
(2011) 05 AHC CK 0289

In the Allahabad High Court

Case No : First Appeal From Order No. 2851 of 2010

National Insurance Company Ltd.

APPELLANT

Vs

Nathu Ram Sharma and Others

RESPONDENT

Date of Decision : 25-05-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 13, 13(1), 13(2)
Motor Vehicles Act, 1988 — Section 147(1), 147(2), 147(3), 149, 149(2)

Citation : (2011) 8 ADJ 165

Hon'ble Judges : Shyam Shanker Tiwari, J; Satya Poot Mehrotra, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

1. The present Appeal has been filed u/s 173 of the Motor Vehicles Act, 1988 (in short "the Act") against the judgment and order / award dated 6.4.2010 passed by the Motor Accidents Claims Tribunal, Etawah in Motor Accident Claim Petition No. 738 of 2008 filed by the claimant Respondent Nos. 1 to 3 on account of the death of Vijay Kumar in an accident, which took place on 25.10.2008.

2. It was, inter alia, averred in the Claim Petition that on 25.10.2008, the said Vijay Kumar boarded Bus No. UP75A7639 (hereinafter also referred to as "the vehicle in question") after paying fare for going from Etawah to his house; and that when the said Bus starting from Etawah reached near Kachaura Ghat under Police Station Belari, District Etawah, the Driver of the said Bus did not slowdown the speed of the said Bus, and he could not see the black stone gitti spread on the road, and the said Bus suddenly overturned on the gitti, as a result of which, the said Vijay Kumar, aged 26 years, died; and that the Driver of the said Bus at the time of the accident was Rashid Ahmad, son of Mushtaq Ahmad; and that had the said Bus been driven by the Driver carefully and following Traffic Rules, the accident could have been avoided; and that the said Vijay Kumar was working on the post of Supervisor in Mohan Dairy, Mahavir Ganj, Auraiya for the last about two and half years.

3. The Claim Petition was contested by Smt. Shitla Devi, owner of the vehicle in question (Respondent No. 4 herein) as well as by the Appellant Insurance Company. In the Written Statement filed on behalf of the said Smt. Shitla Devi (Respondent No. 4 herein) through her Special Power of Attorney Holder, Arun Kumar, the averments made in the Claim Petition were denied. The involvement of the vehicle in question in the accident was denied. It was alleged that Vijay Kumar collided with some other vehicle and he died on account of his own mistake, and the liability could not be fastened on the vehicle in question and its Driver. It was further alleged that at the time of the alleged accident, all the papers in respect of the vehicle in question were valid and the Driver of the vehicle in question was having valid Driving License. It was further alleged that in any case, the liability for payment of compensation was on the Appellant Insurance Company.

4. The Appellant Insurance Company in its Written Statement denied the averments made in the Claim Petition. It was alleged that the death of the said Vijay Kumar did not occur in the alleged accident nor was the said Vijay Kumar traveling in the said Bus (vehicle in question) after purchasing ticket. It was further alleged that the death of the said Vijay Kumar occurred due to some other vehicle or some other cause. It was further alleged that the terms of the Insurance Policy had been violated.

5. The Tribunal framed four Issues in the case.

6. Issue No. 1 was regarding factor of the accident having taken place on 25.10.2008 on account of rash and negligent driving by the Driver of the vehicle in question resulting in the death of the said Vijay Kumar.

7. Issue No. 2 were as to whether the vehicle in question was insured with the Appellant Insurance Company on the date of the accident.

8. Issue No. 3 were as to whether the Driver of the vehicle in question was having valid and effective Driving License on the date of the accident.

9. Issue No. 4 was as to whether the claimant Respondent Nos. 1 to 3 were entitled to get any compensation, and if yes, the quantum of such compensation, and against which opposite party in the Claim Petition.

10. The claimant Respondent Nos. 1 to 3 examined three witnesses on their behalf. Further, the claimant Respondent Nos. 1 to 3 filed documentary evidence including Photostat copies of the Insurance Policy, General Diary, Application of Ram Autar, Panchayatnama, Post Mortem Report, Registration Certification, Permit, Driving License, Voter Identity Card and License in respect of the Dairy. Original Salary Certificate issued by Mohan Dairy was also filed.

11. The owner of the vehicle in question, Smt. Shitla Devi (Respondent No. 4 herein) filed documentary evidence, namely, Photostat copies of the Registration Certificate, Insurance Cover Note, Permit and Driving License.

12. The Appellant Insurance Company filed documentary evidence, namely, attested copy of the Insurance Policy and Form No. 54 containing verification report in respect of the Driving License.

13. On consideration of the material on record, the Tribunal recorded its findings on various Issues.

14. As regards Issue No. 1, the Tribunal held that the accident in question took place on account of the rash and negligent driving by the driver of the said Bus (vehicle in question), which resulted in the death of the said Vijay Kumar. Issue No. 1 was accordingly decided in the affirmative.

15. As regards Issue No. 2, the Tribunal held that the vehicle in question was insured with the Appellant Insurance Company on the date of the accident in question. Issue No. 2 were accordingly decided in the affirmative.

16. As regards Issue No. 3, the Tribunal held that the Driver of the vehicle in question (Rashid Ahmad) was having valid and effective Driving License on the date of the accident. The Tribunal further held that there was valid Permit in respect of the vehicle in question. Issue No. 3 were decided accordingly.

17. As regards Issue No. 4, the Tribunal held that the claimant Respondent Nos. 1 to 3 were entitled to get compensation amounting to Rs. 5,50,500/- with simple interest @ 6% per annum with effect from the date of presentation of the Claim Petition till the date of actual payment.

18. On the basis of the above findings, the Tribunal gave the impugned Award awarding Rs. 5,50,500/- as compensation to the claimant Respondent Nos. 1 to 3 with simple interest @ 6; per annum with effect from the date of presentation of the Claim Petition till the date of actual payment.

19. The Appellant Insurance Company has filed the present Appeal against the said Award.

20. We have heard Shri S.K. Mehrotra, learned Counsel for the Appellant Insurance Company, and perused the record filed with the Appeal.

21. From a perusal of the record, it is evident that an Application u/s 170 of the Act was filed on behalf of the Appellant Insurance Company. However, by the order dated 21.11.2009, the Tribunal rejected the said Application inter alia, observing that the witnesses had been cross examined on behalf of the owner of the vehicle in question (Respondent No. 4 herein).

22. Section 170 of the Act lays down as under:

170 Imp leading insurer in certain cases Where in the course of any inquiry, the Claims Tribunal is satisfied that-

(a) there is collusion between the person making the claim and the person against whom the claim is made, or

(b) the person against whom the claim is made has failed to contest the claim, it may, for reasons to be recorded in writing, direct that the insurer who may be liable in respect of such claim, shall be impleaded as a party to the proceeding and the insurer so impleaded shall thereupon have, without prejudice to the provisions contained in Sub-section (2) of Section 149, the right to contest the claim on all or any of the grounds that are available to the person against whom the claim has been made.

23. Section 149 of the Act referred to in Section 170 of the said Act is reproduced below:

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 Sub-section (3) of Section 147 in favor 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 163A] 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 there under, 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 organized 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 sidecar 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 license 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 nondisclosure 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 Sub-section (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 condition 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 expression "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 purposes of this section, "Claims Tribunal" means a Claims Tribunal constituted u/s 165 and "award" means an award made by that Tribunal u/s 168.

24. Reading Sections 170 and 149(2) of the Act together, it is evident that in case the Tribunal grants permission to the insurer u/s 170, the insurer will get right to contest the Claim Petition on all or any of the grounds that are available to the person against whom the claim has been made. However, if such permission is not granted by the Tribunal, then the insurer will be entitled to contest the Claim Petition on the limited grounds mentioned in Sub-section (2) of Section 149 of the Act. It follows, therefore, that in case an appeal is filed by the insurer against a 7 Award in a case where its application u/s 170 of the Act was rejected by the Tribunal, it (insurer) will be able to challenge the Award only on the limited grounds mentioned in Sub-section (2) of Section 149 of the said Act.

25. The first question to be considered is as to whether the Tribunal was right in passing the order dated 21.11.2009 rejecting the said application u/s 170 of the Act filed on behalf of the Appellant Insurance Company.

26. Section 170 of the Act contemplates the following two situations where the insurer may be given, without prejudice to the provisions contained in Sub-section (2) of Section 149, the right to contest the claim on all or any of the grounds that are available to the person against whom the claim has been made:

(a) where there is collusion between the person making the claim and the person against whom the claim is made, or

(b) where the person against whom the claim is made has failed to contest the claim.

27. In the present case, no collusion has been shown between the claimant Respondent Nos. 1 to 3 and the owner of the vehicle in question namely, Smt. Shitla Devi (Respondent No. 4 herein). Therefore, situation (a), mentioned above, has not been shown to exist in the present case.

28. As is evident from the impugned Award, Written Statement was filed on behalf of the said Smt. Shitla Devi (Respondent No. 4 herein) denying the

averments made in the Claim Petition. Further, various documents including Photostat copies of the Insurance Cover Note, Permit and Driving License were filed on behalf of the said Smt. Shitla Devi (Respondent No. 4 herein). The witnesses examined on behalf of the claimant Respondent Nos. 1 to 3 was cross examined on behalf of the said Smt. Shitla Devi (Respondent No. 4 herein) as noted by the Tribunal in its said order dated 21.11.2009 passed on the Application u/s 170 of the Act.

29. It is, thus, evident that the owner of the vehicle in question (Respondent No. 4 herein) against whom the claim was made, was contesting the Claim Petition. Therefore, situation (b), mentioned above, also does not exist in the present case.

30. In view of the above, we are of the opinion that the application u/s 170 of the Act, filed on behalf of the Appellant Insurance Company, was rightly rejected by the said order dated 21.11.2009.

31. The next question to be considered is as to on what grounds, the Appellant Insurance Company can challenge the impugned Award, and as to whether such challenge is valid.

32. As noted above, in the present case, the Tribunal rejected the application of the Appellant Insurance Company for permission u/s 170 of the Act.

33. In view of the rejection of the said application u/s 170 of the Act, it is evident that the Appellant Insurance Company can challenge the impugned Award only on the grounds mentioned in Sub-section (2) of Section 149 of the Act. Such grounds are evidently in respect of Issue Nos. 2 and 3.

34. As noted above, in regard to Issue No. 2, the Tribunal has recorded finding of fact that at the time of the accident, the vehicle in question was insured with the Appellant Insurance Company. In this regard, it is noteworthy that the Insurance Policy brought on record before the Tribunal showed that the vehicle in question was insured with the Appellant Insurance Company for the period with effect from 6.6.2008 to 5.6.2009, and, thus, the vehicle in question was insured with the Appellant Insurance Company on the date of the accident, namely, 25.10.2008. It is further noteworthy that the factor of the insurance of the vehicle in question with the Appellant Insurance Company was got verified by the Appellant Insurance Company itself.

35. As regards Issue No. 3, the Tribunal has recorded finding of fact that at the time of the accident, the Driver of the vehicle in question was having valid and effective Driving License, and there was valid Permit in operation in respect of the vehicle in question.

36. Shri S.K. Mehrotra, learned Counsel for the Appellant Insurance Company has not been able to show any error or infirmity or illegality in the aforesaid findings recorded by the Tribunal on Issue Nos. 2 and 3.

37. Having perused the record filed with the Appeal, we are of the opinion that the findings recorded by the Tribunal on the aforesaid Issues were correct, and the same do not suffer from any error or infirmity or illegality.

38. Therefore, we are of the view that the Appellant Insurance Company has failed to establish any error or infirmity or illegality in the impugned Award on the grounds open to the Appellant Insurance Company to raise in view of the provisions of Sub-section (2) of Section 149 of the Act.

39. Shri S.K. Mehrotra, learned Counsel for the Appellant Insurance Company submits that the involvement of the vehicle in question in the alleged accident was not established, and the Tribunal erred in deciding Issue No. 1.

40. Shri S.K. Mehrotra, learned Counsel for the Appellant Insurance Company further submits that the quantum of compensation as determined by the Tribunal in deciding Issue No. 4 are not correct.

41. In our opinion, as the application of the Appellant Insurance Company u/s 170 of the Act was rejected by the Tribunal, it is not open to the Appellant Insurance Company to raise the question of involvement of the vehicle in question in the accident or the question of quantum of compensation awarded by the Tribunal in the impugned Award. The pleas raised in this regard by Shri S.K. Mehrotra, learned Counsel for the Appellant Insurance Company, cannot, therefore, be considered.

42. In view of the above, we are of the opinion that the Appeal filed by the Appellant Insurance Company lacks merits, and the same is liable to be dismissed.

43. The Appeal is accordingly dismissed.

44. However, on the facts and in the circumstances of the case, there will be no order as to costs.

45. The amount of Rs. 25,000/- deposited by the Appellant Insurance Company while filing the present Appeal will be remitted to the Tribunal for being adjusted towards the amount payable under the impugned Award.