**(2017) 02 AHC CK 0100**

**In the Allahabad High Court**

**Case No :** First Appeal From Order No. 1241 of 1992

Oriental Insurance Co. Ltd. APPELLANT

Vs

Phoolmati RESPONDENT

**Date of Decision :** 13-02-2017

**Acts Referred:**

Motor Vehicles Act, 1988 — Section 147, Section 149, Section 166, Section 168, Section 171, Section 173

**Citation :** (2017) 2 ACC 642 : (2017) 2 TAC 44

**Hon'ble Judges :** Kaushal Jayendra Thaker, J.

**Bench :** Single Bench

**Advocate :** S.K. Kakkar, Advocate, for the Appellant; S.N. Gupta and Ram Singh, Advocates, for the Respondents

**Final Decision :** Allowed

## Judgement

Kaushal Jayendra Thaker, J.—By way of this appeal, the appellant Insurance Company has felt aggrieved by the award passed by Sri S.C. Shukla, District Judge/Motor Accident Claims Tribunal, Fatehpur in M.A.C. No. 85 of 1990 referred by the case of the deceased. The tribunal awarded a sum of Rs. 58,800/- to the claimant no. 1 Smt. Phoolmati, Rs. 23,200/- to claimant no. 2 Ram Chandra, Rs. 19,600/- to claimant no. 3 Phool Chandra and Rs. 48,000/- to claimant no. 4 Km. Phook Kali as compensation along with 15% per annum.

2. The main submission of the Insurance Company is that the deceased is a gratuitous passenger and raised several grounds in the appeal, but while making the submission, learned counsel for the insurance company assails the said judgment mainly on two grounds. One that the deceased was a gratuitous passenger in just because it was a comprehensive policy that he could not have been permitted to sit in the truck. And the second ground was that the interest awarded at the rate of 15% per annum is on higher side.

3. Section 149 reads with Section 147 of the Motor Vehicles Act, 1988 reads as follows:

Section 149 of The Motor Vehicles Act, 1988

149. Duty of insurers to satisfy judgments and awards against persons insured in respect of third party risks.- (1) If, after a certificate of insurance has been issued under sub-section (3) of section 147 in favour of the person by whom a policy has been effected, judgment or award in respect of any such liability as is required to be covered by a policy under clause (b) of sub-section (l) of Section 147 (being a liability covered by the terms of the policy) [or under the provisions of Section 163- A] is obtained against any person insured by the policy then, notwithstanding that the insurer may be entitled to avoid or cancel or may have avoided or cancelled the policy, the insurer shall, subject to the provisions of this section, pay to the person entitled to the benefit of the decree any sum not exceeding the sum assured payable thereunder, as if he were the judgment debtor, in respect of the liability, together with any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments.

Corresponding Law: Section 96(1) of Act IV of 1939

(2) No sum shall be payable by an insurer under sub-section (1) in respect of any judgment or award unless, before the commencement of the proceedings in which the judgment or award is given the insurer had notice through the Court or, as the case may be, the Claims Tribunal of the bringing of the proceedings, or in respect of such judgment or award so long as execution is stayed thereon pending an appeal; and an insurer to whom notice of the bringing of any such proceedings is so given shall be entitled to be made a party thereto and to defend the action on any of the following grounds, namely:-

(a) that there has been a breach of a specified condition of the policy, being one of the following conditions, namely:-

(i) a condition excluding the use of the vehicle-

(a) for hire or reward, where the vehicle is on the date of the contract of insurance a vehicle not covered by a permit to ply for hire or reward, or

(b) for organised racing and speed testing, or

(c) for a purpose not allowed by the permit under which the vehicle is used, where the vehicle is a transport vehicle, or

(d) without side-car being attached where the vehicle is a motor cycle; or

(ii) a condition excluding driving by a named person or persons or by any person who is not duly licensed, or by any person who has been disqualified for holding or obtaining a driving licence during the period of disqualification; or

(iii) a condition excluding liability for injury caused or contributed to by conditions of war, civil war, riot or civil commotion; or

(b) that the policy is void on the ground that it was obtained by the nondisclosure of a material fact or by a representation of fact which was false in some material particular.

Corresponding Law: Section 96(2) of Act IV of 1939

(3) Where any such judgment as is referred to in sub-section (1) is obtained from a Court in a reciprocating country and in the case of a foreign judgment is, by virtue of the provisions of Section 13 of the Code of Civil Procedure, 1908 (5 of 1908) conclusive as to any matter adjudicated upon by it, the insurer (being an insurer registered under the Insurance Act, 1938 (4 of 1938) and whether or not he is registered under the corresponding law of the reciprocating country) shall be liable to the person entitled to the benefit of the decree in the manner and to the extent specified in sub-section (1), as if the judgment were given by a Court in India:

Provided that no sum shall be payable by the insurer in respect of any such judgment unless, before the commencement of the proceedings in which the judgment is given, the insurer had notice through the Court concerned of the bringing of the proceedings and the insurer to whom notice is so given is entitled under the corresponding law of the reciprocating country, to be made a party to the proceedings and to defend the action on grounds similar to those specified in sub-section (2).

Corresponding Law: Section 96(2-A) of Act IV of 1939

(4) Where a certificate of insurance has been issued under sub-section (3) of section 147 to the person by whom a policy has been effected, so much of the policy as purports to restrict the insurance of the persons insured thereby by reference to any conditions other than those in clause (b) of sub-section (2) shall, as respects such liabilities as are required to be covered by a policy under clause (b) of sub-section (1) of Section 147, be of no effect:

Provided that any sum paid by the insurer in or towards the discharge of any liability of any person which is covered by the policy by virtue only of this sub-section shall be recoverable by the insurer from that person.

Corresponding Law: Section 96(3) of Act IV of 1939

(5) If the amount which an insurer becomes liable under this section to pay in respect of a liability incurred by a person insured by a policy exceeds the amount for which the insurer would apart from the provisions of this section be liable under the policy in respect of that liability, the insurer shall be entitled to recover the excess from that person.

Corresponding Law: Section 96(4) of Act IV of 1939

(6) In this section the expressions "material fact" and "material particular" means, respectively a fact or particular of such a nature as to influence the judgment of a prudent insurer in determining whether he will take the risk and, if so, at what premium and on what conditions, and the expression "liability

covered by the terms of the policy" means a liability which is covered by the policy or which would be so covered but for the fact that the insurer is entitled to avoid or cancel or has avoided or cancelled the policy.

Corresponding Law: Section 96(5) of Act IV of 1939

(7) No insurer to whom the notice referred to in sub-section (2) or sub-section (3) has been given shall be entitled to avoid his liability to any person entitled to the benefit of any such judgment or award as is referred to in sub-section (1) or in such judgment as is referred to in sub-section (3) otherwise than in the manner provided for in subsection (2) or in the corresponding law of the reciprocating country, as the case may be.

Explanation.-For the purposes of this section, "Claims Tribunal" means a Claims Tribunal constituted under Section 165 and "award" means an award made by that Tribunal under section 168.

Corresponding Law: Section 96(7) of Act IV of 1939

Section 147 of The Motor Vehicles Act, 1988

147. Requirements of policies and limits of liability. - (1) In order to comply with the requirements of this Chapter, a policy of insurance must be a policy which-

(a) is issued by a person who is an authorised insurer; and

(b) insures the person or classes of persons specified in the policy to the extent specified in sub-section (2)-

(i) against any liability which may be incurred by him in respect of the death of or bodily injury to any person, [including owner of the goods or his authorised representative carried in the vehicle] or damage to any property of a third party caused by or arising out of the use of the vehicle in a public place;

(ii) against the death of or bodily injury to any passenger of a public service vehicle caused by or arising out of the use of the vehicle in a public place:

Provided that a policy shall not be required-

(i) to cover liability in respect of the death, arising out of and in the course of his employment, of the employee of a person insured by the policy or in respect of bodily injury sustained by such an employee arising out of and in the course of his employment other than a liability arising under the Workmen''s Compensation Act, 1923 (8 of 1923) in respect of the death of, or bodily injury to, any such employee-

(a) engaged in driving the vehicle, or

(b) if it is a public service vehicle engaged as a conductor of the vehicle or in examining tickets on the vehicle, or

(c) if it is a goods carriage, being carried in the vehicle, or

 

(ii) to cover any contractual liability.

Explanation. -For the removal of doubts, it is hereby declared that the death of or bodily injury to any person or damage to any property of a third party shall be deemed to have been caused by or to have arisen out of, the use of a vehicle in a public place notwithstanding that the person who is dead or injured or the property which is damaged was not in a public place at the time of the accident, if the act or omission which led to the accident occurred in a public place.

Corresponding Law: Section 95(1) of Act IV of 1939

(2) Subject to the proviso to sub-section (1), a policy of insurance referred to in subsection(1), shall cover any liability incurred in respect of any accident, up to the following limits, namely:-

(a) save as provided in clause (b), the amount of liability incurred;

(b) in respect of damage to any property of a third party, a limit of rupees six thousand:

Provided that any policy of insurance issued with any limited liability and in force, immediately before the commencement of this Act, shall continue to be effective for a period of four months after such commencement or till the date of expiry of such policy whichever is earlier.

Corresponding Law: Section 95(2) of Act IV of 1939

(3) A policy shall be of no effect for the purposes of this Chapter unless and until there is issued by the insurer in favour of the person by whom the policy is effected a certificate of insurance in the prescribed form and containing the prescribed particulars of any condition subject to which the policy is issued and of any other prescribed matters; and different forms, particulars and matters may be prescribed in different cases.

Corresponding Law: Section 95(4) of Act IV of 1939

(4) Where a cover note issued by the insurer under the provisions of this Chapter or the rules made thereunder is not followed by a policy of insurance within the prescribed time, the insurer shall, within seven days of the expiry of the period of the validity of the cover note, notify the fact to the registering authority in whose records the vehicle to which the cover note relates has been registered or to such other authority as the State Government may prescribe.

Corresponding Law: Section 95(4-A) of Act IV of 1939

(5) Notwithstanding anything contained in any law for the time being in force, an insurer issuing a policy of insurance under this section shall be liable to indemnify the person or classes of persons specified in the policy in respect of any liability which the policy purports to cover in the case of that person or those classes of persons.

 

Corresponding Law: Section 95(5) of Act IV of 1939

4. In this case, the tribunal has come to the finding on fact that the deceased was a person with his own goods and therefore he cannot be said to be a person of gratuitous nature and therefore I do not find that there is any breach of policy. No other aspect requires to be looked into as this was only submission made by the counsel for the appellant which is on facts. The finding against the Insurance Company will not permit this Court to take a different view than that was taken by the tribunal in the year 1992. I am fortified in my view by the decision of Apex Court in the case of New India Insurance Company v. Darshana Devi and others in Civil Appeal No. 1232 of 2008 arising out of SLP (C) No. 15673 of 2004 decided on 12.02.2008 reported in AIR 2008 Sup. SC 1639 held that the deceased being the owner of the goods was covered by the carriage policy and Insurance Company will be laible to indemnify the owner.

5. As far as rate of interest is concerned, the submission is that 15% was not even awarded in 1990 requires consideration and the rate of interest is slashed down to 10% per annum and not 15%. It is vehemently argued by Sri Ram Singh, counsel for the respondents that in those days many of the tribunals were awarding 15% interest and this Court may not interfere with the rate of interest as awarded by the tribunal.

6. I feel that the submission of learned counsel for the appellant Insurance Company is just and proper. 10% rate of interest would suffice in the facts of this case.

7. Learned counsel for the claimants has filed cross objection. He submits that future prospects was not considered. Both the children were minor and there a widow. The tribunal granted only income of Rs. 800/- though, he was person serving as gangman in the railway department. The wife in her evidence had submitted that her husband was earning Rs. 800/- per month and therefore the said amount has been considered by the tribunal. The fact of the future prospects is concerned, it is evident from the calculation made in para nos. 13, 14, 15 and 16 that the learned tribunal has not considered any amount under the head of future prospect. A sum of Rs. 1,49,600/- was awarded. I would add a lump sum amount of Rs. 50,000/- towards future prospects and all other heads in the year 1992 as he was an earning man and was in government service and his age was about 35 years. This amount will also carry 10% interest from the date of petition.

Appeal is partly allowed.

The cross-objection is also partly allowed.

The judgment be modified to the aforesaid extent.

Decree be drawn likewise.

Interim order, if any, shall stand vacated.

 