

(2010) 08 MAD CK 0235

In the Madras High Court

Case No : Civil Miscellaneous Appeal No. 1755 of 2008 and M.P. No's. 1 and 2 of 2008

The National Insurance Co. Ltd.

APPELLANT

Vs

Thiru. Shanmugam and Others

RESPONDENT

Date of Decision : 04-08-2010

Acts Referred:

Contract Act, 1872 — Section 51, 52, 54, 65

Insurance Act, 1938 — Section 2(9)

Motor Vehicles Act, 1988 — Section 147(5), 149(1)

Citation : (2010) 08 MAD CK 0235

Hon'ble Judges : Chitra Venkataraman, J

Bench : Single Bench

Advocate : J. Chandran, for the Appellant; R. Neelakandan, for R1 and R. Sitakumaran, for R6, for the Respondent

Final Decision : Dismissed

Judgement

Chitra Venkataraman, J.—The Insurance Company is on appeal as against the award in a case of injury, where the Tribunal granted a relief of awarding compensation at Rs. 68,806/- payable at 7.5% per annum interest by the Insurance Company to be recovered from the owner of the vehicle. The accident had occurred on 31.7.2005.

2. Admittedly, as on the date of the accident, a policy was there in existence, however, the policy contain a Clause that in case of dishonour of premium of cheque, the document,namely, the policy stands automatically cancelled ab initio. The policy contains a cheque No. 039617 dated 8.7.2005.

3. As far as the present case is concerned, the defence taken by the Insurance Company is that the owner of the vehicle, who had gone in for Insurance with the appellant herein issued a cheque for a sum of Rs. 10,958/-. Unfortunately the cheque given by the insured was dishonoured by Syndicate Bank, Bangalore. Ex.R.5 is the return memo from the Bank and Ex.R.6, the advise slip. The

Insurance Company sent a notice to the owner of the vehicle, the insured, under Ex.R.7 dated 1.8.2007. The letter sent was, however, returned as unclaimed. In the context of the Act that the cheque evidencing payment was dishonoured, thereby, going by the Clause in the insurance policy, the contract has come to an end automatically, the question of any coverage by the Insurance Company did not arise. Since the date of cancellation was 01.08.2005 and the accident had occurred on 31.7.2005 and when dishonouring of the cheque, the contract had also come to an end automatically, the appellant is not bound to make the payment.

4. In support of the said contention, learned Counsel for the appellant placed reliance on the decision reported in National Insurance Co. Ltd. Vs. Seema Malhotra and Others, . The Apex Court while considering the issue on the dishonour of the cheque and the nature of contract, particularly with reference to the insurance contract held that u/s 65 of the Indian Contract Act if the insurer has disbursed the amount covered by the policy to the insured before the cheque was returned dishonoured, the insurer is entitled to keep the money back and if the insured makes up a premium even after the cheque was dishonoured, but before the date of accident, since the policy is in existence, the question of the Insurance Company refusing to meet the liability is totally unjustified. Hence, in a case of a premium paid through the cheque it being Bill of Exchange drawn on a specified banker, hence, it involves a promise to make the payment. When the insured fails to pay the premium or the cheque was returned dishonoured by the Bank concerned, the insurer need not perform his part of the promise, consequently, the corollary is that the insured cannot claim performance from the insurer in such a situation.

5. In the background of this, learned Counsel appearing for the appellant pointed out that on the facts of this case that the cheque was presented on 10.7.2005 and the bank informed on 13.7.2005 that the same was returned on account of want of funds, which led to the cancellation of the policy, the question of a liability, as such, being imposed did not arise. Consequently, the Insurance Company is not bound to make the payment.

6. Per contra, learned Counsel appearing for the first respondent/claimant placed reliance on the decision reported in (1988) 1 SCC 371 (Oriental Insurance Co. Ltd. v. Inderjit Kaur and Ors.) as well as the decision of the Full Bench of the Kerala High Court reported in (2006) ACJ 38 (FB) (Oriental Insurance Co. Limited v. A.B. Sivankuty and Ors.) in support of the contention that as far as the situation like the one on hand is concerned, the third party not having any knowledge about what transpired between the insured and the insurer, the benefit of the award granted under the welfare measure Act, like, Motor Vehicles Act, could not be denied at all. Consequently, going by the decision of the Full Bench of the Kerala High Court that the claimant was a third party for damages, hence, has to be met by the Insurance Company. Even if the policy is cancelled for non-payment of the premium and the accident had taken place after

cancellation, the liability would still enure to be borne by the Insurance Company with the only right to recover from the insured.

7. Regarding such a contention, learned Counsel appearing for the appellant pointed out that when there is no contract between the insured and the insurer, the question of pay and recover did not arise in this case. Consequently, the decision of the Apex Court covers the issue.

8. A perusal of the judgment of the Apex Court reported in *National Insurance Co. Ltd. Vs. Seema Malhotra and Others*, shows that the case therein related to a case of dishonour of cheque on 20.1.1994. The Insurance Company informed the insured as regards the dishonour of the cheque leading to the cancellation of the policy, in a claim made by the fatal accident, the Insurance Company repudiated its claim before the Consumer Protection Commission. While considering the issue as regards the liability of the Insurance Company, the Apex Court considered the decision reported in *Oriental Insurance Co. Ltd. Vs. Inderjit Kaur and Others*, only to point out that the issue as was raised was not considered in the decision *Oriental Insurance Co. Ltd. Vs. Inderjit Kaur and Others*, which was relied on by the learned Counsel for the respondent is also a case of premium paid by way of cheque, which was returned dishonoured and the insured was informed about the same after two months after the vehicle was involved in the accident. In that situation, the Apex Court pointed out that having regard to the provisions of Section 147(5) and 149(1) of the Motor Vehicles Act, the Insurance Company became liable to indemnify third parties in respect of liability which that policy covered and to satisfy the award of compensation in respect thereof, notwithstanding its entitlement cancelled the policy as against the insured when the cheque was dishonoured.

9. The Apex Court also referred to the decision reported in *New India Assurance Co. Ltd. Vs. Rula and Others*, wherein also, the Apex Court pointed out that the question that had been raised was not considered, consequently, going by the provisions of Section 2(9)(b) of the Insurance Act as well as Sections 51, 52 and 54 of the Indian Contract Act, the Apex Court ultimately held that in a contract when an insured gives a cheque towards payment of premium or part of the premium, such a contract consists of reciprocal promise unless the performance is in default on the part of any one of the parties, particularly the insured, the question of claiming performance from the insurer in such a situation did not arise. In the light of the legal principles enunciated, the Apex Court sustained the claim of the Insurance Company, thereby setting aside the judgment of the Division Bench of the High Court directing the Insurance Company to make the payment.

10. As far as the present case is concerned, with facts not controverted, as on the date of accident, as pointed out by the learned Counsel for the first respondent, third party is rightly in a bonafide belief as to the existence of the policy, the question as to whether the cheque is honoured or dishonoured is simply between the insurer and the insured. When that being the case, the

Tribunal is justified in its direction of pay and recover. Even though the policy of the Insurance Company points out that on dishonour of the cheque, the Insurance Company would not be mulcted with any liability on any supposed reasoning of contract proceedings between the insured and the insurer, with the insured remaining *exparte* in this case, the concept of the Legislation, like the Motor Vehicles Act has to be looked into.

11. It is no doubt true that the decision in *National Insurance Co. Ltd. Vs. Seema Malhotra and Others*, considered the decision reported in (1988) 1 SCC 371 (*Oriental Insurance Co. Ltd. v. Inderjit Kaur and Ors.*) only to hold that the issue on the dishonour of cheque was not considered therein. But nevertheless, as pointed out by me, even in a case of contract not being there between the insured and the insurer, when the factum of cancellation is a matter which had come to surface only after the accident had occurred, going by the concept of welfare legislation in this case, I am constrained to agree with the submission of the learned Counsel for the first respondent. In a similar situation, the Kerala High Court considered the decision, which was relied on by the first respondent herein. In paragraph page 5 of the judgment, the Kerala High Court considered the decision reported in (1988) 1 SCC 371 (*Oriental Insurance Co. Ltd. v. Inderjit Kaur and Ors.*) and *New India Assurance Co. Ltd. Vs. Rula and Others*, as well as the decision of the Kerala High Court in the case of *India Assurance Co. Ltd. v. Shamshed* reported in 2000 (2) KLT 67.

12. The Full Bench of the Kerala High Court pointed out that the situation therein is not one of a similarity to a case where the owner of the vehicle did not take insurance at all as on the date of the accident. When the liability of the Insurance Company in damages for third party continues for the entire period covered by the policy in spite of the cheque issued towards payment of premium was dishonoured and consequently the policy was cancelled subsequent there to, the only remedy available to the Insurance Company is to proceed against the insured to have the amount paid by them by way of compensation for third party risks to be got reimbursed. The Full Bench of the Kerala High Court did not touch on the character of the Legislation as a welfare measure, yet on the premise that pay and recover concept is still having relevance therein, the Full Bench of the Kerala High Court thought it fit to grant the relief to the claimant therein.

13. As far as the present case is concerned, even though learned Counsel appearing for the appellant submitted that the concept of pay and recover would have relevance to a case of policy violation and this is a case where no policy at all, the said concept did not have any relevance.

14. I am constrained to hold herein that having regard to the date of accident and intimation made to the insured about the cancellation long after the accident had occurred, even though the policy condition might state that the policy stands automatically cancelled *ab initio*, the terms of the policy is a matter between the insured and the insurer, that the accident happening much prior to the intimation being sent resulting in a cancellation, I do not find that the said document

justifies the contention of the learned Counsel appearing appellant, more so, in welfare legislation, like Motor Vehicles Act.

15. In the circumstances, even going by the concept of a cancellation of a policy on account of the dishonour of the cheque based on the decision reported in 2001 ACJ 638 (National Insurance Co. Ltd. v. Seema Malhotra and Ors.), on the peculiar facts and circumstances of the case, as far as the third party risk is concerned, the only course available is the Insurance Company is directed to pay and recover the amount. The intimation as to the cancellation even though not of warranty as bestowed between the parties to contract, yet, the liability cannot be shifted immediately to the insured. Hence, the only course open to the Insurance Company is to pay the compensation awarded by the Court with liberty to recover the same from the insured.

16. Accordingly, the award stands confirmed and the appeal stands dismissed. No costs. Consequently, M.P. Nos. 1 and 2 of 2008 are closed. It is seen that by order dated 25.6.2008, this Court directed the appellant to deposit the entire award amount to the credit of the MCOP. If the amount had already been deposited, the claimant is permitted to withdraw the same together with accrued interest thereon. If the amount is not deposited, the appellant is directed to deposit the amount within a period of four weeks from the date of receipt of a copy of the order. On such deposit being made, the claimant is permitted to withdraw the same.