
(2011) 09 DEL CK 0348
In the Delhi High Court
Case No : FAO 169 of 1996

Smt. Kamla Devi and Others APPELLANT
Vs
Jagjit Singh and Another RESPONDENT

Date of Decision : 29-09-2011

Acts Referred:

Motor Vehicles Act, 1939 — Section 95(2), 96

Citation : (2011) 09 DEL CK 0348

Hon'ble Judges : Reva Khetrapal, J

Bench : Single Bench

Advocate : Navneet Goyal, for the Appellant; Pankaj Seth, Advocate for the Respondent No. 2-Insurance Company, for the Respondent

Final Decision : Allowed

Judgement

Reva khetrapal, J.—The present appeal has been filed against the judgment and award of the Motor Accident Claims Tribunal dated 17.01.1996 passed in Suit No. 56/1988. The Appellants are the legal representatives of the deceased - Veer Bhan, who died in a motor vehicular accident, which occurred on 14.11.1987.

2. It may be mentioned at the outset that though initially the appeal had been filed seeking enhancement of the quantum of compensation awarded by the learned Tribunal, today the sole contention of Mr. Navneet Goyal, the Learned Counsel for the Appellants is that in view of the "Avoidance Clause" contained in the insurance policy (Exhibit RW2/1), the Insurance Company may be directed to pay the entire amount of compensation to the Appellants and recover the amount paid in excess of its liability, from the owner- cum-driver of the offending vehicle, the Respondent No. 1 herein.

3. This Court is inclined to agree with the aforesaid contention of the Learned Counsel for the Appellants in view of the recent decisions of this Court rendered in the cases of "Gurcharan Kaur and Anr. v. Raja Ram and Anr., 2011 (VI) AD (Delhi) 36, "Lata Goel and Ors. v. Rishipal and Ors." FAO No. 254/1993 decided

on September 23, 2011 and "Bimla Gupta and Ors. v. Mahinder Singh and Ors.", FAO No. 51/1991 decided on September 26, 2011, wherein it has been held that where the liability of the Insurance Company is limited but the insurance policy contains an "Avoidance Clause", the Insurance Company is liable to satisfy the award passed in favour of the claimants in the first instance and then recover the amount paid in excess of its limited liability from the owner and the driver of the offending vehicle. The following discussion in the case of Bimla Gupta (supra) is relevant:

9. The only other aspect of the matter which remains to be considered is the contention of the Learned Counsel for the Appellants that even assuming the liability of the Insurance Company to be a limited one as pleaded by the Respondent No. 3, the Appellants, being third parties, are nevertheless entitled to receive the entire amount of compensation from the Insurance Company. Reliance is placed by Mr. Goyal in this regard on Section 96 of the Motor Vehicles Act, 1939 read with the avoidance clause captioned "Avoidance of Certain Terms and Rights of Recovery contained in the insurance policy as well as the "Important Notice in the Schedule to the Policy, Ex.RW1/1. The avoidance clause states that nothing in the policy or any endorsement thereon shall affect the right of any person indemnified by the policy or any other person to recover an amount under or by virtue of the provisions of the Act. It also provides that the insured will repay to the Company all sums paid by it which the Company would not have been liable to pay but for the said provisions of the Act. The "Important Notice mentions that any payment made by the Company by reason of wider terms appearing in the certificate in order to comply with the Motor Vehicles Act, 1939 is recoverable from the insured. It also specifically refers to the avoidance clause.

10. In *New Asiatic Insurance Company Ltd. v. Pessumal Dhanamal Aswani and Ors.* 1958 ACJ 559, the Supreme Court interpreted the avoidance clause and the important notice as follows: (ACJ, P.565, paras 21 and 22)

21. The Act contemplates the possibility of the policy of insurance undertaking liability to third parties providing such a contract between the insurer and the insured, that is, the person who effected the policy, as would make the company entitled to recover the whole or part of the amount it has paid to the third party from the insured. The insurer thus acts as security for the third party with respect to its realising damages for the injuries suffered, but vis-a-vis the insured, the company does not undertake that liability or undertake it to a limited extent. It is in view of such a possibility that various conditions are laid down in the policy. Such conditions, however, are effective only between the insured and the company, and have to be ignored when considering the liability of the company to third parties. This is mentioned prominently in the policy itself and is mentioned under the heading "Avoidance of certain terms and rights of recovery", as well as in the form of "an important notice" in the Schedule to the policy. The avoidance clause says that nothing in the policy or any endorsement

thereon shall affect the right of any person indemnified by the policy or any other person to recover an amount under or by virtue of the provisions of the Act. It also provides that the insured will repay to the company all sums paid by it which the company would not have been liable to pay but for the said provisions of the Act. The "Important Notice" mentions that any payment made by the company by reason of wider terms appearing in the certificate in order to comply with the Act is recoverable from the insured, and refers to the avoidance clause.

22. Thus the contract between the insured and the company may not provide for all the liabilities which the company has to undertake vis-a-vis the third parties, in view of the provisions of the Act. We are of opinion that once the company had undertaken liability to third parties incurred by the persons specified in the policy, the third parties' right to recover any amount under or by virtue of the provisions of the Act is not affected by any condition in the policy. Considering this aspect of the terms of the policy, it is reasonable to conclude that proviso (a) of para 3 of section II is a mere condition affecting the rights of the insured who effected the policy and the persons to whom the cover of the policy was extended by the company, and does not come in the way of third parties' claim against the company on account of its claim against a person specified in para. 3 as one to whom cover of the policy was extended.

11. In *Amrit Lal Sood and Another Vs. Smt. Kaushalya Devi Thapar and Others*, , the Supreme Court, placing reliance upon the case of *New Asiatic Insurance Company Ltd. (supra)*, reiterated that the avoidance clause is effective only between the insured and the Insurance Company and not a third party. In paragraph 14 of the Report, it observed thus:

14. The above clause does not enable the insurance company to resist or avoid the claim made by the claimant. The clause will arise for consideration only in a dispute between the insurer and insured. The question whether under the said clause the insurer can claim repayment from the insured is left open. The circumstance that the owner of the vehicle did not file an appeal against the judgment of single judge of the High Court under the Letters Patent may also be relevant in the event of a claim by the insurance company against the insured for repayment of the amount. We are not concerned with that question here.

12. In *Oriental Insurance Co. Ltd. Vs. Cheruvakkara Nafeessu and Others*, again the question before the Supreme Court was:

What is the extent of liability of an insurance company towards the third party as per Section 95(2)(b) of Motor Vehicles Act, 1939 (hereinafter called "the Act"), and what are its rights in case of payment of an amount in excess of the limits of the liability under the insurance policy vis-a-vis the insured

On a consideration of the avoidance clause of the policy and Section II of the policy dealing with "Liability to Third Party", the Supreme Court observed: (ACJ, P.3)

A conjoint reading of all the terms of the policy of insurance executed in this case indicate that the total extent of liability of the insurance company is Rs. 50,000/- but the company is liable to indemnify the insured against all sums including claimant's costs and expenses which insured becomes liable to pay and nothing in the policy affects the right of any person indemnified by the policy or any other person to recover an amount under or by virtue of the provisions of Section 96 of the Act. However, the insured is liable to repay to the company all sums paid by the company which the company would not have been liable to pay but for the condition of liability relating to third party.

13. In a recent decision of the Supreme Court in *New India Assurance Company Ltd. v. Vimal Devi and Ors.*, 2010 ACJ 2878 (SC), where the Insurance Company filed an appeal before the Supreme Court aggrieved by the High Court order directing the Insurance Company to pay the entire compensation amount of Rs. 4,90,000/- along with interest to the claimants and then to recover the amount beyond its liability of Rs. 50,000/- from the owner of the vehicle involved in the case, the Supreme Court dealt with the matter as follows:

3. Mr. K.L. Nandwani, Learned Counsel appearing for the insurance company, submitted that the liability of the Appellant being limited to Rs. 50,000/-, the High Court was in error in making such a direction. In respect of the submission, he relied upon a Constitution Bench decision of this Court in *New India Assurance Co. Ltd. Vs. C.M. Jaya and Others*, .

4. Mr. M.R. Calla, learned senior counsel appearing for the Respondent, in his reply submitted that the reliance placed on the Constitution Bench decision was misplaced and the Appellant overlooked the finer point of distinction made in the decision in *C.M. Jaya*. He submitted that in the case in hand, the High Court had noticed the Avoidance Clause in the policy which was in the following terms:

AVOIDANCE of CERTAIN TERMS and RIGHT of RECOVERY.

Nothing in this Policy or any Endorsement hereon shall affect the right of any person indemnified by this policy or any other person to recover an amount under or by virtue of the provisions of the Motor Vehicle Act, 1939, Section 96.

But the Insured shall repay to the company all sums paid by the company which the company would not have been liable to pay but the said provisions.

5. The Avoidance Clause came up for consideration before a three Judges Bench of this Court in *Amrit Lal Sood and Another Vs. Smt. Kaushalya Devi Thapar and Others*, . In its decision in that case this Court observed:

13. In the policy in the present case also, there is a clause under the heading:

AVOIDANCE of CERTAIN TERMS and RIGHT of RECOVERY" which reads thus:

Nothing in this policy or any endorsement hereon shall affect the right of any person indemnified by this policy or any other person to recover an amount under or by virtue of the provisions of the Motor Vehicles Act, 1939, Section 96.

BUT the insured shall repay to the Company all sums paid by the Company which the Company would not have been liable to pay but for the said provisions.

14. The above clause does not enable the insurance company to resist or avoid the claim made by the claimant. The clause will arise for consideration only in a dispute between the insurer and the insured. The question whether under the said clause the insurer can claim repayment from the insured is left open. The circumstance that the owner of the vehicle did not file an appeal against the judgment of the Single Judge of the High Court under the letters patent may also be relevant in the event of a claim by the insurance company against the insured for repayment of the amount. We are not concerned with that question here.

15. In the result, we hold that the insurance company is also liable to meet the claim of the claimant and satisfy the award passed by the tribunal and modified by the High Court. The judgment of the High Court insofar as it exonerates the insurance company (5th Respondent herein) from the liability, is set aside. The award passed by the Division Bench of the High Court can be enforced against the 5th Respondent also. The appeal is allowed to the extent indicated above. The parties will bear their respective costs.

6. Mr. Calla further submitted that in C.M. Jaya and Ors. a Constitution Bench of this Court indeed held that in a policy for limited liability it was not open to the Court to direct the insurance company to make any payment beyond the amount of the limited liability but it took note of the decision in Amrit Lal Sood with approval. He referred to paragraphs 10 and 16 of the judgment in C.M. Jaya where the decision in Amrit Lal Sood is noticed with approval.

7. The Avoidance Clause in the policy in this case makes all the difference and the direction of the High Court to the Appellant, insurance company to make payment of the full amount of compensation to the claimants and to recover its dues from the owner of the vehicle is directly in accordance with that Clause. In our view, the submission of Mr. Calla is well founded. The Appellant in this case can derive no benefit from the decision in C.M. Jaya.

8. We find no merit in these appeals. These are dismissed.

14. In view of the aforesaid law enunciated by the Hon^{ble} Supreme Court, it is directed that the Respondent No. 3 - Insurance Company shall pay the enhanced amount of compensation as awarded hereinabove to the Appellants, after deducting the amount, if any, already paid by the Insurance Company, within 30 days of the passing of this order by depositing the same with the Registrar General of this Court. The Insurance Company shall be entitled to recover the amount paid by it in excess of its liability from the Respondents No. 1 and 2, the driver and owner of the offending truck respectively in accordance with the law.

4. The insurance policy (Exhibit RW2/1), in the present case, contains at the end the "Important Notice", which is as follows:

IMPORTANCE NOTICE

The insured is not indemnified if the Vehicle is used or driven otherwise than in accordance with this Schedule. Any payment made by the Company by reason of wider terms appearing in the Certificate in order to comply with the Motor Vehicle Act, 1939, is recoverable from the insured. See the clause headed "AVOIDANCE of CERTAIN TERMS and RIGHT of RECOVERY

Thus, indisputably, the "Avoidance Clause" is present in the policy at hand and must be given effect to.

5. In view of the aforesaid, the Insurance Company is directed to pay the entire amount of compensation along with interest thereon as awarded by the learned Tribunal, after deducting the amount already paid, if any, by depositing the same with the Registrar General of this Court within 30 days of the passing of this order; which shall be released to the Appellants. The Insurance Company may then recover the amount paid over and above its limited liability of Rs. 1,50,000/- along with proportionate interest thereon from the insured-the respondent No. 1.

6. The appeal is allowed to the aforesaid extent.

7. There shall be no order as to costs. The record of the Claims Tribunal be sent back forthwith.