
(2016) 02 AHC CK 0271

In the Allahabad High Court

Case No : First Appeal From Order No. 548 of 2016

Oriental Insurance Co. Ltd.

APPELLANT

Vs

Smt. Seema Pandey And 5 Ors.

RESPONDENT

Date of Decision : 19-02-2016

Acts Referred:

Citation : (2016) 3 ACC 620 : (2017) ACJ 1265 : (2016) 6 ADJ 246 : (2016) 165 AIC 946 : (2017) 1 AILJ 302 : (2016) 5 AllWC 5109 : (2016) 117 ALR 599 : (2016) 4 TAC 281 : (2016) 2 TNMAC 443

Hon'ble Judges : Krishna Murari and Raghvendra Kumar, JJ.

Bench : Division Bench

Advocate : Ashok Kumar Jaiswal, Advocate, for the Appellant; Chandra Bhushan Dhar Dube, Advocate, for the Respondent

Final Decision : Dismissed

Judgement

1. This First Appeal From Order is directed against the judgment and order dated 30.10.2015 passed by the Motor Accident Claims Tribunal/Additional District Judge, Court No. 19, Allahabad awarding a sum of Rs.11,24,328/- as compensation.

2. An application was made by the claimants seeking compensation to the tune of Rs.12,90,500/- on account of death of Om Prakash Pandey caused in an accident on 26.9.1999 at about 6.30 p.m. Near Red Eagle Military School. According to the claim petition, the deceased was police Sub-Inspector of Delhi Police and was going on motor cycle no. UP-70J-8522 along with another Sub-Inspector Vijay Kumar Mishra to police outpost Pura Gareriya Govindpur and at about 6.30 p.m. when they reached Red Eagle Military School the driver of Tata 407 minibus bearing registration no. UP 70E 8330, which was being driven rashly and negligently, dashed the motor cycle on account of which the deceased Om Prakash Pandey suffered grievous injuries and died while on way to hospital.

3. Case set up by the appellant Insurance Company was that when the cheque of

premium given by the owner of the offending vehicle was presented for encashment it was dishonoured by the bank for want of funds and thereafter, the Insurance Company vide registered letter dated 06.08.1999 informed the owner of the offending vehicle as well as the Road Transport Authority that the cheque of premium has bounced and insurance cover note no. 776731 dated 25.8.1999 and the policy no. 2211 of the vehicle in question has been cancelled. It was also pleaded that accident took place on 26.09.1999, as such, the insurance company in view of Section 64VB is under no liability to make payment of compensation. On behalf of the Insurance Company photocopy of the cheque no. 155357, the memorandum issued by the Union Bank of India dated 28.08.1999 for bouncing of the cheque, letter dated 06.09.1999 issued to the owner of the offending vehicle and certified copy of the register and "Dakbahi" were produced in evidence.

4. The case set up by the owner of the offending vehicle was that photocopy of the cheque filed in evidence, which is alleged to have bounced, was issued by one Raj Kumar and no information of the bouncing of the cheque was ever given to the owner of the vehicle and register and "Dakwahi", which have been produced in evidence, contain cutting and overwriting. It was also pleaded that the memorandum of the bank dated 28.08.1999 and the alleged letter cancelling the policy dated 06.09.1999 and the register and "Dakwahi" have not been proved by producing any witness.

5. Documentary evidence was adduced before the Tribunal by the owner of the offending vehicle in the form of policy cover note no. 776731 which went to show that it was issued by the Oriental Insurance Company on 05.08.1999 and premium paid was Rs. 6148/- through cheque no. 155357 and the policy was effective till 28.04.2000. Documents produced in evidence was duly proved by the DW-1 Virendra Kumar Yadav, the owner of the offending vehicle.

6. Learned counsel for the appellant contends that since the cheque issued for premium was dishonoured, which fact was duly informed to the owner of the offending vehicle, hence, there was no policy in existence and the court below has wrongly and illegally returned a finding that information of the cancellation of the policy was not sent to the owner, as such, the Insurance company cannot deny its liability. It is further submitted that the accident was a result of contributory negligence and the Tribunal committed an error in holding otherwise. Learned counsel for the appellant also submitted that the findings recorded by the Tribunal that information about cancellation of policy was sent to the owner of the offending vehicle and Road Transport Authority by registered cover is totally against the evidence on record.

7. We have considered the argument advanced by learned counsel for the appellant Insurance Company and perused the record.

8. The Tribunal after analysing the evidence brought on record orally as well as documentary on behalf of the parties held that accident was caused due to rash

and negligent driving of the offending bus on account of which the accident took place resulting in death of Om Prakash Pandey. The Tribunal further held that the driver of the offending vehicle was having a valid driving license and road permit and valid fitness certificate. On the basis of the aforesaid finding, the Tribunal awarded the compensation.

9. Analysing the evidence documentary as well as oral the Tribunal disbelieved the statement of D.W. 2 Rajendra Kumar Yadav, who was working as a cashier, produced by the Insurance Company to prove the entry made in the cheque dishonour register on the ground that though in examination-in-chief he stated that he received the dishonoured cheque from the bank on 06.09.1999 along with slip of the bank and an endorsement in respect of the same was made in the register and thereafter, the cheque was presented before the Branch Manager who cancelled the policy and sent information to the owner of the offending vehicle as well as the Road Transport Authority by registered post, however, in cross-examination he stated that he was transferred in this branch in March, 2010. He tried to cover up the assertions made in examination-in-chief by stating in cross-examination that what he actually meant that the cheque was received by the Company and the then person holding the charge made entries in the register. It was not received by him personally and he did not make entry in the cheque dishonour register. He categorically stated that receipt of the cheque and cancellation of the policy took place before he came to be posted in the branch. He also failed to disclose the name of the person in whose handwriting the endorsement was made in the register.

10. The Tribunal also found that there are cuttings and over-writings in the cheque dishonour register. Analysing the paper no. 70Ga, which was certified photocopy of the cheque dishonour register, the Tribunal found that at serial no. (1) the name of one Virendra Kumar is entered but before that there was entry of name of some other person, which was scored out, and thereafter, the name of Virendra Kumar was entered and there was cutting and overwriting on date, policy number, agent code. Similarly, D.W. 3 Babu Ram in his examination-in-chief stated that on 06.09.1999 he was working as record keeper in Naini Branch of the Company and after receipt of the dishonoured cheque, the Cashier informed the Branch Manager who asked the Assistant Manager Ravindra Nath Tiwari to send information of dishonoured cheque to the owner of the vehicle and the Road Transport Authority. He also stated that he sent registered post on 07.09.1999. However, in cross-examination he stated that he was working on Class-IV post and the dispatch register is kept in the custody of the record keeper and one Ashok Kumar is working as record clerk. When he was shown the photocopy of the certified copy of the dispatch register during cross-examination he admitted that there is cutting and overwriting in respect of the entries made regarding dispatch of letter to Virendra Kumar. He also admitted that in the original register at page 111 there are cuttings and over-writings in all the columns at serial no. 868. The Tribunal also returned a finding that the Insurance Company has failed to produce any evidence either in the form of

acknowledgment or receipt which may go to show that information of the cancellation of the policy sent to the owner of the vehicle and the Road Transport Authority was received by them before the accident.

11. On the basis of the aforesaid analysis of evidence, the Tribunal rightly recorded a finding that the Insurance Company has failed to establish that the premium cheque of the policy having been dishonoured by the bank, the insurance policy was cancelled in accordance with law and the fact was duly informed to the owner of the offending vehicle and the Road Transport Authority and the same was received by them before the accident.

12. Learned counsel for the appellant referring to Section 64-VB of the Insurance Act has vehemently urged that since the premium was not received there is no legal obligation on the Insurance Company to cover the risk and cannot be held liable to pay compensation. Section 64 VB of the Insurance Act reads as under :

"64-VB. No risk to be assumed unless premium is received in advance.--

(1) No insurer shall assume any risk in India in respect of any insurance business on which premium is not ordinarily payable outside India unless and until the premium payable is received by him or is guaranteed to be paid by such person in such manner and within such time as may be prescribed or unless and until deposit of such amount as may be prescribed, is made in advance in the prescribed manner.

(2) For the purposes of this section, in the case of risks for which premium can be ascertained in advance, the risk may be assumed not earlier than the date on which the premium has been paid in cash or by cheque to the insurer.

Explanation - Where the premium is tendered by postal money order or cheque sent by post, the risk may be assumed on the date on which the money order is booked or the cheque is posted, as the case may be.

(3) Any refund of premium which may become due to an insured on account of cancellation of a policy or alteration in its terms and conditions or otherwise shall be paid by the insurer directly to the insured by a crossed or order cheque or by postal money order and a proper receipt shall be obtained by the insurer from the insured, and such refund shall in no case be credited to the account of the agent.

(4) Where in insurance agent collects a premium on a policy of insurance on behalf of an insurer, he shall deposit with, or dispatch by post to, the insurer, the premium so collected in full without deduction of his commission within twenty-four hours of the collection excluding bank and postal holidays.

(5) The Central Government may, by rules, relax the requirements of subsection (1) in respect of particular categories of insurance policies."

13. It may also be relevant to quote Section 149 of the Motor Vehicles Act, 1988 (in short the "Act") which casts a duty on the insurer to satisfy the judgments

and awards against persons insured in respect of third party risk. Sub-section (1) of Section 149 relevant for the purpose of the present dispute reads as under :

"(1) If, after a certificate of insurance has been issued under subsection (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 (1) 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."

14. Section 146(1) of the Act contains a prohibition on use of motor vehicles without a insurance policy having been taken in accordance with Chapter XI of the Motor Vehicles Act. The object of this provision apparently is to ensure that a third party who suffers injuries on account of use of motor vehicle, may be able to get damages from the owner of the vehicle and the recovery of damages may not be dependent on the financial condition or solvency of the driver of the vehicle which had caused injuries.

15. Undisputedly, the insurance policy is nothing but a contract between the insurer and insured and the premium is the consideration. It is no doubt correct that if premium is not paid the contract would not be valid as there cannot be a contract without a consideration. Thus once a cheque of premium paid by insured bounces or is not encashed when presented for encashment there is a failure of consideration, as such, it can be said that no contract of insurance comes into existence. However, this principle relating to an ordinary contract may not stand attracted in a contract of insurance relating to a motor vehicle and the same has to be understood and read in the light of the various provisions contained in the Motor Vehicles Act, 1988. The three Judge Bench of the Hon"ble Apex Court in the case of Oriental Insurance Co. Ltd. v. Inderjit Kaur and others, reported in 1998(1) T.A.C. 615 (SC) after considering the provisions of the Motor Vehicles Act answered the issue as under :

"7. We have, therefore, this position. Despite the bar created by Section 64-VB of the Insurance Act, the appellant, an authorised insurer, issued a policy of insurance to cover the bus without receiving the premium therefor. By reason of the provisions of Sections 147(5) and 149(1) of the Motor Vehicles Act, the appellant became liable to indemnify third parties in respect of the liability which that policy covered and to satisfy awards of compensation in respect thereof notwithstanding its entitlement (upon which we do not express any opinion) to avoid or cancel the policy for the reason that the cheque issued in payment of

the premium thereon had not been honoured.

8. The policy of insurance that the appellant issued z representation upon which the authorities and third parties were entitled to act. The appellant was not absolved of its obligations to third parties under the policy because it did not receive the premium. Its remedies in this behalf lay against the insured.

10. It must also be noted that it was the appellant itself who was responsible for its predicament. It has issued the policy of insurance upon receipt only of a cheque towards the premium in contravention of the provisions of Section 64-VB of the Insurance Act. The public interest that a policy of insurance serves must, clearly, prevail over the interest of the appellant."

16. The same view was taken by the Hon"ble Apex Court in the case of New India Assurance Co. Ltd. v. Rula and Others, reported in (2000) 3 SCC 195. In the said case it was held as under :

"If, on the date of accident, there was a policy of insurance in respect of the vehicle in question, the third party would have a claim against the Insurance Company and the owner of the vehicle would have to be indemnified in respect of the claim of that party. Subsequent cancellation of the insurance policy on the ground of non-payment of premium would not affect the rights already accrued in favour of the third party."

17. Hon"ble Apex Court in the case of Deddappa and others v. Branch Manager, National Insurance Co. Ltd., reported in 2008(1) T.A.C. 417 (S.C.) in identical facts and situation of a case observed as under :

"the statutory liability of the Insurance Company vis-a-vis a third party in the context of Sections 147 and 149 of the Act and its liabilities in other cases. But the same liabilities arising under a contract of insurance would have to be met if the contract is valid. If the contract of insurance has been cancelled and all concerned have been intimated thereabout, the Insurance Company would not be liable to satisfy the claim."

18. In the case in hand, we find that cheque issued by the owner of the offending vehicle returned unpaid by the bank on 06.09.1999. After return of the unpaid cheque in the aforesaid situation, the appellant Insurance Company was under a obligation to immediately inform the owner of the vehicle who has issued the cheque and also the transport authority. From the evidence oral and documentary discussed above, we find that the appellant Insurance Company has failed to discharge its duty to establish that after return of the unpaid cheque on 6.9.1999 the insurance policy was cancelled and due intimation of the same under registered cover with acknowledgement due was sent to the owner of the offending vehicle as well as the Road Transport Authority. Admittedly, the Tribunal disbelieved the evidence adduced by the Insurance Company in this regard which has been discussed in detail above.

19. Suffice it to say, the witness produced by the appellant Insurance Company

to prove the documents failed to do so and there were admittedly cuttings and over-writings, which went to demonstrate that interpolation has been made in the entries to demonstrate that policy was cancelled and due intimation of the same was given to the owner of the offending vehicle as well as the Road Transport Authority. But in any case, the burden could not be discharged by the appellant Insurance Company.

20. Once the Insurance Company failed to discharge the burden that it cancelled the policy and gave information of the same to the owner of the offending vehicle and the Road Transport Authority and the same was duly received by them, the liability in respect of a third party shall not shift upon the owner of the offending vehicle from the Insurance Company.

21. The Appeal fails and accordingly stands dismissed in limine.

22. However, there shall be no order as to costs.