

(2011) 01 GAU CK 0007

In the Gauhati High Court

Case No : Review Petition No. 09 (SH) of 2009 in MAC Appeal No. 1 (SH) of 2007

Oriental Insurance Co. Ltd. Review

APPELLANT

Vs

A.J. Thomas

RESPONDENT

Date of Decision : 13-01-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 47 Rule 1
Motor Vehicles Act, 1988 — Section 147, 163(A), 166

Citation : (2011) 4 GLR 289

Hon'ble Judges : P.K. Musahary, J

Bench : Single Bench

Advocate : S. Dutta, B.K. Deb Roy and D. Chakraborty, for the Appellant; A. Paul and K. Paul, for the Respondent

Final Decision : Dismissed

Judgement

P.K. Musahary, J

1. Heard Mr. S. Dutta, learned Counsel for the review Petitioner Appellant and Ms. A. Paul, learned Counsel appearing for the opposite party claimant.

2. The Petitioner seeks review of/modification in the judgment and order dated 6.11.2009 passed by this Court in MAC Appeal No. 01(SH) of 2007 mainly on the ground that the extra premium of Rs. 100 paid by the claimant Respondent is only for covering the personal accident up to Rs. 1,33,330 at the maximum in case of death of the owner and pillion rider and such type of claim is to be adjudicated by the insurance company and this Court erred in holding that the insurer is liable to indemnify the loss suffered by the claimant. The other ground is that the claim petition being made u/s 163(A) of the M.V. Act, 1988, is not maintainable as there is no policy coverage on the accident in question and the learned Tribunal committed an error without considering the legal position that the Petitioner-insurer is not liable to pay the compensation.

3. The maintainability of the review petition has been questioned by Ms. A. Paul,

learned Counsel for the opposite party. She submits that the Petitioner by filing this review application is trying to reopen the entire matter in appeal and trying to raise the issues which were not agitated before the learned Member, Motor Accident Claims Tribunal as well as in the memo of appeal, which is not permissible under the law particularly, under the provisions of order 47, Rule 1 of the Code of Civil Procedure, 1908. The review Petitioner is seeking modification of the reasoning and findings of the appellate court, which cannot be allowed in the review and as such, the review petition is liable to be dismissed. In support of her submissions, Ms. Paul relies upon the case of Smt. Meera Bhanja Vs. Smt. Nirmala Kumari Choudhury, Further, it is submitted by the learned Counsel for the opposite party that the Petitioner-insurer in its written statement and even in the written argument before the learned Tribunal did not take the plea that the insurance policy covered the death of or bodily injury to any person being carried in the vehicle or damage to any property of third party only. The present stand of the Petitioner-insurer that u/s 147, an insurance company does not require to assume risk for death of or bodily injury to the owner of the vehicle, was also not taken in the written statement as well as in the written argument filed before the learned Tribunal. So also, its present stand that driver-owner is not a passenger, much less a third party, was also not taken in the written statement. The stand as taken by the Petitioner insurer in the present petition, having not been taken before the learned Tribunal, the same cannot be raised now in the review petition. The claim petition, according to Ms. Paul, was filed u/s 166 of the MV Act and not u/s 163(A) as presently contended by the Petitioner-insurer in the memo of appeal and as such, the ground taken in the review application that the claim petition is not maintainable inasmuch as there is no policy coverage on the accident in question and the learned Tribunal was totally oblivious of the legal position in passing the award, is not acceptable and such issue cannot be raised now in the review petition.

4. Mr. Dutta, learned Counsel for the review Petitioner, on the question of maintainability of the review petition, submits that review can be asked for not only in the case where the order suffers from error apparent on the face of record and permitting the same would lead to failure of justice but also for any other sufficient reason for the end of justice. In the present case, according to him, it could not be clearly pointed out before the learned Tribunal that extra premium paid by the insured would not cover the entire claim and the claim could be settled between the insurer and the insured without filing any claim petition, could not be placed and thereby a wrong decision was taken holding the Petitioner-insurer liable for the compensation, falls under the other sufficient reasons. In this regard, he would rely on the decision of the Apex Court in *Inderchand Jain (D) through L.Rs. Vs. Motilal (D) through L.Rs.*, wherein it has been held amongst other, that application of review lies when (i) order suffers from error apparent on the face of record and permitting the same would lead to failure of justice, (ii) discovery of new and important matter or evidence which despite exercise of due diligence was not within the knowledge of applicant or

could not be produced at the time when the order was made, (iii) order has been passed on account of some mistake and lastly, (iv) for any other sufficient reason.

5. The scope of review under order 47, Rule 1 of Code of Civil Procedure, 1908, has been expanded tremendously to be applied to subsequent events to meet the ends of justice in a given facts and circumstances of a case, it can be applied to a case where there is a new discovery of a new and important piece of evidence or where there exists an error apparent on the face of the record and if the same is necessitated on account of some mistake or for any other sufficient reasons. Such expansion of law has been declared in Board of Control for Cricket, India and Another Vs. Netaji Cricket Club and Others, wherein it has been held that the words "sufficient reasons" in order 47, Rule 1 CPC is wide enough to include a misconception of fact of law or by a court or even by an advocate and an application of review may be necessitated by way of invoking the doctrine "actus curiae neminem gravabit" which means an act of court shall prejudice no man. The reason behind this law is that law has to bend before justice. Reference has been made to decision of the Apex Court in Lily Thomas v. Union of India AIR 2000 SC 1650 wherein it has been observed that if the court finds that the error pointed out in the review petition was under a mistake and the earlier judgment would not have been passed but for erroneous assumption which in fact did not exist and its perpetration shall result in miscarriage of justice, nothing would preclude the court from rectifying the error.

6. The traditional ground for making review application has been done away for the sake of doing substantive justice to the parties without giving emphasis on technicalities or procedure. In my considered view, no further discussion on the maintainability of review petition is necessary in view of the principles laid down in the aforesaid cases and the court cannot be prevented from entertaining the present review petition. Accordingly, I hold that the present review petition is maintainable.

7. Mr. Dutta, learned Counsel, while contending that against payment of additional premium of Rs. 100, the opposite party claimant would be entitled to personal accident benefit of Rs. 1,33,333 only and under no circumstances, it would exceed Rs. 2,00,000, refers to Clause 27 of the amended India Motor Tariff as adapted by the Tariff Advisory Committee (General Insurance). The said Clause 27 is quoted hereunder for ready reference:

Description of benefits

% of capital sum insured

Premium per year /per person for capital sum insured for Rs. 10,000

For Pvt. Car

Rs.

Motor

Scooter

Rs.

Vehicle Commercial Rs.

(i)

Death only

100

5

7.5

6

(ii)

Loss of Two limbs or sight of two eyes or one limb and sight of one eye

100

5

7.5

6

(iii)

Loss of one Limb of sight of one eye

50

5

7.5

6

(iv)

Permanent Total Disablement from injuries other than named above

100

5

7.5

6

Based on the aforesaid Tariff, the learned Counsel makes the following calculation:

Clause 27, Sheet No. 25

Personal Accident Cover under Motor Tariff Policies under India Motor Tariff.

Admittedly, claimant Respondent paid Rs. 100 as Personal Accident Benefit.

As per chart: If a person pays Rs. 7.5 paise, coverage per insured per year is Rs. 10,000

Respondent paid Rs. 100 as premium. Therefore, his entitlement of claim will be $\text{Rs. } 7.5/100 \times 10,000 = \text{Rs. } 1,33,333$.

Thus, according to him, the opposite party claimant would be entitled to personal accident claim of Rs. 1,33,333 only.

8. Ms. Paul, learned Counsel for the opposite party claimant, submits that the Appellant Petitioner is estopped from taking this ground as no such ground was taken in the written statement before the learned Tribunal below as well as before the appellate court. Such ground cannot be taken at the belated stage in the review petition. The Appellant Petitioner by raising such new ground is making an endeavour to reopen the entire case to its advantage.

9. In the impugned order, it has been noted that none appeared for the Appellant Petitioner when the matter was taken-up for hearing. It is, however, not recorded as to whether adjournment was sought for on behalf of the learned Counsel for the Appellant Petitioner but fact remains that the Appellant's counsel was not present at the time of hearing of the matter. The judgment and order was passed ex parte. The award of the learned Member, MACT, was upheld mainly on the basis of the finding that an extra premium of Rs. 100 was paid by the insured. This has not been denied by the Appellant insurer. This Court discussed the consequence of or benefit to be derived by the claimant insured under the insurance policy where extra premium has been paid. The court came to conclusion that such insurance policy would cover the entire risk and the Appellant insurer would be liable to indemnify the insured only on the basis of submissions made by the learned Counsel for the Appellant claimant.

10. At the time of hearing, it was not brought to the notice of the court the settled position of law in respect of statutory liability of the insurer u/s 147 of the Motor Vehicles Act, 1988. The Apex Court clearly laid down in Dhanraj Vs. New India Assurance Co. Ltd. and Another, holding that Section 147 does not require an Insurance Company to assume risk for death or bodily injury to the owner of the vehicle. Such an insurance policy as held therein, is only to indemnify the insured against the liabilities incurred towards a third person or in respect of damages to property. It is further held that an owner of a vehicle can only claim a payout in respect of bodily injury to himself provided he is specifically covered by the policy in question.

11. Paragraphs 7 and 8 of the aforesaid judgment in Dhanraj's case (supra) cover the present case and I find it appropriate to quote the same hereunder:

7. We have seen the policy. It is a comprehensive policy. The question that arises

is whether a comprehensive policy would cover the risk of injury to the owner of the vehicle also. Section 147 of the Motor Vehicles Act, 1988, reads as follows:

147. Requirements of policies and limits of liability. -- (1) In order to comply with the requirements of the 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 clauses 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.

(2) Subject to the proviso to Sub-section (1), a policy of insurance referred to in Sub-section (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, however, is earlier."

8. Thus, an insurance policy covers the liability incurred by the insured in respect of death of or bodily injury to any person (including an owner of the goods or his authorised respective) carried in the vehicle or damage to any property of a third party caused by or arising out of the use of the vehicle. Section 147 does not require an insurance company to assume risk for death or bodily injury to the owner of the vehicle.

12. It is noticeable that there are two parts in the insurance policy; one part is known as "own damage" and the other part is known as "liability". The words "own damage" as explained and held in paragraph 10 of the aforesaid judgment does not cover liability towards personal injury to the injured but it would mean premium towards damages to the vehicle. It is further clarified therein that an owner of the vehicle can only claim provided when a personal accident insurance has been taken out.

13. From the above discussions, I find that there is an omission in taking note of the law laid down by the Apex Court in Rajani Devi's case (supra) which, otherwise, fully covers the present case. I am also of the opinion that had there been a representation from the Appellant Petitioner at the time of hearing the appeal, it could have been pointed out and this Court would have passed an order in the line of the aforesaid decision of the Apex Court. The objection from the opposite party claimant that the Appellant Petitioner should not be allowed to raise the new point to reopen the case is not appealing inasmuch as question of law could be raised at any stage and even by filing an application for modification and/or review of the earlier order passed by the court. Because of the settled position of law and the issue involved, I find that this is a fit case for re-adjudication by recalling the impugned judgment and order dated 6.11.2009 passed by this Court in MAC. Appeal No. 01(SH) of 2007. It is accordingly recalled.

14. The entire matter is remanded to the learned Tribunal below for re-adjudication with regard to liability of the Appellant Petitioner Insurance Company on the basis of the payment of additional/extra premium of Rs. 100 for personal accident coverage of the insured and also applicability of the Tariff as per contention and calculation of the learned Counsel for the Appellant Insurance Company. The learned Tribunal concerned may allow the parties to lead evidence, both documentary and/or oral, in this regard, if so required. The parties shall be given due notice and opportunity of hearing for effective disposal of the matter in accordance with law within a period of 3 (three) months from the date of receipt of the connected records.

15. The review petition stands allowed to the extent indicated above.

16. Send down the records to the court below forthwith.