(2017) 07 GUJ CK 0050

In the Gujarat High Court

Case No : 1699 of 2016

NEW INDIA ASSURANCE CO. LTD — APPELLANT

Vs

GORDHANBHAI DHURSINGBHAI BHILAD & ORS. — RESPONDENT

Date of Decision : 07-07-2017

Acts Referred:

Motor Vehicles Act, 1988, Section 147, Section 147 - Requirements of policies and limits of liability

Citation : (2017) 07 GUJ CK 0050

Hon'ble Judges : R.M.Chhaya

Bench : Single Bench

Advocate : AJAY R MEHTA

Final Decision : Disposed

Judgement

1. The present appeal is directed against the judgment and award dated 25.02.2016 passed by the learned Motor Accident Claims Tribunal (Aux), Vadodara at Chhotaudepur in MACP No.1298/95.

2. Heard Mr. Ajay R. Mehta, learned advocate for the

appellant. Though served, no one appears for the respondents. Perused the Record and Proceedings of the Tribunal.

3. The record indicates that the accident occurred on 08.06.1995 when the vehicle in question being Truck No.GJ-6U-7705 was being driven by the driver of the said truck of the ownership of respondent no.2. The victim sustained grievous injuries due to the accident. The record indicates that the vehicle in question dashed with the roadside tree and turtled in the roadside ditch and the FIR came to be lodged with Bodeli police station being FIR No.I-CR No.57/95. Respondents no.1-claimant preferred claim petition, which came to be registered as MACP No.1298/95. The appellant filed its written statement at Exhibit 19 and the parties adduced oral as well as documentary evidence and the learned Tribunal by the impugned judgment and award was pleased to

allow the claim petition against the original opponent no.2, i.e., owner of the truck. However, even while exonerating the appellant insurance company from its liability to indemnify the owner of the truck, provided that the insurance company shall have to pay the awarded amount to the claimants and then it may have to recover the same from opponent no.2, i.e., owner of the offending vehicle. Feeling aggrieved with the same, the present appeal is filed.

4. Mr. Ajay Mehta, learned counsel appearing for the appellant contended as under -

1) That the injured victim was travelling in a goods vehicle which is accepted by the driver and therefore, the Tribunal has rightly exonerated the appellant insurance company.

2) It was contended that it is not in dispute that the injured victim was illegal occupant in a goods vehicle whose risk was neither required to be covered nor as a matter of fact covered and therefore, the insurance company cannot be made liable to satisfy the award and then recover it from the owner.

3) It was also contended that the Hon''ble Tribunal has erred in giving such direction as such direction can only be given by the Hon''ble Apex Court in exercise of the power and jurisdiction under Article 142 of the Constitution and such power is not available with the Tribunal and even with this Court and therefore, the impugned award is bad and illegal.

5. Mr. Mehta, learned counsel has relied upon the following judgements -

1) Order dated 17.08.2015 passed in FA No.2684/04 and allied matters (Coram :Akil Kureshi, J.)

2) Judgment and order dated 10.06.2015 passed in FA No.3966/12 and allied matters. (Coram: Harsha Devani, J.)

6. As stated hereinabove, the respondents have preferred not to appear before this Court even though the record indicates that the notice is served. Upon considering the submissions made as well as on perusal of the record and proceeding, in para 17, the Hon''ble Tribunal while considering the liability, has clearly held that the vehicle involved in the accident was a goods vehicle and the injured victim was an unauthorised passenger. In coming to the said conclusion, the Tribunal has relied upon the FIR and the police papers of accident in particular.

7. It deserves to be noted that in the written statement at Exhibit 19, the appellant has contended at as provided under section 147 of the Motor Vehicles Act, 1988, the goods vehicle cannot carry any passenger and the FIR clearly spells out that their were 12 passengers. The same thing is reiterated in the oral deposition of the witness of the appellant at Exhibit 50. Even the statements before the appellant shows that when they were returning from their work near Kapurai chokdi, on hand being shown, the driver of the vehicle

stopped the truck and permitted them to travel. The appellant has proved the fact that the injured victim was travelling in goods vehicle which was not insured for such purpose and was a gratuitous passenger. The Hon''ble Apex Court in the case of National Insurance Company Ltd. vs. Bommithi Subbhayamma & Ors . reported in 2005 ACJ 721, has observed thus -

"8. 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 & Ors, 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 :

"26. 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 the 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 in spite 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 authorized representative remains the same. Although the owner of the goods or his authorized 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."

Having considered such binding decision of the Apex Court, in para 17, the Tribunal rightly observed that the insurance company is not liable and responsible to pay any amount of compensation to the claimant and was pleased to hold that the owner of the truck would be liable.

8. This Hon''ble Court (Coram : Akil Kureshi, J.), in identical fact circumstances, in First Appeal No.2684/04 and allied matters, by an order dated 17.08.2015, has observed thus -

"4. I have heard learned Counsel for the parties at considerable length. The issue of what should be the course of action to be adopted by the Claims Tribunal or the High Court when it is found that on account of fundamental breach in the policy condition, the insurer is not liable to cover the risk of the insured, but looking to the condition of the insured and the poor condition of the claimants, it would be difficult for the claimants to effect recovery of the compensation from the insured, has given rise to many Supreme Court judgments. In many cases, the Supreme Court has, in exercise of its extraordinary jurisdiction under Article 142 of the Constitution, given directions for first payment by the Insurance Company and then permitting the Insurance Company to recover the same from the insured. This formula was adopted by the Supreme Court in case of Baljit Kaur (supra). It was also so directed in case of Pramod Kumar Agrawal & Ors. Vs. Smt.Mushtari Begum & Ors., reported in 2004 AIR SCW, page No.5010. In case of National Insurance Company Ltd. Vs. Parvathneni &

Anr. (SLP No.10993 of 2009), the Supreme Court referred following questions for consideration by 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- Does Article 142 permit the Court to create a liability where there is none-"

5. All these decisions came up for consideration of the learned Single Judge of this Court in First Appeal No.2121 of 2008 decided on 18.11.2013. The Court

concluded as under:-

12.2 The above observations make it clear that the direction to pay the amount first and then to recover such amount can only be given in exercise of power conferred under Article 142 of the Constitution and the Supreme Court in the peculiar facts of the above case, exercised such power notwithstanding the pendency of reference to the larger bench.

13. Be that as it may, there is no scope of passing such a direction either at the instance of the Tribunal below or of this court in this appeal under Section 173 of the Act.

14. On consideration of the entire materials on record, I, therefore, hold that the learned Tribunal below erred in law in passing the direction upon the Insurance Company to pay the amount and then recover such amount notwithstanding its finding that the Insurance Company has no liability to pay the amount as the victims are not the third parties within the meaning of law.

15. I, thus, modify the award impugned by

exonerating the appellant to pay the amount as ordered by the Tribunal. The award would be executable against the owner and the driver of the vehicle.

6. The facts in the present case are rather eloquent. The Truck was the sole vehicle involved in the accident. The accident occurred due to the sole negligence of the driver of the Truck. The vehicle was a Goods Carriage vehicle and insured accordingly covering statutory risk. The claimants themselves or or their predecessor travelling in the Truck not as a gratuitous passengers or along with the goods, but had paid fare for travelling. There was thus clear breach in the policy condition. The Insurance Company was absolved from its liability to cover the risk. Under such circumstances, in view of the judgment of this Court in case of United India Insurance Company Limited Vs. W/o. Deceased Bhikhabhai Premjibhai Kathiriya & Ors., the direction for payment of the compensation first and thereafter to recover from the claimants could not have been issued. It is true that the claimants are extremely poor people and at this distant point of time, it may be next to impossible for them to recover from the owner of the vehicle. However, what can be done by the Supreme Court under its extraordinary jurisdiction under Article 142 of the Constitution, can neither be done by the Tribunal nor by the High Court. Under the circumstances, the appeals of the Insurance Company are allowed. Judgment and awards of the Claims Tribunal to the limited extent of directing the Insurance Company to pay the compensation to the claimants first and thereafter recover from the owner is set aside."

9. Similar view is taken by this Court (Coram : H.N. Devani, J.) in First Appeal No.3966/12 and allied appeals, vide judgment and order dated 10.06.2015, wherein after relying upon the decision of this Court in First Appeal No.710/07 and cognate matters, as well as judgment reported

in 2012(2) GLR 1681, has been pleased to hold while allowing the appeal as under -

"26. The present case would be squarely covered by the above decision. The claimant being a gratuitous passenger in the auto- rickshaw whose risk was not covered by the insurance policy, the case would not fall within the scope and ambit of sub-sections (4) and (5) of section 149 of the Act and hence, the Tribunal was not empowered to issue any direction to the appellant Insurance Company to first satisfy the award and then recover the same from owner of the auto rickshaw. Such directions can be issued only by the Supreme Court in exercise of the powers under Article 142 of the Constitution of India. The aforesaid view is also fortified by the decision of this court in the case of United India Insurance Co. Ltd. v. Jyotibala Ghanshyam Joshi and others, 2012 (2) GLR 1681, wherein the Court has observed that insofar as the directions issued by the Supreme Court for payment in such cases have been issued in exercise of powers conferred on it under Article 142 of the Constitution of India. Therefore, the discretion exercised by the Supreme Court by taking aid of Article 142 of the Constitution of India not being available to the High Court, no such direction can be passed by it. The Court has, accordingly, modified the impugned award to the extent that the same should be recoverable from the owner or driver of the vehicle and not from the insurance company. In United India Insurance Co. Ltd. v. Lilaben, w/of deceased Bhikhabhai Premjibhai Kathiriya and others rendered on 18.11.2013 in First Appeal No.2121 of 2008, this Court has held that the direction to pay the amount first and then to recover such amount can only be given in exercise of power conferred under Article 142 of the Constitution and that there is no scope of passing such a direction either at the instance of the

Tribunal or the High Court in an appeal under section 173 of the Act. The appeal, therefore, deserves to be allowed by setting aside the impugned award of the Tribunal to the extent the same directs the Insurance Company of the auto-rickshaw to satisfy the award. "]

10. Considering the aforesaid facts and upon re- appreciation of the evidence on record, the appeal filed by the insurance company to the limited extent of directing the insurance company to pay first and thereafter to recover from the owner is set aside. However, if any amount is already withdrawn by the claimants during the pendency of this appeal, there shall be no recovery. The appeal is allowed to the aforesaid extent. With these observations and directions, the appeal is disposed of. R & P be transmitted to the Tribunal forthwith.