13)

13.... If, on the date of accident, there was a policy of insurance in respect of the vehicle in question, the third party would have a claim against the insurance company and the owner of the vehicle would have to be indemnified in respect of the claim of that party. Subsequent cancellation of the insurance policy on the ground of nonpayment of premium would not affect the rights already accrued in favour of the third party.

The dicta laid down therein clarifies that if on the date of accident the policy subsists, then only the third party would be entitled to avail the benefit thereof.

19. Almost an identical question again came up for consideration before this Court in National Insurance Co. Ltd. Vs. Seema Malhotra and Others, and a Division Bench noticed both the aforementioned decisions and analysed the same in the light of Section 64-VB of the 1938 Act. It was held: (SCC pp. 156-57, paras 17-20)

17 In a contract of insurance when the insured gives a cheque towards payment of premium or part of the premium, such a contract consists of reciprocal promise. The drawer of the cheque promises the insurer that the cheque, on presentation, would yield the amount in cash. It cannot be forgotten that a cheque is a bill of exchange drawn on a specified banker. A bill of exchange is an instrument in writing containing an unconditional order directing a certain person to pay a certain sum of money to a certain person. It involves a promise that such money would be paid.

18. Thus, when the insured fails to pay the premium promised, or when the cheque issued by him towards the premium is returned dishonoured by the bank concerned the insurer need not perform his part of the promise. The corollary is that the insured cannot claim performance from the insurer in such a situation.

19. u/s 25 of the Contract Act an agreement made without consideration is void. Section 65 of the Contract Act says that when a contract becomes void any person who has received any advantage under such contract is bound to restore it to the person from whom he received it. So, even if the insurer has disbursed the amount covered by the policy to the insured before the cheque was returned dishonoured, the insurer is entitled to get the money back.

20. However, if the insured makes up the premium even after the cheque was dishonoured but before the date of accident it would be a different case as payment of consideration can be treated as paid in the order in which the nature of transaction required it. As such an event did not happen in this case, the Insurance Company is legally justified in refusing to pay the amount claimed by the respondents".

20. A contract is based on reciprocal promise. Reciprocal promises by the parties are condition precedents for a valid contract. A contract furthermore must be for consideration.

14. In today's world payment by cheque is ordinarily accepted as valid tender but the same would be subject to its encashment. A distinction, however, exists between the statutory liability of the insurance company vis-?-vis the third party in terms of Sections 147 and 149 of the Motor Vehicles Act and its liability in other cases but it is clear that if the contract of insurance had been cancelled and all concerned had been intimated thereabout, the insurance company would not be liable to satisfy the claim.

15. In this case, there cannot be any doubt or dispute whatsoever that no privity of contract came into being between the appellant and the second respondent and as such the question of enforcing the purported contract of insurance while taking recourse to Section 147 of the Motor Vehicles Act did not arise.

(emphasis supplied)

16. The second respondent did not contest the case at any stage. He did not adduce any evidence before the Tribunal. He does not appeal from the judgments

of the High Court. No argument in the appeal was advanced in his behalf. Before us also, no appearance has been made on behalf of Respondent 2 despite service of notice.

11. In the, present case also, the owner did not adduce any evidence before the Claims Tribunal nor has entered appearance In this Court despite service of notice, thus, there is no evidence or assertion on the record contrary to the assertion of the insurance company that intimation regarding cancellation of the cover note was sent to the owner. In the circumstances, this Court has no hesitation in concluding that there was no existence of cover note on the date of accident as the cover note was cancelled before the accident for the fact that there was no payment of premium as the cheque tendered by the insured was dishonoured. Relying on the law laid down by the Hon''ble Supreme Court in National Insurance Company Limited vs. Yellamma and another (supra), this Court allows the miscellaneous appeal filed by the insurance company and exonerate the insurance company from the liability to satisfy the impugned award. However, the claimants shall be entitled to recover the amount under the impugned award from the owner of the vehicle. There shall be no order as to costs.