
(1994) 08 MP CK 0024

In the Madhya Pradesh High Court

Case No : Miscellaneous Appeal No. 58 of 1983

The Oriental Fire and General Insurance Co. Ltd.

APPELLANT

Vs

Ram Singh and Others

RESPONDENT

Date of Decision : 12-08-1994

Acts Referred:

Insurance Act, 1938 — Section 45

Motor Vehicles (Third Party Insurance) Rules, 1946 — Rule 1

Motor Vehicles Act, 1939 — Section 110B, 110D, 95, 96

Citation : (1995) ACJ 26 : AIR 1995 MP 171 : (1995) JLJ 342 : (1995) 40 MPLJ 139 : (1995) MPLJ 139

Hon'ble Judges : S.K. Dubey, J;A.S. Tripathi, J

Bench : Division Bench

Advocate : K.B. Chaturvedi, for the Appellant; Balwant Singh, for the Respondent

Final Decision : Dismissed

Judgement

S.K. Dubey, J.

This appeal u/s 110-D of the Motor Vehicles Act, 1939, for short, the Act; has been filed by the Oriental Fire and General Insurance Company, Ltd. against the award dated 21-2-1983, passed in claim case No. 1 of 1981, by the Motor Accident Claims Tribunal, Gwalior, for short, the "Tribunal", whereby compensation of Rs. 41,500/- with interest at the rate of 9% per annum plus costs of Rs. 700/- was awarded to the injured/claimant for the injuries/ fracture of rib Nos. 4, 5, 6 and clavical caused in an accident on 10-12-1979 at about 10.30 a. m. by the use of motor vehicle, passenger bus No. MPH 448, driven by respondent No. 4 during the course of employment of respondent No. 3.

Claimant/respondent No. 1, after notice of the appeal, filed cross-objections Under Order XLI, Rule 22, CPC, for enhancement of the compensation. During the pendency of the appeal, the injured claimant died hence, his name was deleted, as his legal representative, the respondent No. 2, the mother, was

already on record.

The facts are not in dispute which have been given in the order under appeal and hence are not repeated here. However for the present appeal, some facts relating to insurance of the vehicle, and liability of the appellant company to indemnify the insured are necessary. The case of the appellant company is that owner of the vehicle obtained insurance of the vehicle without disclosing the fact of accident which occurred half an hour prior to issue of the cover note (Ex. D/3) which covered the risk commencing from 11.00 a.m. of 10-12-1979. The plea of avoiding the risk and policy being void from its inception as was obtained by making material concealment as to true state of facts by the owner of "the vehicle was taken by incorporating the amendment on 6-11-1982 in the written statement, filed on 26-11-1981. On the amended pleadings issue No. 7 was raised. The owner of the vehicle, the respondent No. 3 examined himself who stated on oath that he paid the premium of Rs. 427/- to Mr. S. K. Sapra (NAW 1) examined on behalf of the appellant company, between 4.00 and 5.00 p.m. in the office, a day before, who assured him that, the vehicle, will be insured from 10-12-1979. He also stated that Mr. Sapra obtained his signature A to A on a blank proposal form (Ex, D/4). He is an illiterate person, he can only sign. He does not know English, nor Hindi well. When he came back from Agra after 3/4 days, NAW 1 gave him the receipt and the cover note. He specifically denied that he signed the proposal form on 10-12-1979. He also denied that he was in knowledge of the accident on 10-12-1979 when, according to the appellant company, he paid the premium and signed the proposal form. Appellant Company examined two departmental witnesses NAW 1, S. K. Sapra and NAW 2, Laxman Masand. NAW 1 stated that owner insured came on 10-12-1979 at about 11.00 a.m. in the office where the proposal form filled by him was accepted in which answers to questions were given and he put his signature thereon. In answer to question No, 14, in the proposal form, which relates to the happening of any accident to the motor vehicle proposed to be insured or having any claim been made upon by the owner in connection with the motor vehicle during the last three years of which the brief particulars were required, the owner gave the answer "No". The premium was deposited on 10-12-1979 of which receipt (Ex,,D/5) was issued by Laxman Masand (NAW2). There after, the cover note was issued covering the risk from 11.00 a. m. of 10-12-1979.

The Tribunal while deciding this issue against the appellant company, held that after issue of cover note, Policy (Ex: D/1) was issued covering risk from 10-12-1979 to 9-12-1980. The risk was not covered from any specified time of 10-12-1979 in the Policy. After the issue of cover note and the Policy, the cover note or the policy was not cancelled, nor avoided nor was the amount of premium refunded, within fifteen days because of the fact of having concealed the material fact, but, on the other hand, the policy remained in force. In such circumstances, a third party cannot be made to suffer as the policy was in force from the date 10-12-1979. Therefore, the tribunal, held that when the policy is taken on a particular date, its effectiveness is from the commencement of that

date, i.e. from the previous midnight and obtaining of the policy after the accident will not make any difference, hence the Insurer is liable to indemnify the insured against whom and his driver, the award was passed. It is this award which has been challenged in this appeal.

Shri K. B. Chaturvedi, learned counsel for the appellant Company and Shri Balwant Singh, learned counsel for the claimants. Heard. Shri N. L. Haswani, counsel for respondent No. 3, the owner, pleaded no instructions, who remained absent in spite of SPC.

Shri K. B. Chaturvedi, in the background of the facts stated above, contended that it is the duty of the insurer to disclose material facts which the insured in law is deemed to know. Though the accident occurred at about 10.30 a.m. about 10 Kms away at Bela-ki-Bavdi, near the outskirts of Gwalior, on Agra-Bombay road, but from the circumstances, it is clear that the insured was aware of the accident and thereafter, he came on 10-12-1979 for getting the vehicle insured. The cover note so issued covered the risk of this vehicle commencing from 11.00 a.m of 10-12-1979.

The contract of insurance between the insured and insurer is of utmost good faith. It is indeed *uberimae fides*. Absence of good faith avoids the contract, a legal obligation is cast upon the party proposing the insurance, to communicate, not only every material fact of which he had actual knowledge, but he will be deemed to know every material fact of which he ought, in the ordinary course of business, to have knowledge and, therefore, it cannot be assumed that the owner of the vehicle was having no knowledge of the accident at the time when he filled the pro-posal form. The material fact of accident having been concealed and the policy having been obtained by playing a fraud and misrepresentation, the cover note which follows the policy, the contract of insurance, was vitiated since its inception and, therefore there was no insurable interest, the appellant company could not have been made liable to indemnify the owner. Learned counsel cited *Mithoolal Nayak Vs. Life Insurance Corporation of India*, ; *Vijaykumar v. New Zealand Insurance Co.* AIR 1954 Bombay 347 ; *The British India General Insurance Co. Ltd. Vs. Seth Ramnath and Others*, : *V. Srinivasa Pillai Vs. Agent of Life Insurance Corporation of India, Madras and Another*, : *Life Insurance Corporation of India v. B. Kusuma T. Rai* 1989 ACC CJ 520 : (AIR 1989 NOC 90) (Kant).

Before we deal with the contention of Shri Chaturvedi, we may state that the Supreme Court in the case of *New India Assurance Co. Ltd. Vs. Ram Dayal and Others*, , wherein the view of Allahabad High Court in the case of *Jaddo Singh v. Malti Devi* AIR 1983 All 87 holding that if proposal of insurance is accepted retrospectively, policy cannot be rendered invalid, it remains very much in force on the date of accident and under Sections 95 and 96 of the Act, the Insurance Company would be liable; that when a policy is taken on a particular date, its effectiveness is from the commencement of that date and it becomes operative from the commencement of the date of insurance; the date means the day which

commences from the previous midnight and if any accident occurs on that date, the Insurance Company will be liable who cannot repudiate its liability by maintaining that the policy had been taken after the accident and, therefore, it had no liability to meet the award of compensation against the owner. This Court and other High Courts have also taken the same view. See, *Radheshyam v. Nasir Hussain* 1991 MPLJ 365; *United India Insurance Co. v. R. M. Shukla* (1988) 2 ACC 491; - *United India Insurance Co. v. Ullash Chandra Jena* (1993 (2) TAC 155) (Orissa); *Jaikishandas v. Chiru-thal Animal* 1984 ACC CJ 530 : (AIR 1984 Mad 321); *The Oriental Fire and General Insurance Co. Ltd. Vs. Tippanna Gadageppa Kundgol and Another*, and *Maya Devi v. Hoob Raj* (1987) 1 ACC 33 (P&H), as also *National Insurance Co. v. Dakhi* 1990 ACC CJ 827 (Raj).

However, the question canvassed before us, placing reliance on the Supreme Court decision in the case of *Mithoolal Nayak Vs. Life Insurance Corporation of India*, and the decision of the Bombay High Court in the case of *Vijay Kumar* (AIR 1954 Bombay 347) (supra) as also a decision of this Court in the case of *The British India General Insurance Co. Ltd. Vs. Seth Ramnath and Others*, that in view of the statutory provisions contained in Section 45 of the Insurance Act, 1938, when a policy is obtained by fraudulent suppression of the material fact, the policy is vitiated as laid down by the Supreme Court in the case of *Mithoolal Naik* (supra) while in case of *Ramnath* (Supra), a Division Bench of this Court has held that Insurance Company was entitled to disown its liability under the policy by reason of failure of defendant No. 1 to disclose the fact that he has parted with the possession of the vehicle in pursuance of an agreement to sell, to be used by defendant No. 2 in any manner he liked at the time when he secured renewal of the policy in his name.

There cannot be any dispute to the proposition that an insurance contract, apart from its special feature, is a contract between the person seeking to be insured and the Insurer. All the contracts are *uberrimae fidei* founding upon the utmost good faith. Absence of good faith avoids the contract. In such, contracts, ordinarily, the risk under taken by the Insurer can only be learnt from the representation made by the intending insurer and non-disclosure of material fact is regarded as fatal to the validity of the transaction. Therefore, upon this principle, there is a legal obligation cast upon the party proposing the insurance, to communicate not only every material fact of which he had actual knowledge, but he is also deemed to know, every material fact of which he ought, in the ordinary course of business, to have knowledge. However, when Insurance Company takes stand of fraud or misrepresentation and seeks avoidance of the policy on the ground of fraud or misrepresentation or concealment of a material fact, in order to entitle the insurer to avoid the policy, insurer has to prove that it has been procured by means of fraudulent misrepresentation as to matters material to the risk. A charge of fraud, naturally requires a high degree of probability. It must be established beyond all reasonable doubt and could not be based on suspicion and conjectures. Fraud is odious and cannot be presumed; *fraus est odiosa et non est prae-sumenda*. The court will not be satisfied with

proof which falls short of showing that the intentional misrepresentation was made with the knowledge of perpetrating fraud. The onus probandi in all such cases rests heavily on party alleging fraud or misrepresentation to repudiate the claim or avoid liability because of the breach of the policy. See, AIR 1941 93 (Privy Council); Lakshmi Insurance Co. Ltd. Vs. Bibi Padma Wati, ; Life Insurance Corporation of India v. I.R. Parvathavardnini Animal, AIR 1965 Madras 357 and Bhanu-mati v. L. I. Corporation 1970 Lab IC 598 (Guj).

In the case of Mithoolal Nayak Vs. Life Insurance Corporation of India, , the Supreme Court, for considering a case of fraudulent suppression of material facts, has laid down three conditions for the application of Section 45 of the Insurance Act as under:

- (a) The statement must be on a material matter or must suppress fact which it was material to disclose;
- (b) The suppression must be fraudulently made by the policy and;
- (c) The policy holder must have known at the time of making the statement that it was false or that it suppressed facts which it was material to disclose.

Let us examine the facts which have come on record. True, the accident occurred at 10.30 a.m. while, according to Insurer, the premium was paid a day earlier and according to the departmental witnesses examined by the Insurance Company, the premium was paid on the opening hour of 10-12-1979 and the cover note was issued covering the risk from 10-12-1979, specifying time therein from 11.00 a.m. The vehicle was on road, about 15 Kms. away from the office of the Insurance Company. Whether the owner insured had the knowledge of the accident who deliberately concealed this material fact. For that, there is no material and it will not be safe to work merely on conjectures in such matters. Ordinarily, the insurance is made after inspecting the vehicle, but that appears not to have been done in the present case. NAW 1, the Development Officer of the Company who filled up the form in English, even did not state till the time the form was filled up, that the owner of the vehicle had the knowledge of the accident, which was suppressed by him. No legal evidence has been produced by the appellant company to hold beyond reasonable doubt that there was a concealment or suppression of material fact and the policy was obtained by misrepresentation. In the circumstances, merely because the time of accident is 10.30 a.m., it cannot be inferred that the Owner concealed the material fact.

Besides, there is a material aspect which cannot be lost sight of. After the cover note, the policy (Ex. D/1), was issued which is a contract of insurance and contains the terms and conditions of the insurance and also the clauses whereon liability can be avoided. In the policy, no time is specified. It is only the date and the date certainly starts from the previous midnight. Yet, there, is another important aspect that the appellant company did not, within fifteen days of the occurrence, cancel the policy, nor repudiate the liability, nor refund the premium amount. After notice of the claim application, no such defence was raised in the

written statement; the plea was taken by way of an amendment after two years, that too, without particulars. In such circumstances, when the policy having not been avoided or cancelled, nor the premium received was returned, repudiating the liability within fifteen days of the insurance, it cannot be held that the policy was void from its inception. .

As the policy specifies the date of commencement of the policy covering the risk, Shri Balwant Singh, learned counsel for claimant/respondent rightly submitted that specifying time of commencement of the policy, in cover note, will not bind the third party according to Third Party Insurance Rules, 1946. He cited a Division Bench Decision of Kerala High Court in *Oriental Insurance Co. Ltd. v. Sivan*, (AIR 1990 Kerala 202). The Kerala High Court, while considering the question whether the insurance policy was effective from 11.00 a.m. on 15-7-1985, as contended in that case, or was effective from the midnight of 14-7-1985, taking the relevant provisions of Sections 94, 95 and 96 of Chapter VIII of the Act and the Third Party Insurance Rules, 1964, in particular, Rule 4, answered the question in para 2 thus, which we quote :

"2. The answer to the question depends upon the construction of the provisions contained in Chapter VIII of the Motor Vehicles Act, 1939 read with the relevant rules of the Motor Vehicles (Third-Party Insurance) Rules, 1946, for short the Third-Party Insurance Rules, Section 94 of the Motor Vehicles Act highlights the need for insurance against third party risk. Section 95 provides that in order to comply with the requirement of Chapter VIII a policy of insurance must be a policy which satisfies the requirements prescribed thereunder. Particular reference requires to be made to Sub-section 4 of Section 95. This sub-section says that a policy shall be of no effect unless and until the insurer issue a certificate of insurance in the prescribed form and containing the prescribed particulars etc., in favour of the person by whom the policy is effected. Equally relevant is the provision contained in Sub-section (3) of Section 96. This section provides that where a certificate of insurance has been issued under Sub-section (4) of Section 95 to the person by whom a policy. has been effected, so much of the policy as purports to restrict the insurance of the persons insured thereby by reference to any conditions other than those in Clause (b) of Sub-section (2) shall, as respect such liabilities as are required to be covered by a policy under Clause (b) of sub-section (1) of Section 95, be of no effect. Alongside we should focus our attention on the relevant rules contained in the Third Party Insurance Rules. Rule 4 makes it imperative that the insurer shall issue to every holder of a policy a certificate of insurance in Form A set out in the schedule attached to the Rules. Similarly every policy, in the form of a cover note issued by an insurer, shall be in Form B set out in the Schedule. The above in short is the scheme of the relevant provisions pertaining to the issue of insurance policy. Going by this scheme every certificate of Insurance shall contain the following particulars.

"Certificate No. Policy No. Description of the vehicles insured :-

(a) Registration mark and number,

(b) Cubic capacity of the Vehicles.

(c) Make and year of manufacture.

(d) Carrying capacity.

Name and address of insured.

Effective date of commencement of insurance for the purpose of the Act.

Date of expiry of insurance.

Persons or classes of persons entitled to drive.

Limitation as to use.

Insurance premium.

....."

There shall be issued a certificate signed by the authorised insurer that the policy in which the certificate relates as well as the certificate of insurance are issued in accordance with the provisions of Chapter VII of the Motor Vehicles Act, 1939. The insurance policy thus issued to be valid, must be one that complies with the requirements prescribe under the provisions contained in Chapter VIII read with the Third Party Insurance Rules. If that be the position, the policy of insurance here, for the purposes of the Act, is effective from 15-7-1985. „....."

For this reason also, the contention of Shri Chaturvedi cannot be accepted.

Coming to the quantum and cross-objections, so far as the compensation awarded for the injury, we are of the view that it does not call for any interference either for enhancement or for its reduction. However, the Tribunal has awarded the interest on the amount of compensation at the rate of 9% per annum from the date of the application. Now, it is well-settled that the interest u/s 110-C of the Act, is awardable at the rate of 12% per annum from the date of the application till payment. That is the settled view of this Court. See, a Full Bench decision of this " Court in the case of Pakramchand v. Chhut-tan, 1991 Jab LJ 733 : (AIR 1991 Madh Pra 280).

16A. However, the submission of Shri Chaturvedi, relying on a decision of the Supreme Court in the case of Atma Ram Mittal Vs. Ishwar Singh Punia, , followed by this Court in case of Govind Chandra Chaturvedi 1992 (1) MPVB 341, that because of the delay in disposal of this appeal, for no fault of the appellant company, the interest of the period of the appeal be not awarded as no man should suffer because of the act of the court deserves consideration in the circumstances of the case. From the record, it is apparent that on the day of admission itself, the claimant's counsel appeared to oppose the stay. On 2-1-1986, the court allowed the prayer for early hearing and directed the appeal to be listed in the next month. Thereafter, the appeal was listed for hearing number of times, but was adjourned for one reason or the other. Therefore,

when the appellant company cannot be blamed for delaying the disposal of the appeal it would be unjust to burden the appellant company for the payment of interest for the long period of about eleven; years. Therefore, it would be just and equitable as also fair to direct the appellant company to pay interest at the rate of 12 per cent per annum from the date of the application tilt the date of the award and thereafter for a further period of six years.

In the result, the appeal fails and the cross-objections are allowed to the extent that on the amount of compensation of Rupees 41,500/-, the respondents shall be entitled to interest at the rate of 12% per annum from the date of the application till the date of the award, and thereafter for a further period of six years. The company shall deposit the amount of compensation with accrued interest within a period of six weeks, failing which the amount shall carry interest at the rate of 18% per annum. Of course, appellant Company shall be entitled to adjustment of the amount already deposited by it, with proportionate interest. The appellant to bear the costs of this appeal. Counsel's fee Rs.750/ if pre-certified.