(2008) 09 GUJ CK 0044

In the Gujarat High Court

Case No : First Appeal No. 4397 of 2008 with Civil Application No. 10514 of 2008

Oriental Insurance Co. Ltd. APPELLANT

Vs

Manojkumar Bhagvandas Rana and Others RESPONDENT

Date of Decision : 08-09-2008

Acts Referred:

Motor Vehicles Act, 1988 — Section 145, 147, 149, 149(2), 164

Citation : (2008) 09 GUJ CK 0044

Hon'ble Judges : H.K. Rathod, J

Bench : Single Bench

Advocate : K.K. Nair, for the Appellant; None for Defendants 1 - 3, for the Respondent

Judgement

H.K. Rathod, J.—Heard learned Advocate Mr. K.K. Nair for the appellant - Oriental Insurance Co. Ltd.

2. Through this appeal, the appellant insurance company has challenged the award passed by the Motor Accident Claims Tribunal, Surat District at Vyara in MACP No. 244 of 1991 vide Exh. 117 dated 26th March, 2008 wherein the claims tribunal has directed opponents No. 1, 2 and 3 jointly and severally to pay Rs. 66,000.00 to the claimant with interest thereon at the rate of 9% per annum from the date of application till the date of realization.

3. Learned Advocate Mr. K.K. Nair has raised contention before this Court as mentioned in para 12 of the memo of appeal which is quoted as under:

It is made specifically clear that the appellant does not challenged any of the findings regarding negligence, disability and/or quantum awarded in this case and the appeal is confined to the statutory defence of breach of material condition of the policy of insurance as stated above.

4. He also submitted that claims tribunal has committed gross error to appreciate that in the accident case, rider of the motor cycle involved in accident had immediately filed FIR after accident and true copy of the said FIR was produced

by the applicant in evidence Exh. 98 and to prove his case, the applicant had relied on the said FIR. Insurance Co. was also relying on the said FIR Exh. 98. Facts stated therein clinches the defence raised by the insurance company. He further submitted that the opponent No. 1 rider of the motor cycle did not hold any driving license as stated by him in the FIR and as per the Driver''s clause in the policy of insurance, persons or classes of persons entitled to drive means any person including insured provided that a person driving holds an effective driving licence at the time of the accident and is not disqualified from holding a licence or obtaining such a licence, therefore, as the opponent No. 1 rider of the motor cycle was not having any driving licence at the time of accident, insurance company is not liable to make payment of compensation even to the third party. He submits that this aspect has not been properly appreciated and examined by the claims tribunal and, therefore, when the breach of material condition of the policy of insurance is proved, then, insurance company cannot be held liable to indemnify the owner - insured. He also submitted that the copy of FIR and copy of insurance policy and other relevant record including claim application filed by the claimant were produced before the claims tribunal and the facts that the boy was driving the motor cycle without licence were admitted by the claimant. Therefore, he submitted that the claims tribunal ought not to have passed any award holding the insurance company liable as it is a clear case of breach of the condition of policy of insurance by the insured because insured was aware about the fact that he was giving possession of the vehicle to the nephew who is not having driving licence and who is also not eligible to get the driving licence according to the Motor Vehicles Rules because of minor. Thus, the contention raised by the learned Advocate Mr. Nair is that the claims tribunal has committed an error in holding insurance company liable to pay the compensation as the opponent No. 1 - rider of the motor cycle was not having licence to drive the vehicle at the time of accident and, therefore, impugned award requires interference of this Court.

5. I have considered the submissions made by the learned Advocate Mr. Nair before this Court. I have also perused the award made by the claims tribunal. Looking to the facts as emerging from the impugned award, on 30.9.1990, the applicant was walking on the main road. The opponent No. 1, driving the motor cycle bearing No. GJ-5-D-6053, rashly and negligently, dashed with the applicant and caused injury on the head and other injuries on the body due to which, applicant is suffering baldness of permanent nature and, therefore, applicant has claimed Rs. 90,000.00 by way of compensation. It was also alleged by applicant that he suffered great mental as well as physical pain. That he was admitted as an indoor patient for 23 days in Mahavir Hospital, Surat. That the parents closed his shop of ration for one month for attending on him in the hospital. That he spent on treatment and transportation and special dietThat he lost chances of better marriage prospect due to baldness. That he suffered adversely on his education.

6. Before the claims tribunal, the opponents were served but opponent No. 1 had

not appeared and opponent No. 2 means owner of the offending vehicle appeared and led evidence and filed written statement at Exh. 48. Opponent No. 3 also filed its appearance and also led evidence and filed written statement Exh. 23 denying the averments made in the claim petition as regards age and other expenses were disputed. It was also disputed that the opponent is liable to pay the compensation contending that the opponent No. 1 was having no driving license and was minor and, therefore, he claimed breach of policy condition. Relevant documents are produced on record by the claimant. Oral evidence is led at Exh. 26 and 27 of both minor and guardian by filing affidavit of applicant No. 1. Thereafter, issues were framed by the claims tribunal at Exh. 18 and tribunal has come to the conclusion that the opponent No. 1 was not examined before the claims tribunal and involvement of the vehicle is not denied and, therefore, opponent No. 1 is responsible for causing accident. Contention raised by the learned advocate appearing on behalf of the insurance company has been examined by the claims tribunal in para 8 to 10 which is quoted as under:

8. The opponent No. 3, the vima company filed the written arguments at Exh. 116, and contended that the opponent No. 1 had not valid or driving license and was student at the time of accident and hence has caused the breach of policy condition and hence not liable to pay the compensation more over it is also submitted that the tribunal has no power to pass and order of pay and recover. the vima company has produced:

a. National Insurance Co. Ltd. Vs. Brij Pal Singh and Another,

b.AIR 2006 SCW 1649 JT 9

9. The opponent No. 2, contended that the insurance company has to prove the breach by leading evidence which he has not done, and hence liable to pay the compensation. He has produced:

a. Abhilasha Bai Vs. Arvind Kumar and Others,

b.2007 ACC (4) 520

In this authority is held that in case of driving license and the breach of policy condition of policy where the driver admitted that he was not holding valid driving license and the liability of insurance company, the Hon''ble high court has held that, - in view of law laid down by supreme court insurance company directed to make payment of compensation to claimant and given liberty to recover amount of compensation from owner and driver as case may be.

c.2007 ACC 196

d.2001 TAC 243

It is held in this authority that Section 145, 147, 164 where liability of insurance company to third party, and its extent concerning breach of policy where, offending vehicle was driven by a person with fake driving license and duly renewed by statutory authority. The question arose whether the insurer can be fastened with liability to pay compensation in respect of the accident to the third party? It was held in affirmative. It is further held that insurer not liable to the insured if policy condition is violated. It is further held that if insurer succeeds in establishing breach of conditions of policy, claims tribunal shall direct the insured to pay the amount to the insurer and in default insurer allowed to recover the amount from the insured.

e. United India Insurance Co. Ltd. Vs. Ravjibhai Karsanbhai Rathod,

f. 2000 TAC 116

In this authority, it is held that u/s 147 and 166 of MV Act, 1988, concerning the driving license and the liabilityo f the insurance company,t he burden of proof whether the onus to prove this issue lies on Iinsurer? Held, yes and insurer liable. Again in the same authority, it is held by the hon''ble High Court that in case of driving license, driver not appear in witness box and license not produced, it was held whether the insurer failed to prove driver was not holding a valid driving license at the time of accident? Held yes and insurer was held liable to indemnify the insured.

g. Digumarthi Subba Rao and Another Vs. Y. Sambasiva Venkata Subba Rao and Another,

It is held in this authority that insurance company pleaded that the driver of the offending tractor-trailor had no valid licence but it made no attempt to establish its defence by summoning the concerned persons and documents. Tribunal exonerated the insurance company and on appeal, it was held that the insurance company is not exempted from liability holding that the insurer failed to establish the exclusion clause against the claimants.

h.2001 TAC 677

From the above authorities produced by the opponents and from 1985 GLR 1242 and 1979 SC 1862, it is specifically held that in case of no driving licence, it is the duty of the insurance company to prove no driving licence to driver. Moreover,

In National Insurance Corporation Ltd. Vs. Mrs. Kanti Devi and Others, DB it is held that

a. Driving licence and mere absence of driving licence, fake, invalid or disqualifications are not defence themselves.

b. Breach of policy condition, pay and recover.

c. Driving licence, the burden of proof on insurance company.

d. Learner''s licence is valid licence.

e. Technical breach of condition not valid defence.

f. Driving licence of one type and driving licence of another type not fundamental breach, pay and recover under same award.

10. Hence, from the above ratio of judgment, a concept is clear in the present claim petition that the insurance company has not proved the breach by leading evidence where burden lies on him and hence I hold insurance company liable to pay to the applicant.

7. Thus, claims tribunal has come to the conclusion that the insurance company has failed to prove breach of condition by leading evidence where the burden lies on the insurance company and, therefore, insurance company is liable to pay the compensation to the applicant.

8. Learned Advocate Mr. K.K. Nair has not disputed or raised any contention about quantum which has been decided by the claims tribunal.

9. The conclusion of the claims tribunal is that the opponent No. 1 was not examined before the claims tribunal and insurance company has also not led any oral evidence and only relied upon the FIR where the facts were admitted by the claimant that opponent No. 1 was not having valid licence and he was minor and on that basis, tribunal ought to have considered contention raised by the insurance company that it amounts to breach of condition of policy of insurance which being contractual liability, should not have been fastened on the insurance company.

10. Looking to the discussion made by the claims tribunal in aforesaid paragraph, according to my opinion, opponent No. 1 Bharatesh Prakashchandra Shah was minor at the time of accident, even injured was also minor infant at that time and opponent No. 1 was not having licence to drive the vehicle and it is also not the case of the claimant that the opponent No. 1 was having effective licence to drive the vehicle and, therefore, in such circumstances, for the purpose of third party claim, it is the statutory liability of the insurance company first to pay the amount to the respondent claimant who is a third party but in such circumstances, this Court can direct the insurance company to recover such amount paid by it to claimants from the insured. Similar question has been examined by the apex court in Samundra Devi and Ors. v. Narendra Kaur and Ors. Reported in 2008 (11) Sc 36. Relevant observations made by apex court in para 14 and 15 of the said judgment are reproduced as under:

14. A contract of insurance as is well known is a contract of indemnity. In a case of accident, the primary liability under law for payment of compensation is that of the driver. The owner of the vehicle also becomes vicariously liable therefor. In a case involving a third-party to the contract of insurance in terms of Section 147 of the Motor Vehicles Act, 1988 providing for a compulsory insurance, the insurer becomes statutorily liable to indemnify the owner. Indisputably, the insurance company would be liable to indemnify the insured in respect of loss suffered by a third party or in respect of damages of property. In a case, therefore, where the liability is fastened upon the insurer, the insurer would be bound to indemnify the insured unless the exceptions contained in Section 149 of the Act are attracted.

15. It has not been disputed before us that in certain situations while opining that the insurance company would not be liable to reimburse the insured, a direction upon the insurance company to pay the amount of compensation to a third party and recover the same from the owner of the vehicle is permissible. Such a direction has been issued by the High Court. The said directions are not under challenge.

Keeping in view the aforementioned principle in mind, the question which arises for our consideration is as to whether it was permissible for the High Court to interfere with the quantum of compensation as awarded by the learned Tribunal, although no appeal was preferred either by the owner or the driver of the vehicle nor any appeal was preferred by the insurance company.

11. Thus, in para 15 of said judgment, apex court has observed that in certain situations while opining that the insurance company would not be liable to reimburse the insured, a direction upon the insurance company to pay the amount of compensation to a third party and recover the same from the owner of the vehicle is permissible and such a direction has been issued by the High Court was not under challenge in that case.

12. Therefore, in this case also, looking to the contention raised by the appellant insurance company and admitted facts which are on record, insurance company is not liable to reimburse or indemnify the insured because it is a clear case of breach of condition of policy of insurance, therefore, in such circumstances, insurance company is duty bound to pay the amount of compensation to the respondents claimants but insurance company is entitled to recover the same from the insured as per the terms and conditions of the policy of insurance by filing necessary application before the executing court to recover the same from the insured, in accordance with the terms and conditions of the policy of insurance. It is also required to be noted that this award is not challenged by the insured before this Court by filing first appeal.

13. I am considering this matter while examining the facts which are not in dispute between the parties. Date of accident is 30th September, 1990 wherein boy aged about seven years was injured by opponent No. 1 who too was minor at that time and not having licence to drive the vehicle and because of the negligence on his part, claimant had received injury and damage to head and suffered baldness of permanent nature which adversely affected chances of better marriage prospects due to baldness. Award of compensation is made by the claims tribunal after about eighteen years, on 26th March, 2008. Contention raised by the insurance company is not disputed by the claimant before the claims tribunal and no objection was raised by opponent No. 1 because he was not remaining present before the claims tribunal. Therefore, opponent No. 1 was not having legal and valid licence, that being undisputed fact as per the contents of the FIR and also as per the contention raised by the insurance company. However, the claims tribunal has gone on footing that this breach of terms and conditions of policy of insurance must be established by the insurance company

by leading proper evidence as burden lies on it but when the facts are remaining undisputed between the parties on the basis of pleadings and documents, then, the question of proving such breach by the insurance company does not arise. However, ultimately, the claims tribunal has directed opponents No. 1, 2 and 3 jointly and severally to pay compensation as per award to claimants but when the insurance policy is violated by insured - owner/opponent No. 1, then, in such situation, it is the right of the insurance company as per the contract not to indemnify the insured, certainly, insurance company has right to recover the amount paid by it to claimant from the insured as per the terms and conditions of the policy of insurance which is permissible in law and, therefore, considering this legal principle, that even otherwise also, insurance company is legally entitled to recover such amount from the insured as per the policy of insurance. Considering the date of accident 30.9.90 wherein award has been made by the claims tribunal after about eighteen years, and considering the fact that the law is permitting the insurance company to recover the amount of compensation paid to claimant from the owner-insured as per terms and conditions of insurance policy which have not been disputed by the insured before the claims tribunal, this Court has not called the insured respondent No. 2 while disposing of this appeal, otherwise, further delay will occur in deciding the appeal.

14. In this appeal, more than reasonable delay has taken place in deciding claim petition. Though insured owner was aware that the person to whom he is entrusting the vehicle is not having driving licence, yet entrusted the vehicle to him and thereby committed breach of the policy of insurance, therefore, considering these facts and circumstances of the case, this Court has decided the appeal at admission stage just to save the time, otherwise, initial liability is that of the driver and owner and the liability of the insurance depends upon the terms and conditions incorporated in the policy of insurance. As the contention raised by the insurance company is covered by Section 149(2) of the MV Act,1988 and is fortified on the basis of the evidence as emerging from the award in question itself, therefore, this Court has passed this order without calling the owner.

15. Vehicle in question is insured with the insurance company after receiving premium and the policy of insurance has been issued by the insurance company. Insurance company is having condition in the policy of insurance that the insurance company is liable to pay the compensation subject to compliance of the terms and conditions of such policy and if the breach of any of the condition incorporated in the insurance policy is committed by the owner, then insurance company is entitled to recover such amount from the insured due to such breach wherein insurance company was required to make payment or indemnify owner insured. So, strictly, there is no need to grant such permission to the insurance company to recover the amount from the owner or insured as such right of the insurance company is crystalized from the conditions of policy itself which are empowering the insurance company for such recovery in such eventuality from the insured or owner. Therefore, as regards contention of learned advocate Mr. Nair to grant such permission to the insurance company, there is no need to

grant such permission as otherwise also, in case of breach of condition committed by the owner and established on the basis of evidence emerging from record, insurance company is empowered enough to recover such loss from the owner. SO, by contractual obligation of the owner to pay such amount in case when breach of any condition is committed by the owner, accordingly, as per the terms and conditions of insurance policy in this case also, since the owner has committed breach of such conditions, insurance company is entitled to recover the same from owner as per the terms and conditions incorporated in the insurance policy itself, meaning thereby, that is legally permissible as per contract between the insured and insurer.

16. In view of the above observations and directions, and also considering the decision of the apex court, this appeal is disposed of while opining that the insurance company would not be liable to reimburse the insured, a direction upon the insurance company to pay the amount of compensation to a third party and recover the same from the owner of the vehicle can be issued but insurance company has to satisfy the award of compensation first.

17. However, it is made clear by this Court that after receiving copy of this order by the owner insured, if the owner is having any grievance against this order, then, he will be at liberty to file appropriate application before this Court with concrete evidence that the person who was driving the vehicle involved in accident was having legal and valid licence to drive the vehicle at the time of accident to the satisfaction of this Court and if such application is made, then, same will be considered by this Court in accordance with law after hearing the owner of the vehicle involved in accident.

18. As the first appeal has been disposed of by this Court today, therefore, no order is required to be made on the civil application for stay. Accordingly, said civil application is also disposed of.