

(2017) 07 BOM CK 0197
In the Bombay High Court
Case No : 142 of 2006

M/s. National Insurance Co. Ltd

APPELLANT

Vs

Bhagwan Rajaram Gawai

RESPONDENT

Date of Decision : 12-07-2017

Acts Referred:

Contract Act, 1872, Section 25 -
Agreement void, if made without consideration
Motor Vehicles Act, 1988, Section 146,
Section 146, <a href=2221-147

Citation : (2017) 07 BOM CK 0197

Hon'ble Judges : Shalini Phansalkar Joshi

Bench : SINGLE BENCH

Advocate : S.P. Deshpande

Judgement

1. This appeal is preferred by the insurance company which is held liable to pay compensation of Rs.79,500/to respondent nos.1 to 4 herein, along with the owner and the driver of the offending vehicle, by the judgment and order dated 11/11/2005 by MACT, Wardha in Claim Petition No. 79/1998.

2. Brief facts of the appeal can be stated as follows:- Deceased Shailesh was the son of respondent nos.1 and 2 and the brother of respondent nos.3 and 4. At the time of accident, he was running the age of 6 years and studying in the school. On 14/04/1995 at about 5:30 p.m. at village Selsura, he was standing by the side of the road in order to cross the road, at that time the Truck bearing no. MP23B6244 driven by respondent no.5 herein, came in rash and negligent manner and gave dash to the deceased. Due to the said accident, offence was registered against the Truck driver. Respondent no.6 is the owner of the said Truck. Respondent nos.1 to 4, therefore, claimed compensation of Rs.1,00,000/ from the appellant and respondent nos.5 and 6 jointly and severally.

3. This petition came to be resisted by appellant contending inter alia that the cheque for the amount of Rs.6,531/issued by the owner of the Truck towards

insurance premium for the period from 15/07/1994 to 15/07/1995 came to be dishonoured. The said fact was also communicated to the owner of the Truck and in such situation as the insurance policy itself was cancelled, appellant cannot be liable to pay any amount of compensation to the claimants.

4. So far as the respondent no.5 - the Truck driver and respondent no.6 - the Truck owner, both of them, did not participate in proceeding before the Tribunal and before this Court also.

5. In support of their case, respondent no.1 Bhagwan, father of the deceased examined himself and produced the copy of F.I.R., spot panchnama and P.M. Report, with chargesheet to prove that the cause of accident was the rash and negligent driving of the Truck. As against it, on behalf of appellant, one Mr. Raut was examined to prove the dishonor of the cheque and issuance of the notice to that effect to the owner of the Truck.

6. On appreciation of this evidence, the learned Tribunal was pleased to hold that cause of the accident was rash and negligent driving of the Truck. Learned Tribunal further held that though the cheque was dishonoured, there was admission given by witness Rao that the policy has been issued after the encashment of the cheque and the appellant insurance company has not produced the dishonoured cheque. As a result, learned Tribunal held the appellant also jointly and severally liable to compensate the claimants along with the owner and driver of the Truck. Learned Tribunal awarded the compensation of Rs.79,500/inclusive of NFL amount, to respondent nos.1 to 4 with interest at the rate of 7.5% per annum from the date of petition till its realization.

7. This judgment of the Tribunal is challenged in the present appeal by learned counsel for appellant mainly on the ground that the liability of payment of compensation should not have and could not have been imposed on the appellant as the insurance policy was already cancelled by issuing requisite notice after dishonour of the cheque. It is submitted that law, in this respect is clearly well settled, which learned Tribunal has failed to consider, and therefore, appellant should be exonerated from the liability of compensating the claimants. In the alternate, it is submitted that as against the deceased who was a third party and hence the liability is to be imposed on the appellant insurance company, then appellant should be held entitled to recover the said amount of the compensation from the owner of the Truck, as already entire amount of the compensation has been deposited by the appellant in the court and it is also withdrawn by the claimants.

8. As regards the factual aspects of the case, there is more than sufficient evidence on record, like the evidence of Bhagwan, father of the deceased, who was an eye witness to the accident and who has deposed as to the manner in which the Truck was driven in a high speed and gave dash to his son Shailesh. Admittedly, the age of the deceased was only 6 years at the time of accident. The copy of F.I.R. also goes to show that police, after carrying out necessary

inquiry held the Truck driver responsible for the cause of accident. The spot panchnama (Exh.22) is also sufficient to depict the manner in which the accident had occurred. The charge sheet is also filed against the Truck driver. The Truck driver himself has not entered into witness box, nor adduced any evidence to prove that the accident has not occurred on account of the rash and negligent driving of the Truck. In such situation, it has to be held that Tribunal has rightly held that the sole cause of accident was rash and negligent driving of the Truck by respondent no.5.

9. Even as regards the compensation amount of Rs.79,500/inclusive of NFL amount awarded by the Tribunal, there is no cross objection filed by learned counsel for respondent nos.1 to 4 for enhancement of the same and considering the finding and reasoning given by the Tribunal for determining the quantum of compensation, no interference is warranted in the said finding also.

10. The only crux of the dispute raised in this appeal pertains to the liability of the appellant insurance company. In this case, it is deposed by witness Damodhar Raut, examined by the appellant insurance company that the cheque for the amount of Rs.6,531/was issued by the owner of the Truck on 15/07/1994. It was towards the premium for the period from 15/07/1994 to 15/07/1995. Accordingly, the cover note bearing no. 324131 was issued on 15/07/1994. The cheque was deposited in the bank for encashment on 18/07/1994 and it was dishonoured by bank on 22/07/1994. The intimation about dishonor of the said cheque was given to the Truck owner on 22/07/1994 itself. The said intimation was also received by the owner. The requisite documentary evidence is also produced on record to that effect including the letter received from the bank about the dishonor of the cheque. The intimation sent to the owner of the vehicle is at Exh.38 and its acknowledgement is at Exh.39.

11. Thus, according to learned counsel for appellant, as the cheque towards the payment of the premium for the relevant period came to be dishonoured and the owner of the vehicle was duly informed about the same, the contractual liability between insurance company and the owner of the vehicle has come to an end. Moreover, as in this case the insurance policy itself was cancelled by issuing requisite notice to the owner of the vehicle and no fresh policy was taken to that effect, the insurance company cannot be held liable to pay compensation.

12. In support of her submission, learned counsel for appellant has relied upon the landmark judgment of the Hon'ble Supreme Court in the case of National Insurance Co. Ltd. -VsSeema Malhotra and others, (2001) 3 SCC 151, which is relied upon in the decision of Punjab and Haryana High Court in the case of Anarkali and others VsNaresh Kumar and others, I (2016) ACC 72 (P & H) and by Andhra Pradesh High Court in the case of United India Insurance Co. Ltd. VsGolla Nattala Gopal, II (2016) ACC 116 (AP). It is submitted that as per the legal position crystallized in these authorities, the liability of insurance company comes to an end when it is shown that on dishonor of the cheque, the owner of the vehicle was informed about the same and as also of the cancellation of the policy.

It was held that the insurance policy, in such situation, never remained in force as the cheque issued by the insured was only a promise to pay money and when that promise had not been fulfilled, the insurer need not perform its part of the promise.

13. The Hon"ble Supreme Court has also considered in this judgment of Seema Malhotra that the policy itself is an agreement and when the insured did not pay the premium, such a policy would become an agreement without consideration, and therefore void under Section 25 of the Contract Act and Section 64VB of the Insurance Act, 1938. It was held that as per section 64VB of the Insurance Act, no insurer shall assume any risk in India in respect of any insurance business on which premium is not ordinarily payable outside India unless and until the premium payable is received by him or is guaranteed to be paid by such person in such manner and within such time as may be prescribed or unless and until deposit of such amount as may be prescribed, is made in advance in the prescribed manner. Here in the case, it is urged that as premium itself was not received and this fact was informed to the insured and he was also further intimated that his policy was cancelled, there was no question of the appellant being liable in any way for compensating the claimants.

14. Learned counsel for appellant has in this respect, also relied upon section 147 of the Motor Vehicles Act to submit that, where a cover note issued by the insurer under the provisions of this Act or the rules made thereunder is not followed by a policy of insurance within the prescribed time, the insurer after communicating the said fact to the owner, will not be liable for the risk by the insured. Thus, submission of learned counsel for appellant is that in the instant case as the cheque issued by the insured was dishonoured and the said fact was communicated to the insured and despite that the premium was not paid and policy was not revived, the liability of appellant to compensate and to cover the risk of the insured comes to an end.

15. However, when the Hon"ble Apex Court has occasion to consider this legal position in the case of New India Assurance Co . Ltd. Vs Rula and others, (2000) 3 Supreme Court Cases 195 , it was held by the Hon"ble Apex Court that "A contract of insurance, like any other contract, is concluded by offer and acceptance. Normally, a liability under the contract of insurance would arise only on payment of premium if such payment was made a condition precedent to the insurance policy taking effect". However, it was further held that, "These are the principles relating to an ordinary contract of insurance, but the contract of insurance relating to motor vehicles has to be understood in the light of the various provisions contained in the Motor Vehicles Act, like section 146, 147(5) and 149". After taking review of these provisions, it was held by the Hon"ble Apex Court, in para no.10 and 11 of this judgment, as follows :- "10. The contract of insurance in respect of motor vehicles has, therefore, to be construed in the light of the above provisions. Section 146(1) contains a prohibition on the use of the motor vehicles without an insurance policy having been taken in

accordance with Chapter XI of the Motor Vehicles Act. The manifest object of this provision is to ensure that the third party, who suffers injuries due to the use of the motor vehicle, may be able to get damages from the owner of the vehicle and recoverability of the damages may not depend on the financial condition or solvency of the driver of the vehicle who had caused the injuries".

"11. Thus, any contract of insurance under Chapter XI of the Motor Vehicles Act, 1988 contemplates a third party who is not a signatory or a party to the contract of insurance but is, nevertheless, protected by such contract. As pointed out by this Court in *New Asiatic Insurance Co. Ltd. Vs Pessumal Dhanamal Aswani*, the rights of the third party to get indemnified can be exercised only against the insurer of the vehicle. It is thus clear that the third party is not concerned and does not come into the picture at all in the matter of payment of premium. Whether the premium has been paid or not is not the concern of the third party who is concerned with the fact that there was a policy issued in respect of the vehicle involved in the accident and it is on the basis of this policy that the claim can be maintained by the third party against the insurer".

16. In this judgment, reliance was also placed by the Hon"ble Apex Court, on its earlier decision in the case of *Oriental Insurance Co. Ltd. Vs Inderjit Kaur*, (1998) 1 SCC 371, wherein it was held in para no.9, as follows : "9. We have, therefore, this position. Despite the bar created by Section 64VB of the Insurance Act, the appellant, an authorised insurer, issued a policy of insurance to cover the bus without receiving the premium therefor. By reason of the provisions of Section 147(5) and 149(1) of the Motor Vehicles Act, the appellant became liable to indemnify third parties in respect of the liability which that policy covered and to satisfy awards of compensation in respect thereof notwithstanding its entitlement (upon which we do not express any opinion) to avoid or cancel the policy for the reason that the cheque issued in payment of the premium thereon had not been honoured."

17. Thus, in the ultimate analysis it was held by the Hon"ble Apex Court that, "The subsequent cancellation of the insurance policy on the ground that the cheque through which premium was paid was dishonored, would not affect the rights of the third party which had accrued on the issuance of the policy on the date on which the accident took place. 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 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."

18. In view of this clear legal position, in the instance case also, appellant cannot be absolved from paying compensation to the respondents claimants for the death of their son. Now the only question that remains is whether the appellant recover the amount of compensation from the owner of the vehicle? According to learned counsel for appellant, learned Tribunal has committed an error in not

passing any such order, and hence having regard to the fact that there was no contractual liability, interse between insured and insurer, even if insurer have not issued policy and the provisions of the Motor Vehicles Act are satisfied, award in force the insurer is entitled to recover that amount from the insured.

19. One would have accepted this argument, but for the fact that in this case there is one admission given by Damodhar Raut himself, who is examined on behalf of the appellant. He has stated that policy was issued after encashment of the cheque. No doubt, he has subsequently denied the said fact. However, the Tribunal in this respect has held that it was necessary for the appellantinsurance company, in such situation, to produce on record the original dishonoured cheque, as normally after the cheque is dishonoured, it returns to the person who has deposited it. Here in this case, the original cheque was admittedly not produced on record and it is coupled with the fact that Shri Raut has admitted that policy was issued after cheque was encashed and hence Tribunal has arrived at the conclusion that there is possibility of the owner paying the amount of premium in cash and the dishonoured cheque being returned to him, and therefore it was not produced in the case. having regard to the entire evidence on record, that possibility cannot be denied, and therefore, finding arrived at by the Tribunal on this point, cannot be disturbed.

20. As a result, appellant cannot get absolved from its liability of paying the compensation amount to the respondentsclaimants. As a matter of fact, amount is already deposited and it is withdrawn also. Appeal therefore holds no substance, and hence stands dismissed, with no order to costs.