

(2009) 01 GUJ CK 0041

In the Gujarat High Court

Case No : First Appeal No's. 4168 and 4169 of 1998

National Insurance Co. Ltd.

APPELLANT

Vs

Monghiben Kodarbhai Parmar

RESPONDENT

Date of Decision : 12-01-2009

Acts Referred:

Constitution of India, 1950 — Article 142
Contract Act, 1872 — Section 25, 65
Insurance Act, 1938 — Section 64VB
Motor Vehicles Act, 1988 — Section 147, 147(5), 149, 149(1)

Citation : (2010) ACJ 429 : AIR 2009 Guj 72 : (2009) 1 GLR 765

Hon'ble Judges : H.K. Rathod, J

Bench : Single Bench

Judgement

H.K. Rathod, J.—Heard learned Advocate Mr. SB Parikh for learned Advocate Mr. Rajni H. Mehta for appellant, learned senior advocate Mr. YS Lakhani for respondent No. 6 Hirabhai Govabhai Patel, learned Advocate Mr. JV Japee for respondents claimants and learned Advocate Mr. KK Nair for respondent No. 9. Notice issued by this Court to respondent No. 5, 7 and 8 is served on them but they have not appeared before this Court either in person or through an advocate. In First Appeal No. 4169 of 1998 also, though respondents No. 2, 4 and 5 have been served with the notice issued by this court, they have not appeared before this Court either in person or through an advocate.

2. These appeals have been filed by appellant National Insurance Co. Ltd. challenging common award made by MACT Sabarkantha District Himatnagar Exh. 88 in Claim Petition No. 431 of 1989 and Claim Petition No. 535 of 1989 dated 30.05.1998.

3. Short question arising for consideration of this court in these appeals is, whether the policy issued by appellant insurance company in respect of vehicle involved in accident bearing No. GAD 7791 was in existence or not on the date of accident 4.03.1989.

4. Learned Advocate Mr. Parikh submitted that the accident occurred on 4.03.1989 at about 3.25 p.m. at Govindnagar Bhiloda Bus Stand. Applicant in Claim Petition No. 535 of 1989 and his deceased father were travelling in rickshaw bearing No. GRN 1284. At that time, tractor bearing No. GAD 7791 came in full speed from opposite direction in rash and negligent manner and dashed with the rickshaw and accident occurred. Due to said accident, applicant in claim petition No. 535 of 1989 has received fracture injuries of pelvis bone and his father received injury on left hand, left leg and fracture injuries of pelvis bone. Deceased was admitted in Cottage Hospital, Bhiloda and, thereafter, shifted to civil hospital at Himatnagar where he remained as an indoor patient for a period from 4.03.1989 to 8.05.1989 and, thereafter, he was discharged from hospital and shifted to home.

5. Written statement was filed by insurance company raising contention that at the relevant time when the accident occurred, tractor was not having valid insurance policy on the date of accident. Insurance policy was obtained by owner for tractor while issuing cheque for premium of Rs. 995.00 on 22.03.1988 and on the same day, receipt was issued by insurance company in favour of owner. Period of insurance was from 23.11.1988 to 22.11.1989. Cheque issued by owner for premium in favour of insurance company was dishonoured on 26.11.1988 and on the same day, insurance company has cancelled policy on 26.11.1988. Owner was informed about dishonour of cheque and cancellation of policy. These facts have not been disputed by either of the parties. However, on behalf of owner, only one contention is raised that before the accident, tractor was transferred in the name of Janubhai Mahmadbhai Mansuri and, therefore, respondent No. 6 owner is not liable to pay compensation to claimant because at relevant time when accident occurred, respondent No. 6 was not owner of vehicle in question. Janubhai Mahmadbhai Mansuri, owner of vehicle in question as alleged by respondent No. 6, was not a party to the proceedings before claims tribunal. This plea was specifically raised by insurance company before claims tribunal and claims tribunal considered it as under in para 21 of award:

Liability: Now, I come to the point regarding the liability of the opponents in respect of the compensation as discussed above. As foregoing discussion and as decided in point No. 1 that the driver opponent No. 1 of the truck bearing registration No. GAD 7791, the accident had taken place solely rash and negligent driving by him. Therefore, generally, the driver, opponent No. 1 and owner, opponent No. 2 and the Insurance Company - opponent No. 3 are liable for the compensation in question. But, on behalf of the Insurance Company, opponent No. 3, it is vehemently contended that at the time of the accident, the owner of the truck i.e. Opponent No. 2 - Hirabhai Govabhai Patel had sold out his tractor by executing the sale agreement dated 22.9.88 to one Janubhai Mohamadbhai Mansuri and possession of the tractor had already been handed over to that Janubhai Mohamadbhai and without joining Janubhai Mohamabbhai as owner of the tractor, the Insurance Company is not liable for the compensation in question. It is also vehemently contended that premium was not

received by the Insurance Company in advance and, therefore, Section 64-VB of the Insurance Act would apply and thereby Insurance Company is not liable for the compensation. It is further contended that the original owner Hirabhai Govabhai had sent the cheque for insurance on 22/11/88 for worth of Rs. 995/- and the Insurance Company had issued the receipt to that effect on the same day but the cheque was not accepted. It was further alleged that hence, the Insurance Company had cancelled the previous policy which was without consideration and thereby; the premium was not paid and, therefore, the policy was not in existence at the time of the accident and for that point also, the Insurance Company is not liable for the compensation in question. In order to prove these contentions, the Insurance Company has examined on its behalf DW No. 1 - Arvindbhai Thakorlal Kayasthak at Exh. 71, who was the Branch Manager at Himatnagar for the period from December, 1987 to 27.6.90. He says in his deposition that he had received cheque for the premium of tractor No. GAD 7791 with trailer No. GRN 7052 on 22.11.88. He says further that in respect of the amount of the cheque, his office had issued receipt bearing No. 12414 on the same day vide Exh. 72. Thus, it is crystal clear that the premium was paid for the amount of Rs. 995/- and the receipt to that effect was also issued. Moreover, it is an evident that policy was issued for the period from 23.11.88 to 22.11.89. But, according to this Branch Manager of the Insurance Company, the cheque of premium was dishonoured on date 26.12.88 and, therefore, said policy was cancelled vide Exh. 76. Thus, it is crystal clear that policy was issued on account of dishonoured of the cheque on 26.12.88, the Insurance Company had cancelled the policy. Exh. 73 discloses that the cheque was returned on account of referred to drawer, and the same was informed to Hirabhai Govabhai vide Exh. 75. The entry of the same is also mentioned in the registered book maintained by the Department of the Insurance Co., at Exh. 72. Thus, it is crystal clear that the policy was cancelled from 23.11.88 for want of premium, as the cheque was dishonoured. On the other side, the accident in question was taken place on 4.3.89 when the policy was not in existence. Even in this position, the learned advocate for the applicants had vehemently argued out that in view of the judgment of the Hon'ble Supreme Court in the case of Oriental Insurance Co. Ltd. v. Inderjit Kaur and Ors. 1997 1 Sc 289, the Insurance Company is liable to pay the compensation in question. In the cited case, a policy of insurance issued by the appellant Insurance Company on 30th November, 1989. The premium for the policy was paid by cheque. The cheque was dishonoured. A letter stating that it had been dishonoured was sent by the appellant to the insured on 23rd January, 1990. The letter claimed that as the cheque had not been encashed, the premium on the policy had not been received and that therefore, the appellant was not at risk. The premium was paid in cash on 22nd May, 1990. In the meantime, on 19th April, 1990, accident took place, the bus collided with the truck, whose driver died. The Insurance Company denied the claim asserting that under the terms of Section 64-VB of the Insurance Act, 1938, no risk was assumed by an insurer, unless the premium thereon been received in advance. The Motor Accident Claims Tribunal rejected the contentions

of the Insurance Company and claim petition was granted and the Hon"ble High Court of Punjab and Haryana was summarily dismissed the appeal against that award. Therefore, in that case, the Hon"ble Supreme Court has held as under: "We have, therefore, this position. Despite the bar created by Section 64-VB of the Insurance Act, the appellant, an authorised insurer, issued a policy of insurance to cover the bus without receiving the premium there for. By reason of the provisions of Sections 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. "The Hon"ble Supreme Court has further held that;" It must also be noted that it was the appellant itself who was responsible for its predicament. It had issued the policy of insurance upon receipt only of a cheque towards the premium in contravention of the provisions of Section 64-VB of the Insurance Act. The public interest that a policy of insurance serves must, clearly, prevail over the interest of the appellant.

6. Looking to the aforesaid discussion, claims tribunal has relied upon the decision of apex court in case of Oriental Insurance Co. Ltd. v. Inderjit Kaur 1997 1 SC 289 : AIR 1998 SC 588.

7. Learned Advocate Mr. SB Parikh for appellant insurance company in both appeals has relied upon recent decision of apex court in case of Deddappa and Others Vs. The Branch Manager, National Insurance Co. Ltd., and submitted that in reported decision of apex court as referred above, when cheque issued by owner was dishonoured and policy was cancelled by insurance company, and intimated to the owner by company, accident occurred subsequently, insurance company is not liable to pay compensation to claimant. This aspect has been discussed by apex court after considering Section 64-VB of Insurance Act. In para 16 of decision, apex court has considered decision of Oriental Insurance Co. Ltd. v. Inderjit Kaur (supra) as referred to above by claims tribunal and has thereafter clarified that in Oriental Insurance Co. Ltd. v. Inderjit Kaur, said question was left open which has been considered by apex court thereafter in aforesaid decision. Decision in case of Oriental Insurance Co. Ltd. Vs. Inderjit Kaur and Others, and National Insurance Co. Ltd. Vs. Seema Malhotra and Others, has been discussed by apex court and thereafter, apex court has come to conclusion that when insured failed to pay the premium or when cheque issued by him towards premium has returned, dishonoured by bank, insurer need not perform his part of promise or the corollary is that the insured cannot claim performance from the insurer in such a situation. Therefore, relevant discussion made by apex court in para 16 to 25 of decision in Dedappa v. Branch Manager, National Insurance Co. Ltd. is reproduced as under:

16. The question came up for consideration before this Court in Inderjit Kaur (supra), wherein it was opined that a policy of insurance which is issued in public

interest would prevail over the interest of the insurance company. In that case a bus met with an accident. The policy of insurance was issued on 30.11.1989. A letter stating that the cheque had been dishonoured was sent by the Insurance Company to the insurer on 23.1.1990. The premium was paid in cash on 2.5.1990. The accident took place on 19.4.1990. Despite noticing Section 64-VB of the 1938 Act, but having regard to the underlying public policy behind the statutory scheme in respect of insurance as evidenced by Sections 147 and Section 149 of the Act and in particular having regard to the fact that policy of insurance to cover the bus without receiving the premium had already been issued, this Court held that the Insurance Company was liable to indemnify the insured.

17. We may, however, notice that in terms of Sub-section (5) of Section 147 and Sub-section (1) of Section 149 of the Act, the Insurance Company became liable to satisfy awards of compensation in respect thereof, notwithstanding its entitlement to avoid or cancel the policy for the reason that the cheque issued for payment of premium thereon had not been honoured.

18. The said question, however, was left open in *Inderjit Kaur* (supra).

19. The said decision proceeded on the basis that it was the Insurance Company which was responsible for placing itself in the said predicament as it had issued a policy of insurance upon receipt only of a cheque towards the premium in contravention of the provisions of Section 64-VB of the 1938 Act. The public interest in a situation of that nature and applying the principle of estoppel, this Court held, would prevail over the interest of the Insurance Company.

20. 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 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:

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 non-payment 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.

21. Almost an identical question again came up for consideration before this Court in *National Insurance Co. Ltd. Vs. Seema Malhotra and Others*, , 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: "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.

22. 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.

23. In today's world payment made by cheque is ordinarily accepted as valid tender. Section 64-VB of the 1938 Act also provides for such a scheme.

24. Payment by cheque, however, is subject to its encashment. In *Damadilal and Others Vs. Parashram and Others*, this Court observed: "On the ground of default, it is not disputed that the defendants tendered the amount in arrears by cheque within the prescribed time. The question is whether this was a lawful tender. It is well established that a cheque sent in payment of a debt on the request of the creditor, unless dishonoured, operates as valid discharge of the debt and, if the cheque was sent by post and was met on presentation, the date of payment is the date when the cheque was posted...."

25. Recently again in *New India Assurance Co. Ltd. Vs. Harshadbhai Amrutbhai Modhiya and Another*, although in the context of the Workmen Compensation Act, 1923, Balasubramanyan, J opined : "It is not brought to our notice that there is any other law enacted which stands in the way of an insurance company and the insured entering into a contract confining the obligation of the insurance

company to indemnify to a particular head or to a particular amount when it relates to a claim for compensation to a third party arising under the Workmen's Compensation Act. In this situation, the obligation of the insurance company clearly stands limited and the relevant proviso providing for exclusion of liability for interest or penalty has to be given effect to. Unlike the scheme of the Motor Vehicles Act the Workmen's Compensation Act does not confer a right on the claimant for compensation under that Act to claim the payment of compensation in its entirety from the insurer himself.

It was further observed:

The law relating to contracts of insurance is part of the general law of contract. So said Roskill, L.J. In *Cehave v. Bremer*. This view was approved by Lord Wilberforce in *Reardon Smith v. Hansen Tangen* All ER 576 wherein he said: "It is desirable that the same legal principles should apply to the law of contract as a whole and that different legal principles should not apply to different branches of that law. "A contract of insurance is to be construed in the first place from the terms used in it, which terms are themselves to be understood in their primary, natural, ordinary and popular sense. (See Colivaux's Law of Insurance, 7th Edn., para 2-01.) A policy of insurance has therefore to be construed like any other contract. On a construction of the contract in question it is clear that the insurer had not undertaken the liability for interest and penalty, but had undertaken to indemnify the employer only to reimburse the compensation the employer was liable to pay among other things under the Workmen's Compensation Act. Unless one is in a position to void the exclusion clause concerning liability for interest and penalty imposed on the insured on account of his failure to comply with the requirements of the Workmen's Compensation Act of 1923, the insurer cannot be made liable to the insured for those amounts. [See: *United India Insurance Co. Ltd. and Another Vs. Parvathi Ramachandram and Another*,

8. Therefore, considering observations made by apex court in case of *Dedappa* (supra), in light of the facts of case before hand, finding given by claims tribunal is erroneous and contrary to law meaning thereby that the decision of apex court in *Inderjit Kaur* (supra) has been wrongly applied by claims tribunal and it amounts to misconception of law on the part of claims tribunal and therefore, findings given and award made by claims tribunal in that regard is required to be quashed and set aside.

9. At this stage, Learned Advocate Mr. JV Japee submitted that appellant insurance company has deposited entire amount together with costs and interest before claims tribunal and, therefore, some suitable directions may be issued to claims tribunal directing claims tribunal to pay entire amount to third party claimant and direction may be issued to insurance company to recover said amount from owner by filing appropriate execution proceedings before executing court. As against that, learned advocate Mr. Parikh for appellant insurance company submitted that as appellant insurance company has been held not liable

to pay compensation to claimants looking to recent decision of apex court as referred above in case of Dedappa (supra), therefore, amount may be ordered to be refunded to appellant insurance company in both appeals and direction may be issued to owner of vehicle involved in accident so that he can deposit entire amount together with costs and interest before claims tribunal and then, that amount may be ordered to be disbursed in favour of respondents claimants.

10. I have considered submissions made by both learned advocates. Question is that deceased and injured claimant both were travelling in auto rickshaw and tractor with trailer which was not having valid policy of insurance on the date of accident dashed with said auto rickshaw and it resulted in accident and in such a situation, to see that the interest of third party claimant may not suffer, some directions are required to be issued. Insurance Company is liable to pay compensation u/s 147 and 149 to third party provided that insurance policy was in existence at the time of accident. However, Court can direct insurance company to pay amount to claimant and then recover same from owner in accordance with law by initiating execution proceedings against owner of vehicle. In case of Dedappa also, apex court had directed insurance company to pay amount to claimants and then to recover same from owner considering fact that claimants are hailing from lowest strata of the society. In this case also, claimants are hailing from lowest strata of society, therefore, ultimately, claimants may not be made to suffer in getting compensation. Relevant discussion made by apex court in case of Dedappa (supra) in para 28 is therefore reproduced as under:

28. However, as the appellant hails from the lowest strata of society, we are of the opinion that in a case of this nature, we should, in exercise of our extraordinary jurisdiction under Article 142 of the Constitution of India, direct the Respondent No. 1 to pay the amount of claim to the appellants herein and recover the same from the owner of the vehicle viz., Respondent No. 2, particularly in view of the fact that no appeal was preferred by him. We direct accordingly.

11. At this stage, learned advocate Mr. Lakhani for respondent No. 6 owner of vehicle raised contention that before issuance of cheque on 22nd November, 1988, vehicle in question was already transferred in the name of Janubhai Mahmadbhai Mansuri. It is necessary to note that the owner has remained absent before claims tribunal and has not filed any written statement and has not raised any contention before claims tribunal, therefore, now, owner cannot raise any contention in present proceedings against claimants as well as insurance company. Apart from that, if the vehicle in question was already sold out and transferred prior to issuance of cheque in favour of insurance company, then, why owner issued cheque of premium in favour of insurance company in respect of the vehicle in question, meaning thereby, on the date on which cheque was issued for premium by respondent No. 6, it is clear that he was registered owner of vehicle in question and that is why he issued cheque, therefore, now, it

is not open for owner to raise such contention before this court in the appeal filed by insurance company. It is also necessary to note that the respondent No. 6 owner has not filed any appeal before this court challenging those finding of claims tribunal holding owner and insurance company both liable to pay compensation to claimants. Therefore, according to my opinion, it would be just and proper and would met interest of justice if the amount deposited by insurance company appellant in these appeals before claims tribunal is ordered to be disbursed in favour of claimants by claims tribunal. Therefore, it is made clear that the insurance company is not liable to pay compensation to claimants and therefore, directions issued by claims tribunal to that effect are quashed and set aside and rest of award made by claims tribunal is confirmed. However, in the interest of justice, amount of compensation which has been deposited by appellant insurance company together with costs and interest way back in the year 1998 may not be refunded to company but the same amount with interest accrued thereon, if any, is to be paid to respondents claimants by claims tribunal by way of an account payee cheque drawn in their favour in both appeals and respondent No. 6 owner of vehicle involved in accident namely Hirabhai Govabhai Patel is now directed to deposit entire awarded amount together with costs and interest before claims tribunal within two months from date of receipt of copy of this order. After realizing said amount from the owner of vehicle involved in accident namely Respondent No. 6 Hirabhai, it is directed to claims tribunal to pay said amount byway of refund to appellant insurance company by way of an account payee cheque drawn in favour of appellant insurance company without any delay. If awarded amount together with costs and interest is not deposited by owner respondent No. 6 before claims tribunal within the aforesaid period, then, it will be open for insurance company to file appropriate execution proceedings before claims tribunal against owner of vehicle involved in accident for recovering amount awarded by claims tribunal together with costs and interests.

12. Subject to aforesaid observations and directions, these appeals are allowed and impugned award stands modified accordingly. There shall be no order as to costs.