(2016) 05 GUJ CK 0012

In the Gujarat High Court

Case No : First Appeal No. 404 of 2015 and Civil Application No. 1312 of 2016

Kumarpal Amichand Bagrecha APPELLANT

Vs

Prabhatbhai Babubhai Parmar RESPONDENT

Date of Decision : 03-05-2016

Acts Referred:

Employees Compensation Act, 1923 — Section 4
Fatal Accidents Act, 1855 — Section 1
Motor Vehicles Act, 1988 — Section 147

Citation : (2016) AAC 1792

Hon'ble Judges : Mr. S.G. Shah, J.

Bench : Single Bench

Advocate : Mr H.M Parikh, Advocate, for the Appellants No. 1 and 1.4; Mr Rasesh H. Parikh, Advocate, for the Appellants No. 1 and 1.4; Mr K.K. Nair, Advocate, for the Defendants No. 3; Mr Vaibhav N. Sheth, Advocate, for the Defendants No. 1.1 and 1.4; Rule Not Read

Final Decision : Partly Allowed

Judgement

Mr. S.G. Shah, J.—Heard learned advocate Mr. H.M. Parikh for the appellants, learned advocate Mr. Vaibhav Sheth for defendant No. 1 and learned advocate Mr. K.K. Nair for defendant No. 3. Defendant No. 2, though duly served remained absent being driver of the vehicle in question, which was involved in the accident.

2. Appellant is original respondent No. 2 being owner of the vehicle in question, whereas defendant No. 1 is original claimant and defendant No. 3 is insurer of the vehicle in question. The appellant has challenged the judgment and order dated 27.03.2014 in MACP NO. 743 of 2011 by the MACT of Anand, whereby though tribunal has awarded total amount of Rs.6,74,983/- towards compensation for the accidental death of one Prabhatbhai B. Parmar, who was serving as a conductor in GJ 23 V 6606, the tribunal has bifurcated the liability between driver and owner on one hand and driver, owner and insurer on another hand, considering that, the liability of insurance company is restricted and limited

under the Employees Compensation Act only. Therefore, out of total amount of compensation, the claimants are entitled to get only Rs. 2,15,650/- from the driver, owner and insurance company under the Employees Compensation Act whereas for the remaining amount of Rs. 4,59,333/- the liability of insurance company has been exonerated and, therefore, tribunal has observed that claimant can receive such amount only from driver and owner. Therefore, owner has preferred this appeal since their liability is fixed to Rs. 4,59,333/- plus cost and interest.

3. I have considered the rival submissions and perused the record. Considering the dispute on hand, practically factual details regarding incident and result are not material, which is well described in the impugned judgment and pleadings.

3.1 However, it should be recollected here that the victim of the road accident namely Prabhatbhai was serving as conductor on vehicle owned by present appellant and insured by defendant No. 3. On 07.09.2011 when driver of such tempo has lost his control and collided with tree, the victim has sustained grievous injuries in such incident and, therefore, he succumbed to the injuries after couple of weeks. Considering the age of the victim being 45 years, his legal heir being defendant No.1 herein, has preferred a claim petition under Section 166 of the Motor Vehicles Act for Rs. 10,00,000/- wherein award as above, is passed by impugned judgment.

4. Considering the issue on hand and pursuant to order dated 12.02.2016 in Civil Application, defendant No.3 ? insurance company has now come forward with certified copy of insurance policy documents, which is to be taken on record. The only issue, which now remains is to the effect that whether insurance company is liable to indemnify the award under the common law or its liability is restricted only under the Employees Compensation Act, so far as claim is concerned.

5. As usual it has been found that in all such cases, generally insurance company is not producing the entire set of policy document including relevant endorsements, which are otherwise referred in schedule of premium and, therefore, it becomes difficult for different tribunal to appreciate and interpret the liability of insurance company, even if insurance company has accepted wider liability than ?Act only policy? by recovering additional amount of premium. In the present case, if we peruse the policy document, now produced on record by the insurance company, it becomes clear that the schedule of premium shows recovery of different additional premium for different eight items under the different clauses and thereby as against basic minimum premium of Rs. 19,079.99, practically insurance company has accepted total amount of Rs. 29,935/- as total premium, thereby covering additional risk for all such additional eight items. The premium and details of such additional items are listed hereunder:

SCHEDULE OF PREMIUM

1.

BASIC OD COVER

Rs. 19,074.99

LESS : UNDERWRITER DISCOUNT

Rs. 1,305.00

BASIC OD TOTAL

Rs. 17,769.99

2.

ADD : IMT23-COVERAGE FOR IMT 21 EXCULSIONS

Rs. 2,861.25

OD TOTAL

Rs. 20,631.00

LESS : NO CLAIM BONUS-GR27

Rs. 4,126.00

MOTOR TOTAL OD

Rs. 16,506.00

3.

ADD : BASIC TP COVER

Rs. 10260

4.

BASIC TP TOTAL

Rs. 10260

5.

ADD:PA FOR OWNER DRIVER-GR36A

Rs. 100

6.

ADD:LL TO COOLIES ? IMT 39

Rs. 75

7.

ADD:LL TO NFPP ? EXCLUDING EMPLOYEES (OWNER OF GOODS) IMT ? 37A

Rs. 150

8.

ADD: LL PAID DRIVER, CONDUCTOR, CLEANER-IMT-40

Rs. 50

TP TOTAL

Rs. 10635

TOTAL PREMIUM

Rs. 27140

STAMP DUTY

Rs. 0.5

ADD SERVICE TAX

Rs. 2795

TOTAL AMOUNT

Rs. 29935

6. Policy also categorically discloses that it is subject to IMT endorsement printed herein/attached to : IMT-39, IMT-40, IMT-23, IMT-21, IMT-37A, IMT-6. Amongst above list of payment of premium and endorsement, at present, we are concerned with endorsement No. IMT-40 which is regarding legal liability to pay driver and/or conductor and/or cleaner employed in connection with the operation of Motor Vehicle. That endorsement shows that such endorsement i.e. IMT-40 is for buses, taxies and motorised three/four wheelers under commercial vehicle. The endorsement No. 39 regarding legal liability to persons employed in connection with the operation and/or maintaining and/or loading and/or unloading of Motor Vehicles and IMT-40 read as under:

"IMT 39. Legal liability to persons employed in connection with the operation and/or maintaining and/or loading and/or unloading of Motor Vehicles. (for Goods Vehicle)

In consideration of the payment of an additional premium of .... it is hereby understood and agreed that notwithstanding anything contained herein to the contrary the insurer shall indemnify the insured against his legal liability under the Employees? Compensation Act, 1923 and subsequent amendments of that Act prior to the date of this Endorsement, the Fatal Accidents Act, 1855 or at common law in respect of personal injury to any paid driver (or cleaner or conductor or person employed in loading/or unloading but in any case not exceeding seven in number including driver and cleaner) whilst engaged in the service of the insured in such occupation in connection with the ?.... and not exceeding seven in number and will in addition be responsible for all costs and expenses incurred with its written consent.

Provided always that :-

(1) This endorsement does not indemnify the insured in respect of any liability in cases where the insured holds or subsequently effects with any insurer or Group of Underwriters a policy of insurance in respect of liability as herein defined for his general employees.

(2) The insured shall take reasonable precautions to prevent accidents and shall comply with all statutory obligations.

(3) The insured shall keep a record of the name of each driver cleaner conductor or person employed in loading and/or unloading and the amount of wages salary and other earnings paid to such employees and shall at times allow the insurer to inspect such record.

(4) In the event of the policy being cancelled at the request of the insured no refund or the premium paid in respect of this Endorsement will be allowed.

The premium to be calculated at the rate of Rs. 25/- per driver and/or cleaner or conductor and/or person employed in loading and/or unloading but not exceeding the number permitted by the Motor Vehicles Act, 1988 including driver and cleaner.

xxxx xxxx xxxx xxxx

IMT 40. Legal liability to paid driver and/or conductor and/or cleaner employed in connection with the operation of Motor Vehicle. (For buses, taxis and motorised three/four wheelers under commercial vehicle tariff).

In consideration of the payment of an additional premium, it is hereby understood and agreed that notwithstanding anything contained herein to the contrary the insurer shall indemnify insured against his legal liability under the Workmen?s Compensation Act, 1923 and subsequent amendments of that Act prior to the date of this Endorsement, the Fatal Accidents Act, 1855 or at common law in respect of personal injury to any paid driver and/or conductor and/or cleaner whilst engaged in the service of the insured in such occupation in connection with the vehicle insured and will in addition be responsible for all costs and expenses incurred with its written consent.

The premium to be calculated and paid while taking insurance of the vehicle concurred at the rate of Rs. 25/- per driver and/or conductor and/or cleaner.

Provided always that :-

(1) this endorsement does not indemnify the insured in respect of any liability in cases where the insured holds or subsequently effects with any insurer or Group of Underwriters a policy of insurance in respect of liability as herein defined for his general employees.

(2) The insured shall take reasonable precautions to prevent accidents and shall comply with all statutory obligations.

(3) The insured shall keep a record of the name of each driver cleaner conductor or person employed in loading and/or unloading and the amount of wages salary and other earnings paid to such employees and shall at times allow the insurer to inspect such record.

(4) In the event of the policy being cancelled at the request of the insured no refund or the premium paid in respect of this Endorsement will be allowed.

Subject otherwise to the terms exceptional conditions and limitations of this Policy except so far as necessary to meet the requirements of the Motor Vehicles Act, 1988."

7. It is to be noted that at least in IMT 39, there are "?......" at two places and that at one place there is "*" is made. However, there is no clarity on the documents to explain that what should be the text on such places. However, in first place, either there should be disclosure of total premium or it should be "as stated in the schedule" and at the second place the words should be "vehicle insured", since same words are found in IMT 40.

8. The bare reading of both above endorsement i.e. IMT 39 and 40 makes it clear that insurance company has accepted additional legal liability under all the laws including Employees Compensation Act, Fatal Accident Act and even common law i.e. litigation like present one, which is under the common law of tort since provisions of Motor Vehicles Act only take care of procedural part whereas basic law applicable is the law of tort i.e. common law and, therefore, now it is not acceptable, if insurance company states that their liability is limited under the Employees Compensation Act because both the endorsement reproduced herein above specifically confirm that they have accepted their legal liability even in common law paid driver, conductor or cleaner while engaged in the service of the insured. Therefore, liability for conductor or cleaner is covered under the risk. It cannot be ignored that now insurance company has no reason to plead or to pray that since the vehicle is a goods vehicle the endorsement No.40 is not applicable in such vehicle, for the simple reason that while issuance of policy, insurance company has accepted the premium under the clause IMT 40 also and there is categorical disclosure in the IMT 40 both under the schedule and premium so also in the list of endorsement as listed herein above. Therefore, now it is very much clear that insurance company has accepted additional legal liability as aforesaid and, therefore, when insurance company has accepted the additional premium for legal liability and endorsed specific disclosure that the insurance shall accept legal liability with respect to persons employed in connection with the operation and/or maintaining and/or loading and/or unloading of vehicle, while engaged in the service of insured then there is no reason for the tribunal to restrict the liability of the insurance company from indemnifying the insurer as done in the impugned judgment.

9. For above facts, circumstances and reasons, the impugned judgment and award needs to be modified to the effect that entire amount of compensation

awarded by the tribunal is to be paid by the insurance company i.e. defendant No.3 and, therefore, insurance company has to indemnify for the entire award with full cost and interest. Therefore, appeal is partly allowed with cost. Cost of this appeal is to be borne by the insurance company since because of the selectiveness of the insurance company, appellant has to spend for stamp and engage an advocate to confirm the legal liability of the insurance company which is otherwise well accepted by the insurance company in the policy itself but insurance company has failed to admit it before the tribunal in proper perspective.

10. Appeal is disposed of in above terms.

11. Record and Proceedings be sent back forthwith.

12. In view of disposal of main appeal, Civil Application does not survive and the same is disposed of.