

(2013) 07 GUJ CK 0012

In the Gujarat High Court

Case No : First Appeal No's. 2345 and 2346 of 2005

New India Assurance Co. Ltd.

APPELLANT

Vs

Jaysukhlal Maganlal Doshi and Others

RESPONDENT

Date of Decision : 04-07-2013

Acts Referred:

Citation : (2014) 1 ACC 872 : (2014) ACJ 1075 : (2014) 2 ALLMR 15 : (2013) 3 GLR 2283

Hon'ble Judges : Bhaskar Bhattacharya, C.J.; J.B. Pardiwala, J

Bench : Division Bench

Advocate : Palak H. Thakkar, for the Appellant; Kirtidev R. Dave for Defendant Nos. 1 - 3 and 5 and Rahul K. Dave for Defendant No. 5, for the Respondent

Judgement

J.B. Pardiwala, J.—These two appeals under Sec. 173 of the Motor Vehicles Act, 1988 are at the instance of the Insurance Company and are directed against the selfsame award dated 13th September, 2004, passed by the Motor Accident Claims Tribunal (Auxiliary), Surendranagar, in M.A.C.P. No. 404 of 1994, by awarding a sum of Rs. 8,92,440/- with interest at the rate of 9% per annum from the date of filing of the application till realization with costs holding the opponents jointly and severally liable to pay the amount, whereas in M.A.C.P. No. 405 of 1994, the Tribunal awarded a sum of Rs. 9,32,000/- with interest at the rate of 9% per annum from the date of filing of the application till realization with costs holding the opponents jointly and severally liable to pay the amount. Being dissatisfied, the Insurance Company has come up with the present appeals.

Although, the claim petitions were allowed in part, the claimants have not filed either any appeal against the award or cross objections in these appeals.

It appears from the materials on record that there was an accident on 26th December, 1993 at about 3-15 in the early morning at a place called Dedadara Patiya, situated in the Taluka of Wadhwan when the jeep in which the claimants and the deceased were travelling, dashed into a tree. As a result of such accident, out of the persons who were travelling in the jeep, three persons died

on the spot, namely (1) Mukeshbhai Delichandbhai, (2) Bhadreshkumar Jaisukhlal Doshi and (3) the driver of the vehicle named Dilawar. The claimants of the Claim Petition No. 404 of 1994 are the legal heirs of the deceased Mukeshbhai Dalichandbhai, whereas the claimants of Claim Petition No. 405 of 1994 are the legal heirs of the deceased Bhadreshkumar Jaysukhlal Doshi.

2. In both the Claim Petitions, the registered owner of the offending vehicle was made opponent No. 1 and the Insurance Company as opponent No. 2. The Insurance Company filed its written statement Exh. 10 in both the claim petitions and the owner of the vehicle in question also filed his written statement vide Exh. 15 in both the Claim Petitions, thereby denying the material allegations made in the Claim Petitions and one of the main defences taken by the Insurance Company was that according to the terms of the policy, the use of the offending vehicle should be only for social, domestic and pleasure purposes and for the insured's own business, and not for hire or reward.

3. In Claim Petition No. 404 of 1994, the wife of the deceased, namely, Prafulaben, led the oral evidence vide Exh. 31, whereas in Claim Petition No. 405 of 1994, the father of the deceased, namely Jaisukhlal Maganlal entered the witness box and led the oral evidence vide Exh. 39. Both these witnesses were cross-examined by the Insurance Company, whereas there was no cross-examination at the end of the registered owner of the offending vehicle and at the same time, the registered owner himself did not lead any oral evidence.

4. It appears from the materials on record that one Sudhirbhai Vinaychandra Shah, one of the occupants of the jeep which met with the accident and brother-in-law of the deceased Bhadreshbhai lodged a First Information Report about the accident at Wadhwan Police Station on the same day i.e. on 26th December, 1993 at 11-35 hours in the morning. According to the contents of the F.I.R. Exh. 32, the first informant Sudhirbhai resided with his family at Mumbai and were desirous of visiting places like Sankheshwar etc. Accordingly, the first informant had informed his brother-in-law, i.e. the deceased Bhadreshbhai to make necessary arrangements for the visit to Sankheshwar as and when the first informant and his family came to village Talaja. According to the first informant, his brother-in-law Bhadreshbhai arranged for a Commando Jeep by taking it on hire. At around 9-00 O'clock in the night, the first informant and the others including the deceased persons left Talaja and while on their way to Sankheshwar, the driver of the jeep rammed the vehicle into a tree, as a result of which the driver named Dilawar, Bhadreshbhai and Mukeshbhai died on the spot.

5. We shall look into the oral evidence of Prafulaben, wife of the deceased Mukeshbhai, Exh. 31. According to her, the accident occurred on 26th December, 1993, when they were all travelling in a jeep bearing registration No. GJ-9-B 947. They left for Sankheshwar from Bhavnagar in the previous night and at around 3-15 hours in the early morning, the jeep which was being driven at a very high speed dashed into a tree, as a result of which her brother Bhadreshbhai, her husband Mukeshbhai and the driver Dilawar died at the spot.

The others who were travelling in the, jeep including herself had sustained few injuries. According to Prafulaben, in all there were 8 to 9 persons in the jeep, including the driver. She deposed in her oral evidence that an F.I.R. was registered in the Police Station regarding the accident. In her examination-in-chief, she produced the F.I.R., which was marked Exh. 32, including the scene of offence panchnama drawn by the Police, the post-mortem report of her husband, the inquest panchnama and the insurance policy of the vehicle. The registration book of the vehicle as well as the driving licence were also produced and marked as Exhs. 24 and 25 respectively. In her cross-examination, she deposed that the jeep in which they were travelling was of village Talaja. The jeep was of the ownership of her brother's friend's friend. She also deposed that her brother many times used to travel right upto Bhavnagar in the said jeep. The name of her brother's friend was Dilawar and he belonged to village Talaja. She had no idea as to how Dilawar was her brother's friend. She also deposed that she had no knowledge whether the jeep in which they were travelling was a private vehicle or a taxi. She also deposed that she had no personal knowledge as to how the jeep met with the accident, but according to her, the driver felt sleepy, and therefore, rammed into the tree. She denied the suggestion that the jeep was taken on hire.

6. In connection with Claim Petition No. 405 of 1995, the father of the deceased Bhadreshbhai, named Jaysukhlal Maganlal, in his oral evidence Exh. 39 deposed that at the time of the accident, his son Bhadresh was aged 24 years and was carrying on independent business of jaggery. He deposed that his son Bhadresh used to earn around Rs. 70,000/- per annum after deducting all his expenses. Bhadreshbhai was married, but had no issues. He further deposed that the jeep belonged to one Iqbal, who happened to be the friend of his son Bhadresh and Bhadresh used to travel many times in the said jeep right upto Bhavnagar and Palitana. No rent was to be paid for using the said jeep as he was allowed to use the jeep due to friendship. In the cross-examination, he deposed that the talks with regard to the vehicle, was at the end of the Iqbal. Iqbal was a muslim. Bhadreshbhai and Iqbal never studied together and Iqbal used to do miscellaneous work for his livelihood. He deposed that he had no idea whether Iqbal used to ply jeep on rent or not. He also denied the suggestion that the jeep was hired on rent by his son Bhadresh.

7. It appears that the principal contention of the Insurance Company before the Tribunal was that the company should not be held liable in any manner as the vehicle was being used as a taxi to carry the passengers for hire or reward. The Insurance Company relied on the terms of the policy, more particularly the limitations as to the use, which states that the use shall only be for social, domestic and pleasure purposes and for the insured's own business. It further clarifies that the policy does not cover the use for hire or reward.

8. The Tribunal came to the conclusion that although in the first information lodged by Sudhirbhai, the brother-in-law of Bhadreshbhai, it was stated that

Bhadreshbhai had hired the vehicle on his request for the purpose of visiting Sankheshwar and other places, such a fact stated in the first information report cannot be taken as a conclusive proof of such a fact, in the absence of Sudhirbhai entering the box and leading oral evidence. The Tribunal also took the view that Sudhirbhai perhaps may not be having any personal knowledge regarding the same and the statement in the F.I.R. could be termed as hearsay. The Tribunal also took into consideration the fact that the registered owner of the vehicle, in his written statement Exh. 15, has not said anything as regards his driver Dilawar fixing any rent with Bhadreshbhai for the purpose of going to Sankheshwar. In such circumstances, the Tribunal rejected the principal contention of the Insurance Company as regards their liability.

9. So far as the other aspects are concerned, the Tribunal arrived at the following conclusion.

M.A.C.P. No. 404 of 1994:

- (a) Age of the deceased 30 years
- (b) Income taken as Rs. 5,400/- per month
- (c) Multiplier 16, 1/5th deducted as personal expenditure and 4/5th dependency
- (d) Amount awarded Rs. 8,92,440/- with 9% interest

M.A.C.P. No. 405 of 1994:

- (a) Age of the deceased 24 years
- (b) Income taken as Rs. 6,000/- per month
- (c) Multiplier 16, 1/4th deducted as personal expenditure and 3/4th dependency
- (d) Amount awarded Rs. 9,32,000/- with 9% interest

10. Mr. Palak Thakkar, the learned Counsel appearing for the Insurance Company mainly contended that the Tribunal committed a serious error in coming to the conclusion that there was no satisfactory or reliable evidence as regards the fact that the use of the jeep was on hire, despite the fact that in the first information report Exh. 32 lodged by Sudhirbhai, it has been specifically stated that the jeep was taken on hire by the deceased Bhadreshbhai. According to Mr. Thakkar, the Tribunal failed to appreciate that by using the jeep on hire, there had been a breach of the Insurance Policy and resultantly, Sec. 149(2)(a)(i)(a) of the Motor Vehicles Act. Mr. Thakkar therefore, in such circumstances submits that the appeals deserve to be allowed only on this ground alone and the award passed by the Tribunal be set aside.

11. On the other hand, Mr. Kirtidev Dave, the learned Counsel appearing for the claimants vehemently submitted that the Tribunal committed no error, not to speak of any error of law, in coming to the conclusion that there was no breach of any of the terms of the Insurance Policy and no satisfactory evidence has

come on record that the jeep was hired by the deceased Bhadreshbhai. Mr. Dave, therefore, submits that in such circumstances, there being no merit in these appeals, the same may be dismissed.

12. Having heard the learned Counsel for the respective parties and having gone through the materials on record, the only question that falls for our consideration in these two appeals is whether the Tribunal committed any error in passing the impugned award.

13. Indisputably, the jeep bearing registration No. GJ-9-B 947 which had been insured with the appellant-Insurance Company, met with an accident on 26th December, 1993 at around 3-15 hours early in the morning somewhere near Dedadara Patiya. It is also not in dispute that the opponent No. 2 is the registered owner of the vehicle in question. It appears that the first informant Sudhirbhai, a resident of Mumbai, who happens to be the brother-in-law of the deceased Bhadreshbhai was desirous of visiting Sankheshwar and other places and therefore, had requested Bhadreshbhai to arrange for a vehicle so as to take them to Sankheshwar. Sudhirbhai in the first information report lodged by him, being Exh. 32, in clear terms has stated that his brother-in-law Bhadreshbhai had hired the jeep. The first information report has been relied upon by the claimants, and Prafulaben, the wife of the deceased Mukeshbhai, in her oral evidence produced the same along with other documents like post-mortem report, inquest panchnama, scene of offence panchnama etc. Prafulaben has also deposed in clear terms that she had no knowledge whether the jeep was taken on rent as a taxi or was a private vehicle. It appears that the registered owner although has not led any oral evidence, thought fit to file a written statement, Exh. 15, and in the said written statement, he very guardedly denied everything including the negligence of his driver, the deceased Dilawar. He has at least admitted in his written statement that the deceased Dilawar was his driver.

14. On the other hand, Jaysukhlal, the father of the deceased Bhadreshbhai, in his oral evidence although denied the fact of Bhadreshbhai hiring the jeep, but at the same time, has named the person driving the vehicle as one Iqbal. It is not clarified whether Dilawar and Iqbal are one and the same person. In his cross-examination, he has deposed that the vehicle was arranged by Iqbal; Iqbal was a Muslim; Iqbal was not residing in the neighbourhood; nor Iqbal studied with Bhadreshbhai at school. How Iqbal and Bhadreshbhai were friends, has not been explained by Jaysukhlal.

15. We have also gone through the insurance policy Exh. 75. In the insurance policy, it has been very specifically stated that the use of the vehicle shall only be for social, domestic and pleasure purposes and for the insured's own business. The policy does not cover the use for hire or reward.

One fact which emerges on record and which has not been disputed is that the opponent No. 1 i.e. the registered owner of the vehicle had no relations with the family of the claimants. In fact, it appears that he had no occasion at any point

of time even to meet them. It is also not in dispute that Dilawar was serving with the opponent No. 1. Such being the position, it is very difficult to believe that since Dilawar happened to be the friend of Bhadreshbhai, he would be in a position to get the jeep from his master free of charge for the purpose of taking Bhadreshbhai and others to Sankheshwar, even though it is believed that Dilawar and Bhadreshbhai were good friends. There is no reason why we should not believe what has been stated in the first information report itself. To say that the contents of the first information report should not be believed as the same could be termed as hearsay in the absence of Sudhirbhai, the first informant, entering the witness box to prove the F.I.R., will be contrary to the well settled principles of the Evidence Act. The first information report Exh. 32 was produced by Prafulaben in her own evidence and Prafulaben relied upon the same in toto. Accordingly, the same was taken in evidence and marked as Exh. 32.

16. The legal position is not in dispute that mere production and marking of a document as exhibit by the Court cannot be held to be a due proof of its contents. Its execution has to be proved by admissible evidence i.e. by the evidence of those persons who can vouchsafe for the truth of the fact in issue. The situation is, however, different where the documents are produced by a party who proposes to rely on the same, but at the same time denies a particular fact stated in the document, which does not suit his case, so as to fix the liability anyhow of the Insurance Company. The claimant, who relied and produced the document, cannot say that on the strength of the contents of such a document only the factum of accident should be believed whereas the other contents should not be believed. We are also not oblivious of the fact that ordinarily an averment made in the First Information Report would not be admissible in evidence per se, but as the averment made in the First Information Report as regards obtaining the vehicle on hire has been made a part of the claim petition, there is no doubt whatsoever that the Tribunal, and consequently, the appellate Courts would be entitled to look into the same.

17. There is no doubt that the burden is on the Insurance Company to prove the breach of conditions of the insurance policy. The question as to whether burden of proof has been discharged by the party to the lis or not, would depend upon the facts and circumstances of the case. If the facts are admitted or, if otherwise, sufficient materials have been brought on record so as to enable a Court to arrive at a definite conclusion, it is idle to contend that the party on whom the burden of proof lay would still be liable to produce direct evidence to establish that the jeep was taken on hire. When the first information report has been relied upon by the claimants themselves, then in such circumstances, there cannot be any doubt whatsoever that the same can be looked into for deciding the main issue in controversy.

18. We are of the opinion, having regard to the evidence on record, that the defence of the Insurance Company that the vehicle was used as a taxi to carry passengers for hire or reward and the same was in breach of the conditions of

the insurance policy, and therefore, no liability should be imposed on them, deserves to be accepted. Since, this is the only point which was raised in these two appeals by the Insurance Company, and we are inclined to accept the submission on behalf of the Insurance Company, we are not going into any other aspects of the matter as to whether the amount awarded was just and proper or not. In the result, both the appeals succeed and are hereby allowed. The award impugned is thus, modified to the extent that the Insurance Company will not be liable. The amount deposited by the Insurance Company in the Tribunal which was kept in fixed deposit by the Tribunal pursuant to the order passed by this Court, be refunded to the Insurance Company with interest. The Insurance Company will also be entitled to recover from the claimants the amount of interest received by them from the fixed deposit. The claimants are, however, free to execute the award against the owner of the vehicle.

FURTHER ORDER:

After the order is pronounced, Mr. Palak Thakkar, the learned Counsel appearing for the Insurance Company has drawn our attention to the fact that pursuant to the orders passed by this Court one dated 24th March, 2007 and the other dated 22nd March, 2006, a sum of Rs. 2 Lac was released in favour of Jaysukhlal Manganlal Doshi and another sum of Rs. 2 Lac was released in favour of Nitaben Bhadreshbhai Doshi and a sum of Rs. 1 Lac was released in favour of Prafulaben Mukeshkumar Shah and another sum of Rs. 1 Lac was released in favour of Savitaben Dalichandbhai Shah, and it was also ordered that, out of the interest accruing on the F.D.Rs. , a sum of Rs. 5,000/- per month be paid to Prafulaben Mukeshkumar Shah.

In view of our order passed in the Appeals, we direct the owner of the vehicle to deposit the requisite amount with interest at the rate of 1% p.a. within four weeks from today, and, in default, the Insurance Company will be free to recover the same from the owner of the vehicle.