
(2014) 09 GUJ CK 0158
In the Gujarat High Court
Case No : First Appeal No. 646 of 2006

New India Assurance Company Ltd.

APPELLANT

Vs

Jilubai and Others

RESPONDENT

Date of Decision : 09-09-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 11 — Motor Vehicles Act, 1988 - Section 140, 166, 173

Citation : (2015) 3 ALLMR 13

Hon'ble Judges : Bhaskar Bhattacharya, C.J.

Bench : Single Bench

Advocate : Palak H. Thakkar, Advocate, for the Appellant; Niyati K. Shah, for the Respondent

Final Decision : Dismissed

Judgement

Bhaskar Bhattacharya, C.J.?This appeal under section 173 of the Motor Vehicles Act is at the instance of the New Indian Assurance Company Limited the insurer of the tempo vehicle involved in the accident and is directed against the award dated 28th November, 2005 passed by the Motor Accident Claim Tribunal (Auxi.), Kachchh at Bhuj in M.A.C.P. No. 627 of 1995 thereby awarding a sum of Rs. 4,74,400/- with interest at the rate of 9% per annum from the date of filing of the application till realization. Being dissatisfied, the insurance company has come up with the present appeal.

2. It appears from the record that the claimant has neither filed any separate appeal nor any cross objection in this appeal filed by the insurance company.

3. There is no dispute about the involvement of the tempo in question, in which the deceased was traveling. There is also no dispute as regards the negligence on the part of the driver of the said tempo. The Tribunal below on consideration of materials on record came to the conclusion that for the death of the victim, the claimant has suffered aforesaid amount.

4. Mr. Thakkar, the learned advocate appearing on behalf of the appellant has raised a pure question of law regarding liability of his client. According to Mr. Thakkar, the tempo had only the third-party insurance and the claimant being the occupant of the said tempo without any goods owned by him, his client was not liable to pay any amount, as the claimant is not covered by the terms of the insurance and such point has not been dealt with by the Tribunal.

5. Ms. Shah, the learned advocate appearing on behalf of the claimant has opposed the aforesaid contention and has pointed out that in a proceedings under section 140 of the M.V. Act, arising out of selfsame accident, the Tribunal below awarded a sum of Rs. 50,000/- in favour of her client and the said award under section 140 of the Act has not been challenged and has attained finality. Such being the position, according to Ms. Shah, the issue as to the breach of condition of the insurance is no longer available in this proceedings under section 166 of the Act, being hit by doctrine of res-judicata or constructive res-judicata.

6. After hearing the learned counsel for the parties and after going through the materials on record, I find that the question whether there has been breach of condition of the existing policy is basically a question of fact, and such plea was available to the Insurance Company at the time of hearing of the application under section 140 of the M.V. Act. The Insurance Company not having raised such question, and after suffering the order, and having made payment of that amount, in my opinion, it is now precluded from raising the above question regarding breach of condition of the policy at the stage of the proceedings under Section 166 of the Act.

7. The aforesaid question is hit by the doctrine of constructive res judicata.

8. It is now settled by the Apex Court that an award under section 140 of the Act is an appealable one (See Smt. Yallwwa and Others Vs. National Insurance Co. Ltd. and Another, and therefore, the insurance company, by not preferring any appeal, has accepted the position that the vehicle was involved in the accident, that there was no breach of any condition of insurance in respect of the vehicle involved in the accident and that the same was insured by the concerned Insurance Company. Those three facts cannot be reopened in the proceedings under Section 166 of the Act either at the instance of the owner of the vehicle or the Insurance Company. At this stage it will be profitable to refer to the following observations of the Apex Court in the case of Satyadhyam Ghosal and Others Vs. Sm. Deorajin Debi and Another, where a Bench consisting of three Judges specifically held that even if Section 11 of the Code of Civil Procedure is not applicable in a judicial proceeding, the principles of res judicata is nevertheless applicable:

"The principle of res judicata is based on the need of giving finality to judicial decisions. What it says is that once a res is judicata, it shall not be adjudged again. Primarily it applies as between past litigation and future litigation, When a matter-whether on a question of fact or a question of law-has been decided

between two parties in one suit or proceeding and the decision is final, either because no appeal was taken to a higher court or because the appeal was dismissed, or no appeal lies, neither party will be allowed in a future suit or proceeding between the same parties to canvass the matter again. This principle of res judicata is embodied in relation to suits in S. 11 of the Code of Civil Procedure; but even where S. 11 does not apply, the principle of res judicata has been applied by courts for the purpose of achieving finality in litigation. The result of this is that the original court as well as any higher court must in any future litigation proceed on the basis that the previous decision was correct."

(Emphasis supplied).

I, thus, find that the only question raised by Mr. Thakkar, the learned advocate appearing on behalf of the Insurance Company, is devoid of any merit, and consequently, this appeal is dismissed. In the facts and circumstances, there will be, however, no order as to costs. The Tribunal is directed to forthwith disburse the amount to the claimants, after proper verification, in the proportion indicated in its impugned award, by accounts payee cheque.