
(2008) 02 BOM CK 0064

In the Bombay High Court

Case No : Writ Petition No. 4746 of 2003

Oriental Insurance Co. Ltd.

APPELLANT

Vs

Chandrabhagabai Waybhase and Others

RESPONDENT

Date of Decision : 05-02-2008

Acts Referred:

Motor Vehicles Act, 1988 — Section 140, 141, 141(3), 160, 166

Citation : (2009) ACJ 1637 : (2008) 3 MhLj 883

Hon'ble Judges : A.H. Joshi, J

Bench : Single Bench

Advocate : P.P. Bafna, for the Appellant;

Final Decision : Dismissed

Judgement

A.H. Joshi, J.—Heard learned Advocate Mr. P.P. Bafna, for the petitioner.

2. The petitioner herein is an Insurance Company which has suffered an award of no-fault liability u/s 140 of the Motor Vehicles Act, 1988.

The Insurance Company preferred an appeal bearing First Appeal No. 127/1999.

3. During pendency of the appeal, the Motor Accidents Claim Tribunal passed an award on 8-12-2000 and held the Driver and owner of the vehicle responsible for payment of compensation, and exonerated the present appellant Insurance Company from any liability, whatsoever.

4. The fact that the Insurance Company has been exonerated was mentioned before this Court at the admission hearing of First Appeal No. 127/1999. In view of contents of un-numbered para 3 of the judgment, it can be inferred that leave for withdrawal of appeal was granted for enabling the insurance company to file an application for review.

5. Upon withdrawal of said appeal, the appellant herein filed a review application bearing MARJI No. 277/2002.

6. It was urged in review application filed before the MACT that, in the award u/s 166, the amount which was ordered to be paid and was paid under the award passed u/s 140 of the Motor Vehicles Act, would have to be included and has been so considered. It is then urged that since now it is held that amount of compensation u/s 166 will have to be paid by the driver and owner of the vehicle the amount, the amount of award u/s 140 which was ordered against the insurance company who has deposited it will have to be refunded, holding that the insurance company was not held liable.

7. Petitioner had placed reliance on the scheme of law as emerging from Sub-section (3) of Section 141 and Sub-section (3) of Section 168.

8. The review application of the appellant herein has been heard and has been dismissed. The MACT, Aurangabad held that the considerations and issues involved in an application u/s 140 and an application u/s 160 are totally different and found that there are no grounds to review the order dated 8-12-2000.

9. The learned Advocate Mr. Bafna placed reliance on all submissions advanced before review forum, and relies upon the judgment of the Supreme Court reported in AIR 2007 SCW 7149, Oriental Insurance Co. Ltd. v. Raj Kumari and Ors. in support of present petition. The emphasis is on what is observed in para. 10 thereof referred judgment which is quoted for ready reference as under:

It is true that in certain cases this Court has, after looking into the fact situation, directed the insurance company to make payment with liberty to recover the amount in excess of the liability from the insured. Those decisions were given on the fact situation of the cases concerned.

10. On the basis of the observations quoted above, the learned Advocate for the petitioner has urged that the pay first and recover is not a rule of universal application and need of its application would depend and vary on the facts as brought on record by the claimant, as to need of passing such order.

11. According to Mr. Bafna, learned Advocate for the petitioner, only when claimant proves that recovery from the owner/driver would be difficult, in such proved fact situation alone need to pass order to recover from insurer first with liberty to the insurer to recover would come into play.

12. According to petitioner in the present case circumstances or reasons as to why the insurance company is required to pay and then to recover have been brought on record by the claimant.

13. The question, as to whether the petitioner's review application was liable to be allowed needs to be considered and ruled in the light of submissions advanced.

14. The question to be considered is whether this doctrine of alleged set off emerging from Section 141(3) and Section 168 includes a power in the Tribunal to review and recall an order u/s 140 when in main claim u/s 160 of the Act the insurance company was found not liable.

15. The petitioner is drawing an inferential corollary that the set off, to which a party which has suffered final award is entitled, would automatically entitle a party who is not held liable to get an order of refund from the Court. The petitioner is attempting to read a text what is not a scheme of the Act.

Petitioner is trying to read into Sections 140, 141, 160 and 168 a text and words which are not employed by legislature. It is likely that the legislature did not visualise an eventuality of the nature in which the petitioner had landed. This situation would not equip the Court with power to fill in this paucity by a judicial act. If the law omits to meet such eventuality, such omission too is a legislative act of omission. On plain reading of these sections, no better and favourable inference from the scheme thereof can be drawn than to permit the set off. Jurisdiction and power to order restitution is not seen as included in the scheme of the Act.

The implication of set off, of the amount of compensation, if any, paid u/s 140 does not therefore automatically generate a corollary that if the liability of insurer u/s 166 is exonerated, that the situation as generated by order u/s 140 too should be reversed and the compensation will have to be refunded. The submission, though, is full of ingenuity, does not find a foundation in the law.

16. Moreover, from the facts of the case, it is clear that the petitioner is trying to take benefit of the eventuality, namely, that though the amount was deposited in the Court, it was not disbursed. This fact, by itself, cannot be used as a ground in depriving the claimant the amount which is readily available.

17. Now it would be necessary to deal with the submission as to whether the claimant has proved difficulty in recovering the amount from the insured. ,

18. It is clear from record that the claimant did not have an opportunity to demonstrate before the Court as the eventuality as to the solvency or liquidity of the truck owner and driver had not arisen in the midst of trial of the claim.

19. The liquidity and capacity to favourably respond to the award as far as driver is concerned, being impossible is a fact of which cognizance is possible by judicial notice.

20. Insofar as the aspect of recovery from the vehicle owner is concerned, the fact of difficulty to recover from him would certainly have been proved. This could be possible if an issue is arising or is framed.

21. In absence of an issue of this type being framed at the behest of the insurance company in the event insurance company is required to pay, the insurance company would hardly be entitled to be governed by para 10 of the judgment in the case of Oriental Insurance Company v. Rajkumari (supra).

22. The fact that petitioner was granted liberty to withdraw the appeal, to file a review application does not necessarily and essentially imply that as liberty was granted for filing a review petition the tribunal was bound to review its order.

23. The mechanism devised by Hon"ble Supreme Court of paying first and recovering latter by the insurer as seen in para 2 of the reported judgment in case of New India Assurance Co. Ltd. Vs. Smt. Shanti Bai and others, , adequately protects the petitioner.

24. The case is not falling within the ambit of any of the yardsticks of review, as laid down in order XLVII or principal doctrine relating to review of judicial orders.

25. In these premise, no interference is called for. The petition is dismissed.