(2005) 08 BOM CK 0148

In the Bombay High Court

Case No : First Appeal No. 710 of 2004

National Insurance Co. Ltd. APPELLANT

Vs

Prakash Sakharam Dudhankar and Others RESPONDENT

Date of Decision : 08-08-2005

Acts Referred:

Motor Vehicles Act, 1988 — Section 147, 147(1), 149(1), 149(2), 166

Citation : (2006) ACJ 1549 : (2006) 2 ALLMR 239 : (2006) 1 BomCR 412 : (2006) 1 CivCC 649 : (2006) 1 MhLj 601

Hon'ble Judges : Kharche S.T., J

Bench : Single Bench

Advocate : S.R. Pathak, for the Appellant; Kukdey and S.S. Sharma, for respondents 3 and 4, for the Respondent

Judgement

Kharche S.T., J.—Heard Mr. Pathak, learned Counsel, for the appellant, Mr. Kukdey, learned Counsel for respondent No. 2 and Mr. Sharma learned Counsel, for respondents 3 and 4 finally.

2. This appeal is against the judgment and award dated 9-12-2002 passed by the Motor Accident Claims Tribunal in Claim Petition No. 433 of 1996 whereby the Tribunal directed the respondent/owner including the insurance company to pay an amount of compensation of Rs. 1,05,000/-with interest at 9% per annum from the date of petition i.e. 7-10-1993 till its realisation. The accident occurred on 9-10-1992. Narayan died in the accident arising out of the use of the motor vehicle i.e. Tipper bearing Registration No. MH-31 /6526. Respondents No. 3 and 4 are the father and mother of the deceased who had filed claim petition u/s 166 of the Motor Vehicles Act, 1988.

3. The learned Counsel for the appellant contended that the deceased was travelling in the aforesaid goods vehicle, i.e. Tipper truck on the date of the accident and, therefore, the insurance company would not be liable to pay compensation. In support of these submissions he relied on the decision of the Apex Court in (National Insurance Co. Ltd. v. Bommithi Subbhayamma) 2005(2)

T.A.C. 1(S.C), wherein it has been held that there is no statutory liability on owner of goods vehicle to get his vehicle insured for any passenger and the insurance company is not statutorily liable for payment of compensation to gratuitous passengers travelling in goods vehicle. The learned Counsel for the insurance company therefore contended that it is only the owner of the motor vehicle involved in the accident who is liable to pay compensation since the deceased was admittedly travelling as a gratuitous passenger in the goods vehicle. He contended that whether the deceased was travelling as a passenger by paying fare is not of much relevance and when it is an admitted position that the deceased was travelling in the goods vehicle as a gratuitous passenger, the insurance company would not be liable to pay compensation.

4. The learned Counsel for the respondent/claimant contended that in view of the decisions of Supreme Court in (National Insurance Co. Ltd. v. Baljit Kaur) 2004(3) Bom.C.R.578 : 2004(3) S.R.J. 178 and in the case of (National Insurance Co. Ltd. v. Challa Upendra Rao) 2005(5) All.M.R. (S.C.) 509, the insurance company is not liable to satisfy the award and then can recover it from the owner of the motor vehicle involved in the accident.

5. Mr. Kukdey, learned Counsel, for the respondent/owner of the vehicle contended that in view of the decision of the Apex Court in (National Insurance Co. Ltd. v. Swaran Singh) : 2004(1) SCALE 180, the insurance comp2004(5) Bom.C.R. 467any is liable to pay compensation because subsection (1) of Section 149 basis a liability upon the insurer to pay to the person entitled to the benefit of the decree as if he were the judgment debtor and the said liability is subject to the provision of this section and that the insurer may be entitled to avoid or cancel or may have avoided or cancelled the policy. Further more, the statute raises a legal fiction to the effect that for the said purpose the insurer would be deemed to be judgment debtor in respect of the liability of the insurer. Furthermore, the insurance company with a view to avoid its liabilities is not only required to show that the conditions laid down u/s 149(2)(a) or (b) are satisfied but is further required to establish that there has been a breach on the part of the insured.

6. This Court has given thoughtful consideration to the contentions canvassed by the learned Counsel for the parties. Two questions of law which arise in this appeal are (i) whether the insurance company would be liable to pay compensation under the provisions of the Motor Vehicles Act if there is a death or bodily injury to the person travelling in the goods vehicle as a passenger in view of the larger Bench decision of Apex Court in National Insurance Co. Ltd. v. Baljit Kaur 2004(3) Bom.C.R.578 : 2004(3) S.R.J. 178 and in the case of National Insurance Co. Ltd. v. Bommithi Subbhayamma 2005(2) T.A.C. 1(S.C.) and (ii) whether the insurance company is liable to satisfy the award in view of Section 168 of the Motor Vehicles Act.

7. In this context, the Apex Court in National Insurance Co. Ltd. v. Bommithi (supra), has laid down that there is no statutory liability on the owner of the

goods vehicle to get his vehicle insured for any passenger and the insurance company is also not statutorily liable for payment of compensation to gratuitous passengers travelling in goods vehicle. It has been specifically observed in para 8 of the judgment as under :

The question again came up for consideration before a 3 Judge Bench of this Court, of which we are members in National Insurance Co. Ltd. v. Baljit Kaur 2004{2) S.C.C. 1, wherein upon considering the effect of amendment carried out in Section 147 of the Motor Vehicles Act, 1988 by Motor Vehicles (Amendment) Act, 1994, it was opined :

By reason of the 1994 Amendment what was added is "including the owner of the goods or his authorised representative carried in the vehicle". The liability of the owner of the vehicle to insure it compulsorily, thus, by reason of the aforementioned amendment included only the owner of the goods or his authorised representative carried in the vehicle besides the third parties. The intention of the Parliament, therefore, could not have been that the words ''any person'' occurring in Section 147 would cover all persons who were travelling in a goods carriage in any capacity whatsoever. If such was the intention there was no necessity of the Parliament to carry out an amendment inasmuch as expression any person contained in sub-clause (i) of Clause (b) of sub-section (1) of Section 147 would have included the owner of the goods or his authorised representative besides the passengers who are gratuitous or otherwise.

The observations made in this connection by the Court in Asha Rani case (supra) to which one of us, Sinha, J., was a party, however, bear repetition :

"In view of the changes in the relevant provisions in the 1988 Act vis-a-vis the 1939 Act, we are of the opinion that the meaning of the words "any person" must also be attributed having regard to the context in which they have been used i.e. "a third party". Keeping in view the provisions of the 1988 Act, we are of the opinion that as the provisions thereof do not enjoin any statutory liability on the owner of a vehicle to get his vehicle insured for any passenger travelling in a goods vehicle, the insurers would not be liable therefore."

In Asha Rani (supra) it has been noticed that sub-clause (i) of Clause (b) of sub-section (1) of Section 147 of 1988 Act speaks of liability which may be incurred by the owner of a vehicle in respect of death of or bodily injury to any person or damage to any property of a third party caused by or arising out of the use of the vehicle in a public place. Furthermore, an owner of a passenger carrying vehicle must pay premium for covering the risks of the passengers travelling in the vehicle. The premium in view of the 1994 Amendment would only cover a third party as also the owner of the goods for his authorised representative and not any passenger carried in a goods vehicle whether for hire or reward or otherwise.

It is, therefore, manifest that inspite of the amendment of 1994, the effect of the provision contained in Section 147 with respect to persons other than the owner of the goods or his authorised representative remains the same. Although the owner of the goods or his authorised representative would now be covered by the policy of insurance in respect of a goods vehicle, it was not the intention of the legislature to provide for the liability of the insurer with respect to passengers, especially gratuitous passengers, who were neither contemplated at the time the contract of insurance was entered into nor any premium, was paid to the extent of the benefit of insurance to such category of people.

8. The question whether the insurer is liable to pay compensation under the provisions of law or under the Motor Vehicles Act if there is death or bodily injury to the person travelling in goods vehicle as a passenger is no longer res integra and there is a clear dictum of Supreme Court in the case of (National Insurance Co. Ltd. v. Ajit Kumar and Ors.) AIR 2003 S.C.W. 4120, that the insurer cannot be made liable to pay compensation if the passenger is travelling in a goods vehicle. In fact, the legal position has been set at rest by the larger Bench decision in the case of (New India Insurance Co. Ltd. v. Asha Rani) 2003(3) Bom.C.R. 765 : AIR 2002 S.C.W. 5209, wherein it has been observed as under :

It is no doubt true that sometimes the legislature amends the law by way of amplification and clarification of an inherent position which is there in the statute, but a plain meaning being given to the words used in the statute, as it stood prior to its amendment of 1994 and as it stands subsequent to its amendment in 1994 and bearing in mind the Objects and Reasons engrafted in the amended provisions referred to earlier, it is difficult for us to construe that the expression including owner of the goods or his authorised representative carried in the vehicle which was added to the pre-existing expression injury to any person is either clarificatory or amplification or the preexisting statute. On the other hand, it clearly demonstrates that the legislature wanted to bring within the sweep of Section 147 and making it compulsory for the insurer to insure even in case of a goods vehicle, the owner of the goods or his authorised representative being carried in a goods vehicle when that vehicle met with an accident and the owner of the goods or his representative either dies or suffers bodily injury.

9. The aforesaid decisions in the cases of Asha Rani and Ajit Kumar have been followed by this Court in the case of New India Assurance Company Ltd. Vs. Santoshidevi Sharma and Others, and therefore the legal position which is no longer res integra as per the clear dictum of the Supreme Court is that the insurer cannot be made liable to pay compensation if the passenger is travelling in the goods vehicle. Therefore, question No. (i) is answered accordingly.

10. So far as question No. (ii) is concerned, there is a larger Bench decision of Apex Court in National Insurance Co. Ltd. v. Baljit Kaur 2004(3) S.R.J. 178, supra, wherein in unequivocal terms it has been held in para 21 as under :

The upshot of the aforementioned discussions is that instead and in place of the insurer the owner of the vehicle shall be liable to satisfy the decree. The question, however, would be as to whether keeping in view the fact that the law was not clear so long such a direction would be fair and equitable. We do not think so. We therefore, clarify the legal position which shall have prospective effect. The Tribunal as also the High Court had proceeded in terms of the decisions of this Court in Satpal Singh (supra). The said decision has been overruled only in Asha Rani (supra). We, therefore, are of the opinion that the interest of justice will be subserved if the appellant herein is directed to satisfy the awarded amount in favour of the claimant if not already satisfied and recover the same from the owner of the vehicle. For the purpose of such recovery, it would not be necessary for insurer to file a separate Suit but it. may initiate a proceeding before the Executing Court 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. We have issued the aforementioned directions having regard to the scope and purport of Section 168 of the Motor Vehicles Act, 1988 in terms whereof it is not only entitled to determine the amount of claim as put forth by the claimant for recovery thereof from the insurer, owner or driver of the vehicle jointly or severally but also the dispute between the insurer on the one hand and the owner or driver of the vehicle involved in the accident inasmuch as can be resolved by the Tribunal in such a proceeding.

11. The aforementioned larger Bench decision of the Supreme Court squarely applies to the facts and circumstances of the present case. It is not disputed that deceased Narayan was travelling in the tipper as a passenger. It is not relevant as to whether he was travelling as a fare paying passenger or a gratuitous passenger. Since he was travelling in the goods vehicle, the insurance company is not statutorily liable to pay compensation and the question has to be answered in the light of larger Bench decision of Supreme Court in the case Baljit Kaur (supra) wherein the Apex Court considered the scope of Section 168 of the Motor Vehicles Act and held that the interest of justice will be served if the insurance company is directed to satisfy the award and then recover the same from the owner of the vehicle and for the purpose of such recovery it would not be necessary for the insurer to file a separate suit but it may initiate a proceeding before the Executing Court as if the dispute between the insurer and the owner was the subject-matter of determination before the Tribunal.

12. The question whether the insurance company is liable to satisfy the award in view of Section 168 of the Motor Vehicle Act was not the subject for consideration of the Supreme Court in the case of National Insurance Co. Ltd. v. Boomithi, supra, and thus the decision of the larger Bench in the case of National Insurance Co. Ltd. v. Baljit Kaur, supra, is occupying the field as on today and therefore, it is obvious that the interest of justice will be served if the insurance company is directed to satisfy the award and then recover the same from the owner of the vehicle and for the purpose of such recovery it would not be necessary for the insurer to file a separate suit but it may initiate a proceeding before the Executing Court as if the dispute between the insurer and the owner

was the subject-matter of determination before the Tribunal. In such circumstances, this appeal is partly allowed and stands disposed of in the aforesaid terms.

