

(2012) 09 BOM CK 0197

In the Bombay High Court

Case No : First Appeal No. 520 of 2004 and First Appeal No. 587 of 2004

New India Assurance Company Ltd.

APPELLANT

Vs

Kashinath Raot and Others

RESPONDENT

Date of Decision : 12-09-2012

Acts Referred:

Insurance Act, 1938 — Section 64VB

Citation : (2012) 6 ALLMR 316

Hon'ble Judges : M.N. Gilani, J

Bench : Single Bench

Advocate : A.J. Pophaly in F.A. No. 520 of 2004 and Mr. C.A. Joshi in F.A. No. 587 of 2004, for the Appellant; A.J. Pophaly, Advocate for Respondent No. 4 in F.A. No. 587 of 2004 and Mr. C.A. Joshi, Advocate for Respondent No. 3 in F.A. No. 520 of 2004, for the Respondent

Final Decision : Allowed

Judgement

M.N. Gilani, J.—Both these appeals are directed against judgment and award dated 02.06.2004 passed by Motor Accident Claims Tribunal, Akola in M. A. C. P. No. 268/1999, which was filed for grant of compensation on account of death of one Kiran occurred in motor vehicular accident involving a Jeep driven by respondent no. 1, owned by respondent no. 2 (for short the "Insured") and insured with original respondent no. 3 (for short the "Insurer"). After appreciating the evidence adduced by the parties, the learned tribunal held that the accident occurred because of rash and negligent driving of respondent no. 1. Since the deceased, while travelling had not held rod/iron bar and secured himself, he was also held to be negligent to the extent of 10%. Owing to the absence of evidence of the income of the deceased, the learned tribunal assumed notional income at Rs. 15,000/- per year and after deducting 1/3rd of the amount towards personal expenses of the deceased and considering his contributory negligence to the extent of 10%, arrived at the loss of dependency to Rs. 9,000/-. The claimants, being aged about 60 years and 55 years respectively, tribunal applied multiplier of 16 and thus awarded compensation of

Rs. 1,51,000/- under all the heads. As regards fastening of the liability on the Insurer, the learned tribunal held that the cheque issued by the Insured towards premium of the insurance policy was dishonoured and, therefore, the Insurer cancelled the cover note. Few months thereafter the accident in question occurred. Therefore, according to the tribunal, primary liability to satisfy the award would be that of the Insured. However, directed the Insurer to satisfy award at the first instance and recover the said amount from the Insured.

2. First appeal No. 587/2004 is filed by the Insured, questioning the findings recorded by the learned tribunal. It is submitted that because of his own negligence, the deceased has fallen down from the vehicle and as such he solely was responsible for his own death. As regards the choosing of multiplier and the amount of deduction made towards personal expenses of the deceased, it is contended that the approach of the tribunal was totally wrong and against the settled principles of law. The finding of the tribunal that there was no privity of contract between the Insured and the Insurer and hence the primary liability to satisfy the award shall be that of the Insured, is vehemently disputed.

3. First Appeal No. 520/2004 is by the Insurer. Mr. Pophali, learned counsel for the Insurer, contended that the learned tribunal has committed error in relying upon decision of the Supreme Court in the case of Oriental Insurance Co. Ltd. Vs. Inderjit Kaur and Others, According to him, following factual events in the matter of issuance of cover note and cancellation of the same may be considered. They are thus:

(i) On 26.10.1998, Cheque was accepted by the Insurer and against that receipt No. 664761 was issued.

(ii) On 27.10.1998, Cover Note was issued.

(iii) On the next day, cheque was presented to the Bank of Baroda, Parbhani branch.

(iv) On 20.11.1998, the Insurer received intimation from the bank that cheque is dishonoured.

(v) On 25.11.1998, letter was dispatched by the Insurer to the Insured about dishonour of the cheque and cancellation of the Cover Note.

(vi) On 13.08.1999, accident occurred.

He further contended that at no point of time, the policy was issued. In this background, it is contended that the ratio in Inderjit Kaur's case (supra) is not applicable to the facts and circumstances of the present case and particularly in view of subsequent decision in the case of National Insurance Co. Ltd. Vs. Seema Malhotra and Others, .

4. The points, which arise for my determination are:

(i) Whether the amount of compensation Rs. 1,51,000/- awarded by the tribunal

to the parents of the deceased, aged about 25 years, warrants any interference?

(ii) Despite non payment of amount of premium by the Insured, whether the Insurer would be liable to indemnify the Insured? And if no, whether the tribunal, in the facts and circumstances of the present case, was justified in directing the Insurer to satisfy the award at the first instance and then to recover the said amount from the Insured?

5. Evidence was led to the effect that the deceased was driver by profession and was earning Rs. 3,000/- per month. The learned tribunal, for want of documentary evidence, did not believe the same and, therefore, assumed notional income of the deceased at Rs. 15000/- per annum. After deducting 1/3rd of the amount towards his personal expenses, loss of dependency was calculated to Rs. 10,000/-. However, it was reduced to Rs. 9,000/- because of contributory negligence of the deceased and then arrived at figure of total compensation of Rs. 1,51,000/-. Even assuming that, the approach of the learned tribunal in deducting 1/3rd of the amount towards personal expenses of the deceased instead of 50%, since the deceased was unmarried, was wrong, the total amount of compensation of Rs. 1,51,000/- awarded for death of a young boy of 25 years, cannot be said to be on higher side. In fact, the tribunal was wrong in disbelieving the case that the deceased was not earning any amount. Even if, it is assumed that the deceased was getting minimum wages, his monthly income would be more than Rs. 3000/- per month. Thus, even a lower multiplier is applied based on the age of the claimants and 50% deduction towards personal expenses of the deceased is made, the total amount of compensation, in no circumstances, would be less than Rs. 1,50,000/-.

6. Mr. Joshi, learned counsel for the Insured, contended that he was the deceased who was solely responsible for his death and, therefore, no liability ought to have been fastened upon the driver and the Insured. It is pertinent to note that the Insured entered the witness box (Exh.-37). However, he did not utter a word that because of negligence of the deceased, he had fallen from the running vehicle and died. Presumably, this may be for the reason that he was not an eye witness to the incident. P. W. 1 Kashinath father of the deceased, deposed that the deceased had fallen from the running vehicle. In fact, he is also not an eye witness. The learned tribunal, after perusing the documents like FIR, spot panchanama etc. observed that:

.....Record clearly goes to show that the deceased had occupied a seat in the rear portion of the jeep. It is not in dispute that the deceased fell out of the jeep when the jeep was in motion. When a passenger is travelling in open jeep, he is expected to hold the iron bars tightly; so as to avoid possibility of his falling down from the moving vehicle. The deceased was certainly negligent because he alone fell down from the jeep. Considering this aspect, in my considered opinion, the deceased himself has contributed in the occurrence of the accident to a certain extent and his contribution can be accepted to the tune of 10% and that of driver of the jeep can be accepted at 90%.

7. The fact that while travelling in the jeep, he was thrown out of it, itself suggests that this can only be possible because of sudden application of the brakes and, in that view of the matter, the approach of the learned tribunal in holding the driver of the jeep negligent to the extent of 90%, appears probable.

8. On the issue of liability, it is the case of the Insurer that no payment towards premium was made by the Insured and in that view of the matter, at no point of time, there was privity of contract between the Insured and the Insurer. Mr. Kandi, the then Assistant Administrative Officer, entered the witness box. According to him, on 23.10.1998, the Insured had approached him for insurance of the vehicle, delivery of which he was supposed to take on 26.10.1990. After ascertaining the details like chassis no., make of the vehicle etc. he accepted the cheque of Rs. 8576/- from the Insured and issued a cover note, covering the liability for a period from 27.10.1998 to 26.10.1999. Accordingly, proposal was accepted and receipt dated 26.10.1998, for an amount of Rs. 8576/-, was passed. On the next date, cheque was presented to Bank of Baroda. On 20.11.1998, intimation (Exh.-45) was received from the Bank about dishonour of the cheque for want of sufficient funds. Immediately, an intimation letter regarding dishonour of cheque was dispatched by registered post to the Insured. All the relevant documents are at Exh.-46 and 49. Only on 26.10.1999, that means after one year of this, the Insured came to the office with a request for renewal of his policy with a declaration that the vehicle was not involved in any accident. The dishonoured cheque (Exh.-39), Cover note issued on 26.10.2000 (Exh.-51) were produced on record. Only relevant thing which was pointed out to this witness in his cross-examination was about mistake in the name of tamer of the Insured. This aspect has been well considered by the tribunal. The fact remains that the Insured was aware and presumed to have been aware about dishonour of the cheque and despite this, vehicle was being plied on the road without insurance cover. It is pertinent to note that at no point of time, policy was issued. Exh.-46, is letter, which was dispatched to the Insured and Exh.-49 is its postal receipt. The address appearing on Exh.-49 tallies with the undisputed address of the Insured. The Insured himself deposed on oath that after eight days of issuance of the cheque, he learnt that it was bounced. However, he put forth a case that he approached Mr. Kandi and paid him premium in cash. Had it been so, the Insured would have taken care to obtain cover note or at least a receipt. Although, he tried to put forth a case that the letter of cancellation of the cover note was not received by him this aspect becomes totally insignificant for the sole reason that he himself deposed on oath that the fact of bouncing of cheque had come to his knowledge just after eight days of its issue and to amend the things he went to Mr. Kandi and paid him the amount in cash. Thus, at no point of time, there did exist contract of insurance between the parties and that too on the basis of the payment of premium by cheque, which was later on bounced.

9. The last point involved is the applicability of the decision in Inderjit Kaur's case (supra). The facts in the present case stand on different footing. At no point

of time, policy of insurance was issued. What was issued was merely a cover note. Immediately after the cheque was dishonoured, intimation was sent to the Insured about it. Even it is the case of the Insured that within eight days of issuing the cheque he went to Mr. Kandi and paid the amount of premium in cash, which fact is disbelieved by the tribunal and rightly so. Thus, the fact remains that at no point of time, the Insurer had issued any policy covering the third party risk or any other risk.

10. In *National Insurance Co. Ltd. Vs. Seema Malhotra and Others*, , Their Lordships had an occasion to refer to the decision in *Inderjit Kaur's* case (supra) and observed thus:

9. A three Judge Bench in *Oriental Insurance Co. Ltd. v. Inderjit Kaur* left this point unconsidered. In that case also the premium was paid by cheque which was later dishonoured and the insured was intimated about it by the Insurance Company two months after the vehicle got involved in the accident. When a claim was made by the legal heirs of the driver who died in the accident the Insurance Company resisted the claim on the strength of Section 64VB of the Insurance Act 1938.

(Emphasis supplied)

11. The distinguishing facts in *Inderjit Kaur's* case (supra) and in the present case are that in the former, the policy was cancelled after the vehicle got involved in the accident; in the present case, no policy was issued at all. Whatever was issued, was only a cover note. The Insured had acknowledged that the cheque was issued but it was dishonoured. The Insurer intimated the fact of dishonour of the cheque to the Insured and also cancelled the cover note. After about eight months thereafter, the vehicle got involved in the accident.

12. In *National Insurance Co. Ltd. Vs. Seema Malhotra and Others*, , Their Lordships, while dealing with this issue, observed thus:

17. In a contract of insurance when the insured gives a cheque towards payment of premium or part of the premium, such a contract consists of reciprocal promise. The drawer of the cheque promises the insurer that the cheque, on presentation, would yield the amount of cash. It cannot be forgotten that a cheque is a bill of exchange drawn on a specified banker. A bill of exchange is an instrument in writing containing an unconditional order directing a certain person to pay a certain sum of money to a certain person. It involves a promise that such money would be paid.

18. Thus, when the insured fails to pay the premium promised, or when the cheque issued by him towards the premium is returned dishonoured by the bank concerned the insurer need not perform his part of the promise. The corollary is that the insured cannot claim performance from the insurer in such a situation.

13. In First Appeal No. 771/2004, decided on 12.07.2005, this Court, after relying upon the decision in *National Insurance Co. Ltd. Vs. Seema Malhotra and*

Others, , took a view that in such a situation, the Insurer is not liable to satisfy the award. In case of The Divisional Manager, The National Insurance Co. Ltd. Vs. Tasri Pradhan and Others, Nirasah Pradhan and Others and Jaga Mantri and Others, , similar issue was cropped up. Relying upon decision in National Insurance Co. Ltd. Vs. Seema Malhotra and Others, case (supra), it is held that when the Insured fails to pay the premium promised or when the cheque issued towards the premium is dishonoured by the Bank concerned, the Insurer need not perform his part of promise and thus the corollary is that the Insured cannot claim benefits from the Insurer in such a situation.

14. Aforesaid being the legal position, First Appeal No. 587/2004, filed by the Insured, will have to be dismissed and First appeal No. 520/2004 filed by the Insurer will have to be allowed. Accordingly, first appeal No. 587/2004 is dismissed with no order as to costs.

First Appeal No. 520/2004 is allowed. It is declared that the appellant Insurer did not incur any liability to satisfy the award. Consequently, the order directing the Insurer to satisfy the award in the first instance and then to recover the amount from the Insured is set aside. If any amount has been paid by the Insurer, it shall be entitled to recover the same from the Insured.

No order as to costs.