(2013) 10 MP CK 0271

In the Madhya Pradesh High Court

Case No : M.A. No. 2364 of 2006

New India Assurance Company Ltd. APPELLANT

Vs

Domenic Tahir and Others RESPONDENT

Date of Decision : 04-10-2013

Acts Referred:

Citation : (2013) 10 MP CK 0271

Hon'ble Judges : S.R. Waghmare, J

Bench : Single Bench

Advocate : C.P. Singh, for the Appellant; K.K. Kaushal, Learned Counsel for the Respondents No. 1 to 4, for the Respondent

Final Decision : Allowed

Judgement

S.R. Waghmare, J.—This is the appeal filed by appellant/Insurance Company u/s 173 of the Motor Vehicles Act, 1988 being aggrieved by the award dated 16.03.2006 passed by 21st Additional M.A.C.T., Indore in claim case No. 130/2005 awarding the compensation for a sum of Rs. 1,88,000/- to the claimants. Brief facts of the case are that on 24.05.2002 at about 6:00 in the morning Vikas @ Vicky was driving the scooter belonging to non-applicant No. 1 bearing Registration No. MP-09-JA-1061 with his friend Shafique Khan as pillion rider, when on reaching Kinetic Honda Factory at Pithampur an unknown vehicle dashed against them, as a result of which Vicky died on the spot and Shafique Khan died during treatment at the hospital. The police report was filed to this effect at police station Pithampur. On behalf of the deceased Vicky, it was stated that he had passed B. Com Examination and he had bright chance in future and he was working and his family was dependent upon him. Moreover the scooter was also being driven with the permission of non-applicant No. 1 owner and it was insured with non-applicant No. 2 Insurance Company and whereas the defence taken up by non-applicant No. 1 owner of the vehicle was that the accident did not take place by the alleged vehicle and the vehicle was insured with non-applicant No. 2 insurance company. Non applicant No. 2 insurance company took up the defence that the policy did not cover the accident and the claim has been filed u/s. 163 of the Motor Vehicle Act and the insurance company was not liable. Moreover it was denied that the accident took place by the alleged vehicle. The Tribunal on considering the evidence, however, found that the accident took place due to the rash and negligence of the driver and the insurance company was liable to pay the compensation of Rs. 1,88,000/- to legal representative of deceased Vicky Being aggrieved the insurance company has filed the present appeal.

2. Counsel for the appellant has vehemently urged the fact that the policy did not cover the risk of the driver and owner and the company was not liable to pay the compensation, besides the accident did not occur as alleged, in fact deceased driver himself was negligent in causing the accident and risk was, therefore, not covered under the policy. Counsel relied on the matter of New India Assurance Company Ltd. Vs. Sadanand Mukhi and Others, to state that the Apex Court had held that when the death of the son of the owner had occurred in the accident while driving the motorcycle and when a stray dog came in front of the vehicle, the insurance company disputed its liability on the ground that deceased was not a third party and would step into the shoes of the owner. The Apex Court had held that the insurance company was not liable since the person becomes victim of the accident, arising out of use of vehicle and would not come within the purview of the term ''a person'' u/s 147 of the Act. The same principle has been held in the matter of Oriental Insurance Co. Ltd. Vs. Joseph, , however, in the said case the Tribunal had exonerated the insurance company yet directed to pay and recover and held that the question of pay and recover arises when victim of the accident is covered under the policy but there are violations of the terms of the policy. He further relied on the judgment of this Court National Insurance Company Vs. Bharat Singh and others, in the Miscellaneous Appeal No. 115/2006, whereby this Court had held that insurance company was not liable since it was not doling out largesse and the risk was not covered under the policy: as, in the case also, the deceased himself was driving the motorcycle belonging to his friend.

He further urged that in the matter of Oriental Insurance Company Ltd. Vs. Surendra Nath Loomba and Others, , a car dashed against a tree and the case of a passenger was being considered this Court held that the insurance company is liable under comprehensive/package policy but not under Act policy; and in the present case Counsel submitted that the insurance company was under the Act policy and risk of the driver was not covered. In the matter of New India Assurance Company Ltd. V. Rambabu and others in the Miscellaneous Appeal No. 1399/2006 this Court held and also considered the fact the that claim against owner is not maintainable u/s 163A of the Motor Vehicle Act. Counsel relied on the matter of National Insurance Company Ltd. Vs. Balakrishnan and Another, , whereby the Apex Court had held that risk of the passenger in private car is covered under the comprehensive/package policy and insurance company is liable but the third party risk of an occupant of a private car is not covered under the Act policy. Counsel submitted that risk of the third party was being covered but since the injury had occurred to the driver himself, the insurance company was not to be liable. Counsel prayed that the award of the M.A.C.T. be set aside and the claim be dismissed.

3. Counsel for the respondents/claimant has vehemently urged the fact that the deceased Vicky would be a third party in the present case and risk would be covered under the policy and even the premium paid is for one plus one, according to the document Ex. D/1 which is the insurance policy, Counsel contended that deceased Vicky had taken Kinetic Honda Scooter from the respondent No. 5/Anurag Saxena, who is the owner of the alleged vehicle and was travelling with one Shafique Khan as the pillion rider when the accident occurred. Counsel relied on two judgments of this Court to state that the terms of third party have been interpreted in a judgment of Full Bench of this Court in the matter of Jugal Kishore and Another Vs. Ramlesh Devi and Others, , whereby this Court held that third party will be a party other than insurer and insured and it includes the passengers in the vehicles not travelling for hire or reward. Moreover when the accident of insured vehicle driven in breach of condition of policy took place, the insurance company was liable to pay the compensation and indemnify the victim; however the insurance company would be entitled to recover the amount from the insured for breach of condition of policy. In the said case, the accident had taken place with the owner, who was himself driving along with other person in the vehicle. This Court held that it will be proper to narrow the scope and ambit of the word ''third party'' and exclude the passengers from the operation and purview which would not only defeat the very purpose of taking out the insurance policy, but the very object of the Motor Vehicles Act, which makes it mandatory requirement of law that all vehicles/owners of the vehicles must be compulsorily insured against third party risk. Counsel also relied in the matter of Amrit Lal Sood and Another Vs. Smt. Kaushalya Devi Thapar and Others, to state that the term ''any person'' was similarly translated by the Apex Court, whereby the Apex Court held that expression ''any person'' would include an occupant of car who is gratuitously travelling in the car. Madras Motor and General Insurance Co. Vs. Katanreddi Subbareddy and Others, and Prabhudayal Agarwal Vs. Saraswati Bai and Another, distinguished; Kaushalya Devi and Others Vs. Dr. Lakhbir Sood and Others, reserved.

Counsel also urged that there are no cross objection filed in the present case and Counsel has not raised any objection regarding the amount of compensation paid to the legal heirs of deceased Vicky. Counsel vehemently urged that the judgment of the Trial Court was in accordance with provisions of law and he prayed for dismissal of the appeal.

4. Considering the above submissions, the impugned award and the record, I find that the sole question that arises for determination in this appeal by the insurance company is whether insurance company would be liable to pay compensation in the present case when the deceased himself was driving the

alleged vehicle belonging to respondent No. 5 Anurag Saxena would the step into shoes of the owner or would be classified as third party. Considering the matter of Full Bench of this Court in the matter of Jugal Kishore (supra) and in the matter of the Apex Court decision in the matter of Amrit Lal Sood (supra), I find that these are comparatively old judgments and much water is flown under the bridge. According to the latest decision in the matter of National Insurance Company Ltd. Vs. Balakrishnan and Another, , the Apex Court has categorically held that it is the nature of the policy, which would decide whether the insurance company was liable to pay the compensation to the claimant''s or not. The Apex Court held thus:

In view of the aforesaid factual position, there is no scintilla of doubt that a ''comprehensive/package policy'' would cover the liability of insurer for payment of compensation for the occupant in a car. There is no cavil that an ''Act Policy'' stands on a different footing from a ''comprehensive/package policy''. As the circulars have made the position very clear and the IRDA, which is presently the statutory authority, has commanded the insurance companies stating that a ''comprehensive/package policy'' covers the liability, there cannot be any dispute in that regard. We may hasten to clarify that the earlier pronouncements were rendered in respect of the ''Act Policy'' which admittedly cannot cover a third party risk of an occupant in a car. But, if the policy is a ''comprehensive/package policy'', the liability would be covered. These aspects were not noticed in the case of Bhagyalakshmi and Others Vs. United Insurance Co. Ltd. and Another etc., and, therefore, the matter was referred to a larger Bench. We are disposed to think that there is no necessity to refer the present matter to a larger Bench as the IRDA, which is presently the statutory authority, has clarified the position by issuing circulars which have been reproduced in the judgment by Delhi High Court and we have also reproduced the same.

5. Similarly in the matter of Oriental Insurance Company Ltd. Vs. Surendra Nath Loomba and Others, , the Apex Court held that it is the nature of the policy which has to be decided first and remanded the matter back. The Apex Court had categorically stated that comprehensive/package policy would cover the liability of the insurance company for payment of compensation an occupant of the car but under the Act policy the insurer would not be liable and it does not cover third party risk of the occupant vehicle. Therefore, in this regard it would be profitable to consider the testimony of insurance Agent Harish Phansalkar witness No. 1, who had categorically stated that the policy was an Act policy in the name of respondent No. 5 Anurag Saxena as owner and the owner and driver of the vehicle was not covered under the same and the liability could not be passed on to the insurance company. In the impugned para No. 3 of his deposition, he has categorically stated that vehicle owner and driver could not be termed as third party, although under the insurance policy Ex-D/1 additional premium had been taken to cover the third party risk. He however, candidly admitted that the policy did not specify the different heads under which the premium was taken; it is stated that to extent Rs. 375/- taken as third party

damage and Rs. 19/- toward premium. I have also perused the policy and under the title person or class entitled to drive it is mentioned any person- a) insurer- b) any other person, who is driving, on the insured''s order or with his permission provided that the person driving the vehicle had a valid driving licence and use was also mentioned. Besides the policy did not cover the use for hire or reward etc. of the vehicle. And in the instant case, if is Ex-D/1 is perused, it is an Act policy. Undoubtedly, if the accident had occurred at the hand of the deceased and if some other persons have been injured the insurer appellant/ insurance company would have been liable to pay the compensation; however in the present case, I find that he would step into shoes of the owner and not into the shoes of a "third party" and the risk cannot be covered under the Act policy. Therefore, placing reliance of judgment of this Court in the matter of National Insurance Company Vs. Bharat Singh (supra), whereby this Court held that when the deceased himself driving the motorcycle belonging to owner Sandeep under similar circumstance, the insurance company was not held to be liable to pay compensation. Moreover this Court had held that under the contract of Insurance no extra premium was paid to cover the risk of a person who himself was driving the motorcycle. And in the present case also the insurance agent Harish Phansalkar witness No. 1 has himself stated that no such extra premium has been paid and, therefore, in the instant case placing reliance in the matter National Insurance Co. Ltd. V. Balakrishan (supra) it is held that the insurance policy was an Act policy and being statutory policy no additional premium has been paid and the appellant insurance company cannot therefore, be held liable to pay the compensation.

6. In view of the above law laid down by the Apex Court; the award of the M.A.C.T. cannot be sustained. The appeal of the Insurance Company is, therefore, allowed and the impugned award is set aside. The amount, if is deposited by the appellant insurance company shall be returned to the appellant insurance Company. With the aforesaid observations, the appeal is allowed to the extent herein above indicated.

