
(2008) 06 GAU CK 0070
In the Gauhati High Court

Ratul Das

APPELLANT

Vs

Oriental Insurance Co. Ltd. and Others

RESPONDENT

Date of Decision : 27-06-2008

Acts Referred:

Constitution of India, 1950 — Article 12, 226

Citation : (2010) ACJ 482 : AIR 2008 Guw 180 : (2008) 3 GLT 874

Hon'ble Judges : Jasti Chelameswar, C.J;B.P. Katakey, J

Bench : Division Bench

Final Decision : Allowed

Judgement

B.P. Katakey, J.—The appellant/insured, the owner of the motor vehicle bearing registration No. AS-02/A-8159 (Tata Sumo), which was used as commercial vehicle for carrying passengers, lodged a First Information Report on 26.5.2003 in Nagaon Police Station alleging that on 24.5.2003 the said vehicle was hired by four passengers at about 10AM from the taxi stand near Nagaon United Bank and proceeded to Golaghat driven by his driver Sri Hemanta Gogoi, but the vehicle did not return and inspite of his enquiry he could not get any information of the whereabouts of the said vehicle as well as the driver, which leads to the suspicion that the said passengers might have taken away the vehicle along with the driver in the guise of passengers. On the basis of such report, Nagaon Police Station Case No. 449/2003 (GR. Case No. 896/2003) under Sections 406/420, IPC was registered. The appellant, who took out the policy in respect of the said commercial vehicle belonging to him from the respondent/Insurance Company, which was valid from 1.2.2003 to 31.1.2004, in terms of which the respondent/Insurance Company assured the insured to indemnify against the lost or damages to the vehicle insured and or its accessories due to the burglary, house breaking or theft, apart from covering the other risk, informed the Insurance Company about loss of the said vehicle. The Branch Manager of Insurance Company vide communication dated 01.8.2003 informed the appellant/insured to file the claim form duly completed and signed enclosing therewith the original policy as well as the final police investigation report from the Court, the original

registration certificate etc., which was duly complied with by the appellant. Meanwhile, the investigating Agency on completion of the investigation in the aforesaid Police Station case, submitted the report in final form in the Court of the learned Chief Judicial Magistrate, Nagaon u/s 173 of the Code of Criminal Procedure on 30.8.2003 stating that though the case registered under Sections 420/406/379, IPC is true but they could not gather sufficient proof against the arrested suspects. The learned Magistrate vide order dated 24.9.2003 accepted the report in final form, upon perusal of the materials available in the case diary and discharged the accused persons. The respondent/Insurance Company in spite of receipt of all the documents, as sought for vide communication dated 1.8.2003, including the report in the final form submitted u/s 173, Cr PC and also the order of the learned Magistrate dated 24.9.2003, repudiated the claim of the appellant for compensation for the loss suffered by him, vide communication dated 8.6.2004, on the ground that the driver has committed breach of trust and hence no compensation can be paid, the policy having not covered any liability occurred due to breach of trust committed by the driver. The appellant filed the writ petition being W.P. (C) No. 5943/2004 praying for directing the respondent/Insurance Company to settle the claim and to pay a sum of Rs. 3,48,000/-being the insured value under the policy for the loss of the vehicle with interest. The learned Single Judge, upon hearing the learned Counsel for the parties vide judgment and order dated 15.6.2006 dismissed the writ petition on the ground that it involves the disputed question of fact as to whether there was theft of the vehicle or breach of trust of the driver. Hence, the present appeal.

2. We have heard Mr. K.K. Mahanta, the learned Senior counsel for the appellant and Mr. A. Ahmed, the learned Counsel appearing on behalf of the respondent/Insurance Company.

3. Mr. Mahanta, the learned Senior counsel for the appellant referring to the contract of insurance, the First Information Report filed in Nagaon Police Station as well as the report in final form submitted by the Investigating Agency, which was accepted by the learned Chief Judicial Magistrate, Nagaon, has submitted that it is apparent that the vehicle in question has been unlawfully taken away by some unidentified persons along with the driver, belonging to the appellant, thereby depriving him of the vehicle permanently and such taking away of the vehicle belonging to the appellant having not been disputed by the respondent/Insurance Company, the claim of the appellant cannot be repudiated on the ground that there was breach of trust by the driver, more so when the Investigating Agency in the report submitted in the final form has informed the Court that the case registered under Sections 406/420/379 IPC was true but no evidence could be collected. According to Mr. Mahanta, in a claim for the loss suffered by an insured, under a contract of insurance, he need not prove the theft of the vehicle as required under the provisions of the EPC and what required to substantiate such claim is to prove taking away the property of insured by someone with the intention of depriving the true owner of it, which having not been disputed by the Insurance Company, the appellant is entitled to

compensation under the contract of insurance. Mr. Mahanta, therefore, submits that dismissal of the writ petition by the learned Single Judge on the ground that it involves the disputed question of fact, needs to be interfered with and the direction may be issued to the respondent/Insurance Company to pay the amount of compensation payable under the contract of insurance.

4. Per contra, Mr. Ahmed, the learned Counsel for the respondent/Insurance Company supporting the judgment and order passed by the learned Single Judge has submitted that under the contract of insurance, the Insurance Company is liable to indemnify the appellant/insured for the loss or damage suffered by him in case of theft of the vehicle and not for the loss suffered by him on account of the criminal breach of trust of the driver. Mr. Ahmed referring to the FIR registered in Nagaon Police Station has submitted that it is apparent that the case was registered under Sections 406/420 JPC and not u/s 379 IPC and, therefore, the Insurance Company has rightly repudiated the claim by refusing to pay any compensation under the policy of insurance. It has further been submitted by Mr. Ahmed that the burden on the appellant/insured to prove that there was theft within the meaning of the IPC and in the instant case, he having failed to do so, is not entitled to any compensation under the contract of insurance. Mr. Ahmed in this regard has placed reliance on the decision of the Apex Court in *United India Insurance Co. Ltd. Vs. Harchand Rai Chandan Lal*, . Placing reliance on another decision of the Apex Court in *Federal Bank Ltd. Vs. Sagar Thomas and Others*, , it has been submitted by Mr. Ahmed that since the respondent/Insurance Company is a private body, the writ petition under Article 226 of the Constitution of India is not maintainable, more so when the disputed questions of facts are involved, for which according to Mr. Ahmed, the appellant has to approach the appropriate forum where such disputed question of fact can be properly adjudicated upon.

5. We have considered the submissions of the learned Counsel for the parties and also perused the materials available on record including the judgment and order passed by the learned Single Judge.

6. There is no dispute to the proposition of law that the Writ Court may not exercise its jurisdiction under Article 226 of the Constitution of India where disputed question of facts is involved, determination of which requires examination of the evidences. However, when there is no dispute relating to the facts, the Writ Court can exercise the jurisdiction under Article 226 of the Constitution and issue a direction to the Insurance Company to indemnify the insured for the loss sustained by him strictly in terms of the contract of insurance between the parties provided the Insurance Company is an authority within the meaning of Article 226 of the Constitution of India. The Apex Court in *Federal Bank Ltd.* (supra) referring to the earlier decisions on the issue has observed that a writ petition under Article 226 of the Constitution of India may be maintainable against (i) the State (Government); (ii) an authority; (ii;) a statutory body; (iv) an instrumentality or agency of the State; (v) a company which is financed and

owned by the State; (vi) a private body run substantially on State funding; (vii) a private body discharging public duty or positive obligation of public nature and (viii) a person or a body under liability to discharge any function under any statute, to compel it to perform such a statutory function. The Apex Court in the said case has held that the Federal Bank Ltd. being a banking company, which has its own resource to raise its fund without any contribution or shareholding by the State and the Board of Directors being elected by the shareholders, it works like any other private company in the banking business, is not an authority within the meaning of Article 12 of the Constitution and no writ lies against it. However, in certain circumstances a Writ may be issued to such private bodies or persons as there may be statutes, which needs to be complied with by all concerned including the private company. The Apex Court, however, has observed that a case of the nationalized bank stands on different footings. In the case in hand, it is an admitted position of fact that the respondent/Insurance Company is a nationalized Insurance Company under the provisions of the General Insurance Business (Nationalization) Act, 1972 and Government has pervasive control over it. Hence it is an authority within the meaning of Article 12 of the Constitution of India. Therefore, the respondent/Insurance Company is amenable to the writ jurisdiction under Article 226 of the Constitution of India.

7. The next question, which requires consideration is whether there is any disputed question of fact involved in the present case so as not to exercise the jurisdiction under Article 226 of the Constitution of India and whether the appellant/insured is entitled to the compensation for the loss of his vehicle.

8. It is not in dispute that the vehicle was taken away by some unidentified persons in the guise of hiring it, alongwith its driver, appointed by the appellant/insured. It is not the case of the respondent/Insurance Company that the vehicle has never been taken away by anyone. The Insurance Company has repudiated the claim of the appellant/insured only on the ground that it is a case of criminal breach of trust by the driver and loss due to such breach of trust being not covered by the policy of insurance, the insured is not entitled to any compensation. Such assertion of the Insurance Company, it is evident from the pleadings of the parties, is on the basis of the registration of the FIR, filed by the appellant/insured in Nagaon Police Station, under Sections 420/406 PC. Therefore, there is no disputed question of fact in the case in hand about the taking away of the vehicle from the possession of the appellant depriving him from its use permanently. The meaning of the "theft" as assigned in the IPC cannot be applied in case of a Policy of insurance issued by the Insurance Company unless of course it is specifically applied under the terms and conditions of such Policy. The "theft", according to Black's Law Dictionary, means - the felonious taking and removing of another's personal property with the intent of depriving the true own of it; larceny. "Larceny" according to Black's Law Dictionary, means - the unlawful taking or carrying away of someone else's personal property with the intent to deprive the possessor of it permanently. The theft has not been defined in the contract of insurance entered into between the

parties, therefore, it has to be given the meaning as understood in common parlance and not with the vigor of proof under the criminal law.

9. The respondent/Insurance Company, as noticed above, has not disputed the taking away of the property from the possession of the appellant/insured by some unidentified persons alongwith the driver. The only ground on which the Insurance Company has refused to pay the compensation is that it is a case of criminal breach of trust by the driver. There is no material before the Insurance Company except the registration of the aforesaid First Information Report lodged by the appellant in the police station under Sections 406/420 IPC, to arrive at such a conclusion. The Insurance Company at the same time did not take into consideration the report in the final form submitted by the Investigating Agency u/s 173 Cr PC, which was accepted by the learned Magistrate, wherefrom it is evident that the Investigating Agency has reported that the case under Sections 406/420/379 IPC though is true, but there is lack of materials to prove. It is not that for the purpose of the claim under the policy of insurance, the claimant has to prove the factum of theft as required under the criminal law. It would be sufficient if the factum of taking away the insured property by someone thereby depriving the insured of it permanently, is established. In the present case as noticed above, there is no dispute in that respect.

10. The Apex Court in United India Insurance Company Ltd. (supra) has observed that the claimant is not entitled to any relief unless his case is covered by the terms of policy of insurance and it is not open to interpret the expression appearing in the policy in terms of common law, but it has to give meaning to the expression as defined in the policy. In the said case, the claim as in respect of the burglary, which was defined in the policy. In the case in hand, the theft has not been defined in the policy of insurance. Since the taking away of the property, as observed above, with the intention of depriving its true owner of it permanently, having not been disputed, the appellant/insured is entitled to the compensation under the contract of insurance and the repudiation of such claim by the Insurance Company is not sustainable in law.

In view of the aforesaid discussion, the impugned judgment and order passed by the learned Single Judge is set aside. The respondent/Insurance Company is directed to assess the quantum of compensation payable for the loss sustained by the appellant/insured, under the policy of insurance and to pay the same within a period of two months from today.

11. The appeal is accordingly stands allowed to the extent indicated above. No cost.