

(1997) 08 GUJ CK 0024

In the Gujarat High Court

Case No : Civil Revision Application No. 164 of 1994

Premilaben Ishwarlal Raijada

APPELLANT

Vs

Oriental Insurance Co. Ltd. and Others

RESPONDENT

Date of Decision : 12-08-1997

Acts Referred:

Motor Vehicles Act, 1988 — Section 174, 175

Citation : (1998) ACJ 1339 : (1998) 1 GLR 248

Hon'ble Judges : S.D. Shah, J

Bench : Single Bench

Advocate : Y.S. Lakhani, for the Appellant; Uday R. Bhatt, for the Respondent

Final Decision : Dismissed

Judgement

S.D. Shah, J.—This C.R.A. is directed against the judgment and order of M.A.C.T. (Main) at Rajkot dated 21.9.1993 arising from the execution proceedings for executing the above (sic.) order. It appears that the M.A.C.P. No. 109 of 1990 was instituted by one D.P. Dholakia before the Tribunal at Rajkot. In the accident two vehicles were involved, one being the Fiat car which was not insured as required under the provisions of the Motor Vehicles Act and another vehicle being autorickshaw which was insured with the Oriental Insurance Co. Ltd. The claim of the claimant was partially passed by the Tribunal, inter alia, holding that he was entitled to recover amount of Rs. 43,000/- with 12 per cent interest from the date of the application till realisation and proportionate costs of the petition from the present petitioner who was the original opponent travelling in the Fiat car and from opponent Nos. 3 & 4 jointly and severally. Though it is stated in the memo of C.R.A. that the judgment and award of the Tribunal will be produced before the Court at the time of hearing, it must be stated that the same is not produced. The driver and owner of the Fiat car, one of them being the present petitioner was found to have contributed to the accident that occurred and finding of the Tribunal was that there was contributory negligence of the petitioner, namely, Premilaben Ishwarlal Raijada who was the owner of the Fiat

car. The liability of the driver of autorickshaw and the insurance company was held to the extent of 75 per cent and therefore, the Oriental Insurance Co. Ltd., opponent herein, was held to be liable to pay or discharge its liability to the extent of 75 per cent. Unfortunately, without reading the award and knowing that the liability of the Oriental Insurance Co. Ltd., which insured the autorickshaw was held to the extent of 75 per cent only and the Tribunal has recorded a positive finding that it was a case of contributory negligence where but for the negligence of the owner and driver of the Fiat car, present petitioner, no accident would have occurred, the Tribunal passed the award for the aforesaid amount holding that the present petitioner and opponent Nos. 3 & 4 were jointly and severally liable. The liability of the owner and driver of autorickshaw for the accident was assessed at 75 per cent and to that extent the insurance company, present opponent herein, was liable to deposit 75 per cent of the amount awarded. The Tribunal has in terms found that it is a case of contributory negligence of the two vehicles and therefore, the insurance company which insured the autorickshaw, whose contributory negligence was assessed at 75 per cent was thereby to deposit the amount of award, costs and interest to the extent of 75 per cent only. Unfortunately, opponent herein, namely, Oriental Insurance Co. Ltd., with whom the autorickshaw was insured deposited the full amount of award though the liability of the vehicle insured with it was assessed at 75 per cent only. In fact, therefore, the insurance company was liable to deposit the amount to the extent of 75 per cent of the award with costs and interest. Since the full amount was deposited, the claimant withdrew the full amount from the Tribunal and the mistake was detected by the Senior Divisional Manager of the Oriental Insurance Co., present opponent, and an application was made to recover the excess amount u/s 110-E of Motor Vehicles Act, 1939, as it stood prior to the amendment of the Act which is equal to Section 174 of the Motor Vehicles Act, 1988. After examining the application same was admitted by the Tribunal and notice was issued to the opponent and below such application in the Darkhast Proceeding No. 7 of 1994 the Tribunal passed the judgment and order, dated 21.9.1993, allowing the application and calling upon the owner and driver of the vehicle to pay to Oriental Insurance Co. Ltd. the amount of Rs. 14,096.25 within two months from the date of the order.

2. Being aggrieved by such judgment and order of the Tribunal, the present C.R.A. is preferred by the owner of the Fiat car whose liability was assessed at 25 per cent and whose vehicle was admittedly not insured as per the requirements of law. Since the owner of the Fiat car was called upon to pay the amount to the extent of 25 per cent of the total amount awarded, she has preferred the present C.R.A. challenging the judgment and award of the Tribunal. It shall have to be kept in mind that the driver and owner of the vehicle having been found to have contributed to the vehicular accident to the extent of 25 per cent, the owner of the Fiat car has come forward stating that since the liability was said to be joint and several even if the liability was assessed at 75 per cent for autorickshaw and 25 per cent for the Fiat car, it was not liable to refund the

amount or deposit the amount in the Tribunal. It failed to deposit the amount of its share and therefore, the claim for the full amount of Rs. 56,385/- though it ought to have been 25 per cent lesser because to that extent the owner and driver of the Fiat car was held to have contributed towards their share:

3. Mr. Y.S. Lakhani, learned Counsel appearing for the petitioner who is the owner of the Fiat car, has placed reliance on present Section 174 of the Motor Vehicles Act, 1988 which is comparable with Section 110-E of the Motor Vehicles Act, 1939, which stood repealed by the present Act. Both the provisions, i.e., Section 110-E of the old Act and Section 174 of the new Act are put in juxtaposition in the tabular form herein so that the contention of the learned advocates appearing for both the parties can be well appreciated in their proper perspective:

Section 110-E Section 174

Recovery of money from insurer as Recovery of money from insurer as arrear of land revenue. - Where any arrear of land revenue. - Where any money is due from any person under amount is due from any person under an award, the Claims Tribunal may, an award, the Claims Tribunal may, on an application made to it by the on an application made to it by the person entitled to the money, issue person entitled to the amount, issue a certificate for the amount to the a certificate for the amount to the Collector and the Collector shall Collector and the Collector shall proceed to recover the same in the proceed to recover the same in the same manner as an arrear of land same manner as an arrear of land revenue. revenue.

4. It is not disputed that the present petitioner Premilaben Ishwarlal Raijada is the owner of the Fiat car bearing registration No. GJT 8147 and the said Fiat car was not insured at all on the date of the vehicular accident. It is also not disputed that the liability of the driver and owner of the Fiat car, present petitioner, was to the extent of 25 per cent and but for their contributory negligence of 25 per cent the accident would not have occurred. The owner and driver of the Fiat car, however, did not deposit any amount but unfortunately the insurance company of autorickshaw, the respondent herein, deposited the total amount of the award being amount of Rs. 56,385/-. It was not liable to pay the full amount. Its liability was specifically determined to the extent of 75 per cent only as the owner and driver of other vehicle has contributed to the extent of 25 per cent and to that extent the respondent company was not required to deposit the full amount. The present petitioner was served with the notice, but since the full amount was already recovered by the claimant, she chose not to appear nor the amount of 25 per cent which was held to be its liability was deposited.

5. In the final award of the Tribunal, dated 24.3.1992 it is clearly found in its finding on issue No. 1 that the vehicular accident occurred on account of contributory negligence on the part of the present petitioner (who was opponent No. 1 herein) to the extent of 25 per cent and also because of negligence which

was assessed to the extent of 75 per cent for the autorickshaw driver and owner. The application of the Oriental Insurance Co., with whom the autorickshaw was insured to recover the amount to the extent of 25 per cent back ultimately is granted by the Tribunal calling upon the present petitioner to deposit the amount of Rs. 14,096.25. It is such order which is under challenge before this Court. Mr. Y.S. Lakhani, learned advocate appearing for the petitioner, i.e., the owner of the Fiat car which was not at all insured and whose liability for the accident was fixed at 25 per cent and when finding was recorded that there was contributory negligence of the driver of the Fiat car, the insurance company of the autorickshaw was not required to deposit the full amount, but unfortunately, either by ignorance of law or because of the fact that no amount was deposited, it deposited the full amount as the Tribunal has held liability to be joint and several liability. The question, therefore, that would arise before this Court is that whether the owner of the Fiat car which was not at all insured and was thus herself a wrongdoer was entitled to recover 25 per cent of the amount of the award from the insurance company of the autorickshaw or whether she was liable to refund the said amount as the liability of the owner and driver of the vehicle was held to be 25 per cent and the said liability was rightly described by the Tribunal as contributory negligence. In reply to the application, the owner of the Fiat car has submitted detailed written statement at Exh. 16. The main contention which is raised is that either u/s 110-E of the Motor Vehicles Act, 1939 or u/s 174 of the Motor Vehicles Act, 1988 the Tribunal cannot recover the excess amount which is paid by the insurance company and that the party shall have to file civil suit, it being the money claim for the recovery of the amount. On the other hand, the contention of the learned advocate for Oriental Insurance Co., with whom the autorickshaw was insured is that since its liability was held to be to the extent of 75 per cent only, excess amount deposited was liable to be refunded to the insurance company and that it was not liable to file money suit as if it was a suit for amount due and payable by the other side to the insurance company.

6, One important aspect of law of joint tortfeasors shall have to be kept in mind. When there are two joint tortfeasors and the liability of each tortfeasor is said to be contributory and the extent of said liability is also determined, it is the case of contributory negligence, but for whose negligence accident would not have occurred in the manner it has occurred or would have been averted. In fact, in such cases, the liability of the second joint tortfeasor shall have to be joint and several, but the liability is several liability as assessed by the Tribunal. The vehicular accident has occurred because of contributory negligence of the Fiat car to the extent of 25 per cent and the contributory negligence of the autorickshaw to the extent of 75 per cent. It is undoubtedly a case of contributory liability and not liability which was liability of one party only. Both the parties have contributed to the negligence, and therefore, at the most, to the extent of liability the party is liable to reimburse the victim or the injured person. The concept of contributory negligence and joint and several liability is well discussed

in the Law of Torts by Winfield and the author has found that in case of negligence that occurs because of contributory negligence, the liability of both parties is joint liability only and not several liability. In fact the liability which is several and therefore, to the extent of negligence found on the part of the owner/driver, the liability is several.

7. Winfield on Tort, 9th Edn., Chapter 26 deals with joint and several tortfeasors. On page 556 under the heading "Joint and Several Tortfeasor" the law as it existed earlier is stated. On page 557 it is stated that at common law the general rule was that a joint tortfeasor, even though he had satisfied the plaintiff's claim against him in full, could recover neither an indemnity nor a contribution towards his liability from any other joint tortfeasor. This harshness of common law rule has been modified. After discussing the modification which is effected by Law Reform (Married Woman and Tortfeasor) Act, 1935, the author has referred to the right to contribution. By referring to the provisions of said Act the author has observed that the Act gives the right to contribution to any tortfeasor who is liable in respect of the plaintiff's damage, and it is given to him only against another tortfeasor who is, or would, if sued, have been liable in respect of the same damages, whether as a joint tortfeasor or otherwise. The liability of contribution between tortfeasors is not itself a right of action in tort. The word "liable" as used in describing one tortfeasor as "held liable", i.e., sued to judgment successfully, or presumably that he has rightly accepted liability by admission or payment without an action being brought against him. Where the word is used to describe another tortfeasor from whom the contribution may be recovered "liable" means "held liable" and if a person has been sued to judgment and held not liable then no contribution may be recovered from him. However, when another person is held to be liable for his contribution to negligence, the liability is determined by specifically apportioning the liability. In such cases, the joint tortfeasor whose liability is ascertained as in the present case, namely, Fiat car owner/driver to the extent of 25 per cent, the liability having been specifically apportioned, he does not become entitled to recover the full amount from the insurance company of another vehicle because the liability of the driver/owner of that vehicle is already specifically apportioned, namely, 75 per cent. In such case, therefore, the reference to Section 174 of the present Act is not permissible because though the liability is found to be contributory, the Tribunal has in terms fixed the contribution of the driver/owner of the vehicle and to the extent of that contribution the owner/driver of the Fiat car cannot recover the full amount from the owner/driver of the other vehicle, i.e., autorickshaw. In view of the aforesaid position of law and the observations made by S.P. Bharucha, J. (as his Lordship then was of the Bombay High Court) it must be held that the excess amount which is deposited by the insurance company of another vehicle shall have to be refunded to the insurance company and the order passed by the Tribunal shall have to be upheld.

8. Mr. Y.S. Lakhani, learned advocate appearing for the petitioner owner of the Fiat car, has disputed the order passed by the Tribunal and submitted that since

the full amount was already deposited by the other insurance company, Section 174 of the present Act would operate and that the owner of the Fiat car cannot be called upon to refund the amount which the claimant has recovered.

9. If one refers to the language employed in Section 174 of the present Act, it shall have to be seen that it is captioned as "Recovery of money from insurer as arrear of land revenue". The said Section provides that "where any amount is due from any person under an award, the Claims Tribunal may, on an application made to it by the person entitled to the amount, issue a certificate for the amount to the Collector and the Collector shall proceed to recover the same in the same manner as an arrear of land revenue." The question which is required to be first determined is as to whether any amount is due from the owner and driver of autorickshaw which was insured with the Oriental Insurance Co. Ltd. The answer is that the amount due was only to the extent of 75 per cent of the award and that the amount was already paid or deposited by the insurance company. The full amount which is deposited by the Oriental Insurance Co. Ltd. cannot be said to be amount which was due from the insurance Co. Ltd. under the award to the owner of the Fiat car. Secondly, the Tribunal is to be moved on an application by the person entitled to the amount. Now surely, the present petitioner who is the owner of the Fiat car whose liability was assessed to the extent of 25 per cent and which Fiat car was not at all insured cannot be said to be a person entitled to excess amount which it has recovered. In my opinion, Section 174 of the present Act, therefore, has no application to the fact situation which obtained before the Tribunal, and the Tribunal rightly, justly and legally reached the decision.

10. Mr. Lakhani very vehemently submitted before this Court that the words "any person" occurring in the first part of the phrase in Section 174, namely, "where any amount is due from any person under an award" is misinterpreted by the Tribunal. According to Mr. Lakhani, the word "any person" is required to be properly interpreted and this is in fact interpreted in favour of the owner of the Fiat car by other High Courts. The learned Counsel placed reliance upon the decision of the Bombay High Court in *Oriental Fire and General Insurance Co. Ltd. Vs. Balkrishna Ramchandra Nayan and others*, , as well as the case of *K. Gopalakrishnan Vs. Sankara Narayanan and Others*, . Turning now to the decision of the Madras High Court reported in *K. Gopalakrishnan Vs. Sankara Narayanan and Others*, it shall have to be kept in mind that two vehicles were involved, one was the lorry and the other was the scooter. It was found that when the lorry reached the middle of the cross-roads, the scooter came from its right side and struck the lorry. However, the Tribunal found that it would not absolve the driver of the lorry of his liability. He should have slowed the vehicle and given way to the scooter which entered the crossroads from his right side. The Tribunal also found that, however, it was wrong on the part of the scooterist to contend that since he had right of way, it was not necessary for him to keep a look out for the vehicles approaching the crossing from his left. It was in this situation, that question arose of determining the liability. In the context of Section 110-E of the

Motor Vehicles Act, 1939, the Tribunal took a view that though the liability was assessed, the Tribunal has no power to enforce its award against the driver/owner of the vehicle, but the claimant can file suit on the basis of the award as a debt and that such suit would not be barred by the provisions of Section 110-F of the Act which is equal to Section 175 of the present Act which deals with bar of jurisdiction of civil Court. The Tribunal found that in case of contributory negligence, the common law rule that tortfeasors are jointly and severally liable to pay compensation to the person injured, without apportionment, has been modified in England by a statute, namely, Law Reform (Married Woman and Tortfeasor) Act, 1935, and therefore, the English decision on that point cannot be followed. In the opinion of the Tribunal, the Courts in India would act on the principles of equity, justice and good conscience in matters which are not covered by any statute and rely upon the principles established under the English law to find out what the rule of justice, equity and good conscience is. However, every statutory amendment made in England cannot be made applicable to the liability arising from the contributory negligence of joint tortfeasors.

11. In the case of Oriental Fire and General Insurance Co. Ltd. Vs. Balkrishna Ramchandra Nayan and others, , the Division Bench of the Bombay High Court to which S.P. Bharucha, J., (as His Lordship then was) was a party, the question arose of interpreting Section 110-E of the old Act which is equal to Section 174 of the present Act. In the case before the Division Bench of the Bombay High Court, unfortunately the Tribunal which made the award did not specify the amount to be paid under the award by the insurer, the owner and driver of the vehicles involved. Undoubtedly, two vehicles were involved. Insurance company paid the entire amount due under the award. In that fact situation, it was held that apportionment of liability between the parties is the function of the Tribunal. Recovery of amount paid in excess of its liability by one opposite party from another opposite party is governed by Section 110-E of the old Act and the only remedy is the recovery of monies due under the award. When the insurer made payment under the award larger than the limited liability it was held that the remedy was to move the civil Court. However, in my opinion, it would be just and proper to refer to the judgment and award of the Tribunal before the Division Bench of Bombay High Court. The Tribunal found that it was a case of contributory negligence and there was negligence of the driver and owner of other vehicle also, but unfortunately, it did not decide the extent of contributory negligence. The insurance company of one of the vehicles thereupon deposited the full amount without calling upon the Tribunal to determine the extent of contributory negligence of the driver/owner of the vehicle which was insured with it. In such a fact situation, the observations made by the Division Bench of the Bombay High Court could be well appreciated but in my opinion in paras 15 and 17 of the reported judgment what is observed by S.P. Bharucha, J., on behalf of the Division Bench is very pertinent and is required to be closely noted. In para 15, the Division Bench made following observations:

It will be observed that the Tribunal is required in making the award to specify

the amount to be paid thereunder by the insurer, the owner and the driver of the vehicle involved. Apportionment of liability between them is a function of the Tribunal and the apportionment is a part of the award. The recovery of the amount paid in excess of its liability by one opposite party from another opposite party is, then, the recovery of monies due under an award and Section 110-E is attracted. It must also be noted in this connection that Section 110-E refers to monies due from any person under an award. It is, therefore, not correct to say, as the Tribunal did, that the Tribunal does not have the power to issue a certificate u/s 110-E to recover monies due by one opposite party from another opposite party.

12. It is thus clear that it is for the Tribunal in case of contributory negligence to specify the amount to be paid therein by the insurer or the driver or owner of the vehicle involved. Apportionment of liability between them is the function of the Tribunal and the apportionment is a part of the award. Thereupon, the contention of the other side was noted to the effect that before the Tribunal the appellants had not raised the plea that their liability was limited. The learned advocate submitted before the Division Bench of the Bombay High Court that the Tribunal would have apportioned the liability and would have given an award under which the liability of the respondent could have been determined and the liability in that case could be said to be several liability. Since the Tribunal omitted to do it, the insurance company could not have been compelled to pay under the award the amount larger than the amount of its liability. Dealing with this contention in para 17, Bharucha, J., speaking for the Division Bench of the Bombay High Court made the following pertinent observations:

Reference must be made to Section 110-F whereunder the jurisdiction of the civil Courts is barred in respect of "any question relating to any claim for compensation which may be adjudicated upon by the Claims Tribunal". It is necessary to lay stress on the words "any question relating to any claim for compensation". The determination of the liability of a party and, therefore, the determination and recovery of the excess thereon paid by him under an award is such question, and its seizure by a civil Court is barred. The impugned order is erroneous insofar as it refers the appellants to a civil suit to recover the excess amount.

(Emphasis added)

13. The aforesaid observations made by Bharucha, J., (as His Lordship then was) is direct answer to the contentions raised and it shall have to be held that the other party should not be compelled to file civil suit to recover the excess amount or one cannot be called upon to recover the excess amount by following the procedure of obtaining recovery certificate from the Collector. It shall have to be kept in mind that even when Section 110-E of the old Act was in existence and operative, and that was noted by the Division Bench and yet the aforesaid conclusion was reached. This decision rather than helping Mr. Lakhani goes against him and clearly decides that the determination of liability of a party is

within seisin of the Tribunal and the jurisdiction of civil Court is barred. In fact the party which had made payment of excess amount, namely, the insurance company of autorickshaw in the present case, cannot be compelled to file civil suit to recover the excess amount. The conclusion which is reached by the Division Bench of the Bombay High Court in para 17 is, therefore, complete answer to the submission made by Mr. Lakhani. In my opinion, the Tribunal in the present case rightly interpreted the provisions of Section 110-E of the old Act or Section 174 of present Act. The Tribunal in the present case has also found that the jurisdiction of the civil Court is barred in such cases and that when the Tribunal failed to specify the amount and to determine as to what was the contributory negligence of either party to vehicular accident the question of operation of Section 174 would arise. Apportionment of liability between the parties is merely the function of the Tribunal and the recovery of amount paid in excess of its liability by one opposite party from another party is itself not a matter of recovering the excess amount due under the award.

13-A. In view of the aforesaid position of law, in my opinion, the M.A.C.T. at Rajkot was justified in allowing the application of the Oriental Insurance Co. Ltd. and in calling upon the owner of the Fiat car which was not at all insured to pay to the insurance company Rs. 14,096.25 within two months. The judgment and award of the Tribunal being just and proper and in accordance with law is not required to be interfered with nor could it be said that the Tribunal has committed any jurisdictional error which would call for interference of this Court.

14. In the result, the C.R.A. fails. The judgment and award of the Tribunal is upheld. Rule is discharged. Interim relief is vacated. No costs.

15. It is stated at the Bar by Mr. Lakhani, learned Counsel appearing for the petitioner that at the time of admission of the civil revision application, an amount of Rs. 5,000/- was required to be deposited as per the order passed by J.M. Panchal, J. The said amount is already deposited before the trial Court. The adjustment of the said amount shall be given by the Tribunal while refunding the amount to the Oriental Insurance Co. Ltd. and the amount is required to be refunded, after including the aforesaid amount of Rs. 5,000/-.