

(1998) 07 CAL CK 0013
In the Calcutta High Court

Case No : Civil Appellate Jurisdiction F.M.A. No. 41 of 1996

The Oriental Insurance Co. Ltd.

APPELLANT

Vs

Smt. Santosh Devi Goyal and Others

RESPONDENT

Date of Decision : 17-07-1998

Acts Referred:

General Insurance Business (Nationalisation) Act, 1972 — Section 35
Insurance Act, 1938 — Section 64
Motor Vehicles Act, 1939 — Section 140

Citation : (1999) ACJ 1195 : (1998) 2 CALLT 582 : 2 CWN 28

Hon'ble Judges : Satyabrata Sinha, J; Dibyendu Busan Dutta, J

Bench : Division Bench

Advocate : Mr. S.R. Khastagir, for the Appellant; Mr. Krishanu Banik, for the Respondent

Judgement

S.B. Sinha, J.—This appeal is directed against a Judgment and order dated 17th September, 1994 passed by Sri A.K. Bhattacharya, Judge, Motor Accident Claim Tribunal at Allpore in M.A.C. Case No. 315 of 1993 whereby and whereunder the said Tribunal awarded a sum of Rs. 25.000/- towards compensation u/s 140 of the Motor Vehicles Act.

2. The 1st respondent herein for self and on behalf of her parents-in-law and three minors children filed an application for grant of compensation arising out of a motor vehicle accident caused by a vehicle bearing registration No, WB-J2-E-0379 which is said to have been insured with the appellant.

3. The owner of the said vehicle has not preferred any appeal and thus we are not concerned in this appeal with the quantum of the award made by the learned Tribunal. The fact that an accident had taken place is not denied or disputed. The fact that the claimants-respondents are entitled to file the application is also not denied and disputed.

4. The question which is raised by the appellant herein, is that the claim petition was filed in violation of the rules framed by the State of West Bengal under the

Motor Vehicles Accident Rules. It is further contended that as no premium was paid by the owner, the same would be hit by section 64VB of the insurance Act. 1938.

5. Mr. Banik, the learned counsel appearing on behalf of the claimant-respondents, however, submitted that a third party is not concerned with the question as to whether the appellant had been paid the premium or not. According to the learned counsel, an insurance cover note had been issued which is said to have been cancelled at a later date and, thus on the date on which the insurance cover note was issued. It would be deemed that there existed a valid contract of insurance.

6. The provisions of the West Bengal Motor Vehicles Rules are not mandatory in nature. If substantial compliance is made with regard to the requirement of the said provision, the same would serve the purpose. For the purpose of consideration of the objection raised by the appellant herein we may note that clause 17 of the claim petition, it is stated :--

"Name Policy No. Insurance Particulars and address of the Insure of the vehicle.

The Oriental Insurance Co. Ltd. 7. Red Cross Place. Calcutta-- 1, Cover note No. A-3/103376. valid upto 26.7.93. issued on 25.6.93.

Service through : --Motor Third Party Claim Cell C/o. Oriental Insurance Co. Ltd., 5, N.S. Road (Royal Exchange Building). Cal-700 001.

7. The appellant in its written statement, inter alia, stated :--

"With reference to the statements made in the answering portion of column Nos. 15 to 17 of the claim application this opposite party has not issued any insurance Policy in respect of the vehicle bearing No. WBY-4211 at the material time of the alleged accident and as such the relationship of insurer and insured has not been established between the owner of the said vehicle and the Oriental insurance Co. Ltd., and accordingly this opposite party is not liable to indemnify the liabilities of the owner of the said vehicle in regard to third party risk as alleged in the claim application.

This opposite party further states that the cover note issued by this opposite party on 25.6.93 against the vehicle being No. WBY-4211 has been cancelled by this opposite party due to non-payment of premium by the owner of the vehicle being No. WBY 4211 and accordingly, the question of issuance of insurance Policy in respect of the said vehicle does not arise at all since the cover note issued previously by the insurance Company has already been cancelled.

This opposite Party No. 2 namely the Oriental insurance Co. Ltd., cancelled the cover note issued by the insurance Company on the ground that the provision as envisaged u/s 64VB of the Indian Insurance Act has not been complied by the owner of the said vehicle being No. WBY 4211 and accordingly the insurance Company has not issued the insurance Policy in respect of the said vehicle and as

such there is no insurable interest as per indian insurance Act."

8. The appellant examined one Pradlp Kumar Chakraborty as a witness. The said witness produced the carbon copy of the insurance cover bearing the signature of the Development Officer. He also proved a factmill of G.B. Rao. the then Chairman, with endorsement "Cancelled". He. however, accepted the fact that the original copy of the insurance cover note was valid upto 26.7.93. He further stated :--

"It might be that the said insurance Cover note or temporary certificate pertains to 3rd party insurance. The insurance Co. do not issue any certificate without payment of insurance."

9. In cross-examination by the claimant, he further stated :--

"No policy issued by their insurance Co. In respect of the said vehicle but the document produced is insurance cover note. He did not issue any letter to the owner or financier demanding payment of premium. (Then says) There was no scope for issuing such letter as he received the insurance Cover note Book much later followed by requisition. Since the said document was not document at all due to non-payment of premium, he did not inform about the cancellation to the party. He denies that he is deposing falsely."

10. The fact that the accident had taken place on 20th June, 1993 is not is dispute. According to the witness examined on behalf of the appellant himself the insurance was valid till 26/7/93.

Section 64VB of the insurance Act reads thus :--

"Section. 64VB. No risk to be assumed unless premium is received in advance.
(1) No insurer shall assume any risk in india in respect of any insurance business on which premium is not ordinarily payable outside india unless and until the premium payable is received by him or is guaranteed to be paid by such person in such manner and within such time as may be prescribed or unless and untill deposit of such amount as may be prescribed, is made in advance in the prescribed manner.

(2) For the purposes of this section, in the case of risks for which premium can be ascertained in advance, the risk may be assumed not earlier than the date on which the premium has been paid in cash or by cheque to the insurer.

Explanation.-Where the premium is tendered by postal money order or cheque sent by post, the risk may be assumed on the date on which the money order is booked or the cheque is posted, as the case may be.

(3) Any refund of premium which may become due to an insured on account of the cancellation of a policy or alteration in its terms and conditions or otherwise shall be paid by the insurer directly to the insured by a crossed or order cheque or by postal money order and a proper receipt shall be obtained by the insurer from the insured, and-such refund shall in no case be credited to the account of

the agent

(4) Where an insurance agent collects a premium on a policy of insurance on behalf of an insurer, he shall deposit with, or despatches by post to the insurer, the premium so collected in full without deduction of his commission within twenty-four hours of the collection excluding bank and postal holidays.

(5) The Central Government may, by rules, relax the requirements of subsection (1) in respect of particular categories of insurance policies."

11. The said provision merely forbids an insurer to assume any risk unless the premium payable is received or is guaranteed. Thus, it will not be correct to contend that the insurance Act makes a prohibition altogether that no contract of insurance can be entered into unless actually the premium has been paid. The insurance business of the appellant is governed by the provision of the General Insurance Business (Nationalisation) Act, 1972. It is true that in terms of section 35 of the said Act, the provision of the insurance Act has been applicable. Section 35 of the General Insurance Business (Nationalisation) Act, 1972 reads thus :--

"Section. 35. Application of insurance Act.--Subject to such exceptions, restrictions and limitations, if any as the Central Government may, by Notification, specify in this behalf, the insurance Act shall apply to or in relation to the Corporation and every acquiring company as if the Corporation or the acquiring company, as the case may be, were an insurer carrying on general insurance business within the meaning of that Act."

12. The appellant was under an obligation to produce requisite notification as to whether any other directions has been issued as regard applicability of section 64VB of the insurance Act. but the same has not been produced.

13. A vehicle is compulsorily insurable under the Motor Vehicles Act, 1988. If the vehicle is not insured, the owner thereof would be liable for penal action.

14. In the instant case a cover note has been issued. Once a cover note has been issued, a presumption would arise that the vehicle was insured. Admittedly it had been cancelled on a later date. The consequences of such cancellation have to be faced by the owner, if any, but a third party keeping in view the benevolent nature of the provision of the Motor Vehicles Act cannot suffer therefor.

15. This aspect of the matter has been considered in *V. Ravt v. M/s. New India Assurance Co. Ltd. & Ors.* reported in (2) 1997 TAC 693 (Cal.).

16. In this case we are not concerned with the fact of such cancellation inasmuch as even if the said insurance cover has been cancelled, the same is a matter between the insurer and the owner. Furthermore, the appellant can always initiate any proceeding as against the owner for recovery of the amount paid by it to the respondents. Reference in this connection may be made to *National Insurance Co. Ltd. v. Bosontt Bagchl* reported in 1998 (1) SCC 594.

17. In *Oriental Insurance Co. Ltd. v. Inderjit Kaur and Ors.* reported in AIR 1998

SC 588, it has been held :--

"We have, therefore, this position. Despite the bar created by section 64VB of insurance Act, the appellant, an authorised insurer, issued a policy of insurance to cover the bus without receiving the premium therefor. By reason of the provisions of sections 147(5) and 149(1) of the Motor Vehicles Act, the appellant became liable to indemnify third parties in respect of the liability which that policy covered and to satisfy awards of compensation in respect thereof notwithstanding its entitlement (upon which we do not express any opinion) to avoid or cancel the policy for the reason that the cheque issued in payment of the premium thereon had not been honoured."

18. In *The Oriental Insurance Co. Ltd. Vs. K. Gowramma and Others*, it has been held :--

"The second contention urged for the insurer was that the cheque issued for payment of premium towards "cover note" concerned, having been issued by a third party, the same was not encased by the insurer and that hence the insurer was not liable under that "cover note". This contention is again devoid of merit as the reason now put forth for non-encashment of the cheque is different from the reason put forth by the Officer of the insurer examined in the case as RW 2. The reason for non-encashment of the cheque as stated by RW 2 in his evidence, reads :

The cheque is not encased by D-3 (Insurance Company), namely on the ground that after a month they got information that the bus had met with an accident. Even other wise, when the cheque was obtained from the insured as valid payment towards premium for the cover note issued, non-presentment of the cheque by the insurer for encashment cannot have the effect of absolving the insurer of the liability under the cover note issued pursuant to the receipt of such cheque. Hence, the second contention urged for the insurer is also rejected,"

19. In Paragraph 377 of Halsbury's Laws of England, Fourth Edition. Vol.-25, the law is stated thus :--

"The effect of non-disclosure or misrepresentation, within the principles already discussed, is that the insurers have the right to repudiate, that is to say to avoid, the contract."

20. For the reasons aforementioned there is no merit in this appeal which is accordingly dismissed but in the facts and circumstances of this case there will be no order as to costs.

D.B. Dutta, J.--I agree.

21. Appeal dismissed