
(2016) 09 AHC CK 0272

In the Allahabad High Court

Case No : First Appeal From Order No. 2844 of 2016

National Insurance Co. Ltd.

APPELLANT

Vs

Rajni Devi

RESPONDENT

Date of Decision : 16-09-2016

Acts Referred:

Motor Vehicles Act, 1988 — Section 149

Citation : (2017) AAC 677 : (2017) 3 ADJ 754 : (2017) 1 AILLJ 657

Hon'ble Judges : Krishna Murari and Prashant Kumar, JJ.

Bench : Division Bench

Advocate : Vinay Kumar Khare, Advocate, for the Appellant

Final Decision : Dismissed

Judgement

1. This appeal under Section 173 of the Motor Vehicles Act has been filed by the National Insurance Company Limited challenging the judgment and award dated 30.04.2016 passed by the Additional District Judge (Court No. 3)/Motor Accident Claims Tribunal, Kushinagar at Padrauna awarding a sum of Rs. 5,61,000/- along with 7% simple interest as compensation on death of Satya Prakash Dwivedi, predecessor-in-interest of the claimant-respondents in a motor accident. Tribunal further gave insurance company a right to recover the awarded amount from the owner of the offending vehicle as driving license of the driver of the offending vehicle was not produced.

2. Learned counsel for the appellant contends that once driving license of the driver of offending vehicle was not produced in evidence, it shall be presumed that driver was not having a valid driving license and vehicle was being driven in violation of the insurance policy and thus, the appellant ? insurance company was not liable to pay the award and the tribunal committed manifest error of law in fastening the said liability upon the insurance company.

3. The issue for consideration is whether in such a circumstance the insurance company can be fastened with the liability to satisfy the amount and recover the

same from the insured.

4. Section 149 of the Motor Vehicles Act 1988, hereinafter referred to as the "Act" prescribes the duty of insurers to satisfy judgments and awards against persons insured in respect of third party risks, which reads as under :

"149. Duty of insurers to satisfy judgments and awards against persons insured in respect of third party risks.

(1) If, after a certificate of insurance has been issued under subsection (3) of section 147 in favour of the person by whom a policy has been effected, judgment or award in respect of any such liability as is required to be covered by a policy under clause (b) of sub-section (1) of section 147 (being a liability covered by the terms of the policy) [or under the provisions of section 163-A] is obtained against any person insured by the policy, then, notwithstanding that the insurer may be entitled to avoid or cancel or may have avoided or cancelled the policy, the insurer shall, subject to the provisions of this section, pay to the person entitled to the benefit of the decree any sum not exceeding the sum assured payable thereunder, as if he were the judgment debtor, in respect of the liability, together with any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments.

(2) No sum shall be payable by an insurer under sub-section (1) in respect of any judgment or award unless, before the commencement of the proceedings in which the judgment or award is given the insurer had notice through the Court or, as the case may be, the Claims Tribunal of the bringing of the proceedings, or in respect of such judgment or award so long as execution is stayed thereon pending an appeal; and an insurer to whom notice of the bringing of any such proceedings is so given shall be entitled to be made a party thereto and to defend the action on any of the following grounds, namely:-

a. that there has been a breach of a specified condition of the policy, being one of the following conditions, namely:-

i. a condition excluding the use of the vehicle-

a. for hire or reward, where the vehicle is on the date of the contract of insurance a vehicle not covered by a permit to ply for hire or reward, or

b. for organised racing and speed testing, or

c. for a purpose not allowed by the permit under which the vehicle is used, where the vehicle is a Transport vehicle, or

d. without side-car being attached where the vehicle is a motor cycle; or

(ii) a condition excluding driving by a named person or persons or by any person who is not duly licensed, or by any person who has been disqualified for holding or obtaining a driving licence during the period of disqualification; or

(iii) a condition excluding liability for injury caused or contributed to by conditions of war, civil war, riot or civil commotion; or

b. that the policy is void on the ground that it was obtained by the non-disclosure of a material fact or by a representation of fact which was false in some material particular.

(3). Where any such judgment as is referred to in sub-section (1) is obtained from a Court in a reciprocating country and in the case of a foreign judgment is, by virtue of the provisions of section 13 of the Code of Civil Procedure, 1908 (5 of 1908) conclusive as to any matter adjudicated upon by it, the insurer (being an insurer registered under the Insurance Act, 1938 (4 of 1938) and whether or not he is registered under the corresponding law of the reciprocating country) shall be liable to the person entitled to the benefit of the decree in the manner and to the extent specified in sub-section (1), as if the judgment were given by a Court in India:

Provided that no sum shall be payable by the insurer in respect of any such judgment unless, before the commencement of the proceedings in which the judgment is given, the insurer had notice through the Court concerned of the bringing of the proceedings and the insurer to whom notice is so given is entitled under the corresponding law of the reciprocating country, to be made a party to the proceedings and to defend the action on grounds similar to those specified in sub-section (2).

(4). Where a certificate of insurance has been issued under subsection (3) of section 147 to the person by whom a policy has been effected, so much of the policy as purports to restrict the insurance of the persons insured thereby by reference to any conditions other than those in clause (b) of sub-section (2) shall, as respects such liabilities as are required to be covered by a policy under clause (b) of sub-section (1) of section 147 be of no effect:

Provided that any sum paid by the insurer in or towards the discharge of any liability of any person which is covered by the policy by virtue only of this sub-section shall be recoverable by the insurer from that person.

(5). If the amount which an insurer becomes liable under this section to pay in respect of a liability incurred by a person insured by a policy exceeds the amount for which the insurer would apart from the provisions of this section be liable under the policy in respect of that liability, the insurer shall be entitled to recover the excess from that person.

(6). In this section the expressions "material fact" and "material particular" means, respectively, a fact or particular of such a nature as to influence the judgment of a prudent insurer in determining whether he will take the risk and, if so, at what premium and on what conditions, and the expression "liability covered by the terms of the policy" means a liability which is covered by the policy or which would be so covered but for the fact that the insurer is entitled to

avoid or cancel or has avoided or cancelled the policy.

(7). No insurer to whom the notice referred to in sub-section (2) or sub-section (3) has been given shall be entitled to avoid his liability to any person entitled to the benefit of any such judgment or award as is referred to in sub-section (1) or in such judgment as is referred to in sub-section (3) otherwise than in the manner provided for in sub-section (2) or in the corresponding law of the reciprocating country, as the case may be.

Explanation.- For the purpose of this section, "Claims Tribunal" means a Claims Tribunal constituted under section 165 and "award" means an award made by that Tribunal under section 168.

5. A bare reading of the aforesaid provision goes to show that after certificate of insurance has been issued under Section 147 (3) of the Act and a judgment or award has been made in respect of a liability covered by Section 147 (1) (b) against a person insured by the policy then even if the insurer is entitled to avoid or cancel or has avoided or cancelled the policy shall pay to the person entitled to the benefit of the award any sum not exceeding the sum assured as if he was the judgment debtor. Section 149 (1) puts obligation upon insurer to satisfy award made against a person insured by the policy. This obligation is depended upon three conditions, namely, (i) that a certificate of insurance has been issued under Section 147 (3); (ii) that the judgment or award is in respect of a liability required to be covered by Section 147 (1) (b); and (iii) that the judgment or award is against the person insured by the policy. The liability of the insurer is based upon legal fiction i. e. insurer must pay as if he is the judgment debtor.

6. In view of the provisions of sub-section (4) of Section 149, the insurer is under liability to pay even if it is entitled to cancel or avoid the policy or has actually cancelled or avoided it. The provisions of sub-section (4) enables the insurer to recover any sum paid by it towards the discharge of a liability of any person covered by the policy from him. Proviso provides statutory remedy to the insurer to recover the amount paid by it in discharge of the liability imposed upon the insured under a judgment or award.

7. It is undisputed that Motor Vehicles Act is a beneficent statute. The social need of the victim or his dependents to be compensated was subject matter of consideration by the Hon'ble Apex Court in the case of British India General Insurance Co. v. Capt. Itbeer Singh, (1960) 1 SCR 168 and it was observed as under :

"Again, we find the contention wholly unacceptable. The statute has no doubt created a liability in the insurer to the injured person but the statute has also expressly confined the right to avoid that liability to certain grounds specified in it. It is not for us to add to those grounds and therefore, to the statute for reasons of hardship. We are furthermore not convinced that the statute causes any hardship. First, the insurer has the right, provided has reserved it by the policy, to defend the action in the name of the assured and if he does so, all

defences open to the assured can then be urged by him and there is no other defence that he claims to be entitled to urge. He can thus avoid all hardship if any, by providing for a right to defend the action in the name of the assured and thus he has full liability to do so. Secondly, if he has been made to pay something which on the contract of the policy he was not bound to pay, he can under the proviso to sub-section (3) and under sub-section (4) recover it from the assured. It was said that the assured might be a man of straw and the insurer might not be able to recover anything from him. But the answer to that is that it is the insurer's bad luck. In such circumstances the injured person also would not have been able to recover the damages suffered by him from the assured, the person causing the injuries."

8. The same view has been reaffirmed by the Hon'ble Apex Court in *Skandia Insurance Company Limited v. Kokilaben Chandrvadan and others* (1987) 2 SCC 654 *Sohan Lal Passi v. P. Sesh Reddy and others* (1996) 5 SCC-21.

9. In the case of *National Insurance Co. Ltd., v. Swaran Singh* 2004 (2) AWC 1589 SC, while analysing the provision of Section 149, it has again been held that once the assured proved that the accident was covered by the compulsory insurance clause, it was for the insurer to prove that it falls within an exception. The liability of the insurer was held to be statutory and its liability to satisfy the decree passed in favour of the third party was also held to be of the same character. The Apex Court emphasised that if the insurer was made to satisfy the award even though it was not bound to pay the same under the contract of insurance. It was open to him to recover it from the assured. In this context, the Hon'ble Apex Court in paragraph 81 of the reports has observed as under :

"81. Sub-section (5) of Section 149 which imposed a liability on the insurer must also be given its full effect. The insurance company may not be liable to satisfy the decree and, therefore, its liability may be zero but it does mean that it did not have initial liability at all. Thus, if the insurance company is made liable to pay any amount, it can recover the entire amount paid to the third party on behalf of the assured. If this interpretation is not given to the beneficial provisions of the Act having regard to its purport and object, we fail to see a situation where beneficial provisions can be given effect to. Sub-section (7) of Section 149 of the Act, to which pointed attention of the Court has been drawn by the learned counsel for the petitioner, which is in negative language may now be noticed. The said provision must be read with sub-section (1) thereof. The right to avoid liability in terms of subsection (2) of Section 149 is restricted as has been discussed hereinbefore. It is one thing to say that the insurance companies are entitled to raise a defence but it is another thing to say that despite the fact that its defence has been accepted having regard to the facts and circumstances of the case, the Tribunal has power to direct them to satisfy the decree at the first instance and then direct recovery of the same from the owner. These two matters stand apart and require contextual reading."

10. Hon'ble Apex Court summed by the conclusion in respect of point in issue in

paragraphs 101 and 102 of the reports as under :

"101. It is, therefore, evident from the discussions made hereinbefore that the liability of the insurance company to satisfy the decree at the first instance and to recover the awarded amount from the owner or driver thereof has been holding the field for a long time."

"102. Apart from the reasons stated hereinbefore, the doctrine of stare decisis persuades us not to deviate from the said principle."

11. In the case of National Insurance Co. Ltd. v. Challa Upendra Rao, (2004) 8 SCC 517, it has been observed as under :-

"Considering the beneficial object of the Act, it would be proper for the insurer to satisfy the award, though in law it has no liability. In some cases the insurer has been given the option and liberty to recover the amount from the insured. For the purpose of recovering the amount paid from the owner, the insurer shall not be required to file a suit. It may initiate a proceeding before the concerned 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. Before release of the amount to the claimants, owner of the offending vehicle shall furnish security for the entire amount which the insurer will pay to the claimants. The offending vehicle shall be attached, as a part of the security. If necessity arises the executing Court shall take assistance of the Regional Transport Authority concerned. The executing Court shall pass appropriate orders in accordance with law as to the manner in which the owner of the vehicle shall make payment to the insurer. In case there is any default it shall be open to the executing court to direct realization by disposal of the securities to be furnished or from any other property or properties of the owner of the vehicle i.e. the insured. In the instant case considering the quantum involved it is in the discretion of the insurer to decide whether it would take steps for recovery of the amount from the insured."

12. Same principle was reiterated by the Hon"ble Apex Court in the case of Oriental Insurance Co. Ltd v. Nanjappan, AIR 2004 SC 1630 in the following words:-

"For the purpose of recovering the same from the insured, the insurer shall not be required to file a suit. It may initiate a proceeding before the concerned 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. Before release of the amount to the insured, owner of the vehicle shall be issued a notice and he shall be required to furnish security for the entire amount which insurer will pay to the claimants. The offending vehicle shall be attached, as a part of the security. If necessity arises the Executing Court shall take assistance of the concerned Regional Transport Authority. The Executing Court shall pass appropriate orders in accordance with law as to the manner in which the insured, owner of the

vehicle shall make payment to the insurer. In case there is any default it shall be open to the Executing Court to direct realization by disposal of the securities to be furnished or from any other property or properties of the owner of the vehicle, the insured."

13. It may also be pertinent to point out that in the case of *National Insurance Co. v. Roshan Lal* passed in SLP (C) No. 5669 of 2006 vide order dated 19th January, 2007 the issue whether direction can be issued to the insurance company to discharge the liability under the award first and then recover it from the owner has been referred for adjudication by a larger Bench. Similarly, in *National Insurance Co. Ltd. v. Parvathneni* (2009) 8 SCC 785, the Apex Court has referred the following identical question for consideration by a larger Bench :

(1) If an insurance company can prove that it does not have any liability to pay any amount in law to the claimants under the Motor Vehicles Act or any other enactment, can the court yet compel it to pay the amount in question giving it liberty to later on recover the same from the owner of the vehicle.

(2) Can such a direction be given under Article 142 of the Constitution, and what is the scope of Article 142?"

14. During the pendency of adjudication of the aforesaid questions by larger Bench, the matter again came up for consideration before Apex Court in the case of *Manager, National Insurance Co. Ltd. v. Saju P. Paul*, (2013) 2 SCC 41 and it was held that pendency of consideration of the above questions by a larger Bench does not mean that the law laid down by the judgment in the case of *Baljit Kaur* (sic) and *Challa Upendra Rao* (supra) should not be followed particularly. Accordingly, the insurance company was permitted to recover the amount paid from the owner by following the procedure laid down in *Challa Upendra Rao*. Undoubtedly, the issue as to whether a direction can be issued to the insurance company to pay the amount in the first instance and to recover it thereafter from the owner, following the procedure which is laid down in *Challa Upendra Rao* is a matter pending reconsideration before a larger Bench of the Supreme Court. However, as observed, pendency of the reference to a larger Bench by itself does not mean that the same course should not be followed in the meantime.

15. While considering the question of right of the insurance company to file an appeal under Section 173 of the Act where the insurer has been directed to pay the compensation awarded to the claimant and thereafter to recover it from the owner of the offending vehicle, a Full Bench of our Court in the case of *United India Insurance Company Limited v. Smt. Shashi Prabha Sharma and others*, 2015 (5) AWC 4774 has held as under :

"In these circumstances, we hold that where the insurer is directed to pay the amount in the first instance despite having been held not to be under a legal liability to pay the awarded amount, while permitting the insurer to recover the amount from the owner, the procedure which has been laid down in *Challa Upendra Rao* (AIR 2004 SC 4882)(supra) would have to be followed. This would

envisage that before the amount is released to the claimant, the owner of the offending vehicle shall furnish security for the amount which the insurer has to pay to the claimants. The offending vehicle is to be attached as a part of the security for the purpose of recovering the amount from the insured. The insurer shall not be required to file a suit and may initiate a proceeding before the executing Court. The executing Court may pass appropriate orders in accordance with law as to the manner in which the insured, namely the owner of the vehicle, shall make payment to the insurer. In the event that there is any default, it is open to the executing Court to direct realisation by the disposal of the securities to be furnished or from any other property or properties of the owner of the vehicle. In the event that the person on whose behalf payment has been made by the insurer, does not furnish security or is not in a position to furnish security to the insurer, the insurer should promptly move the executing Court. The executing Court shall then duly ensure that it exercises all its available powers in execution in accordance with law so that while on one hand payment is made to the person to whom it is due, the concerns of the insurer are duly balanced. We may only add here that all necessary and proper steps should be taken by the executing Court to ensure that the intent and object of the legislature in enacting the beneficial provisions of the Act is duly preserved and are expeditiously implemented."

16. In view of the aforesaid settled legal proposition by judicial pronouncements of the Apex Court as well as Full Bench of this Court, we do not find any force in the argument advanced by the learned counsel for the appellant that since there was a breach of the terms and conditions of the policy the insurance company cannot be put under a responsibility to satisfy the award and to recover it from the insured thereafter. The appeal is, thus, devoid of merits and accordingly stands dismissed.

17. The insurance company shall proceed to deposit the entire awarded amount with the tribunal who in turn shall release the same to the claimants after following the direction and procedure prescribed for release of the amount by the Full Bench of this Court in the case of United India Insurance Co. Ltd. (supra).