
(1992) 10 GUJ CK 0013
In the Gujarat High Court
Case No : F.A. No. 259 of 1981

United India Fire and Genl. Ins. Co. Ltd.	APPELLANT
Vs	
Naniben and Others	RESPONDENT

Date of Decision : 07-10-1992

Acts Referred:

Constitution of India, 1950 — Article 134A
Insurance Act, 1938 — Section 64VB

Citation : (1993) ACJ 838

Hon'ble Judges : Y.B. Bhatt, J;N.B. Patel, J

Bench : Division Bench

Advocate : M.I. Patel, for the Appellant; B.A. Surti and J.B. Shah, for the Respondent

Final Decision : Allowed

Judgement

Y.B. Bhatt, J.—The present appeal arises from the judgment and award passed by the Motor Accidents Claims Tribunal (Main) at Bharuch in Motor Accident Claim Petition No. 248 of 1979. The present appeal is by the insurer of the vehicle involved in the accident from which the claim arose. The respondent Nos. 1, 2 and 3 are the original claimants, whereas respondent Nos. 4 and 5 are the driver and the owner respectively of the car involved in the accident.

2. It is pertinent to note at this stage that the appellant (hereinafter referred to as "the insurer") has not challenged the quantum of compensation awarded by the Tribunal; but has challenged its liability to meet the award in question. It is also pertinent to note that no other party, viz., the claimants, the owner or the driver has filed any appeal challenging the award in question nor filed any cross-objections in the present appeal.

3. The pertinent facts, in brief, leading to the claim petition and the present appeal are as under:

3.1. An Ambassador car bearing registration No. MRZ 3969 was proceeding on

National Highway No. 8 and when it was near the GIDC Estate near Bharuch, it was involved in an accident at about 8 a.m. on 30th August, 1979. The injured deceased, being the husband of the first respondent herein, was walking along the eastern side of the road when he was hit from the rear by the car in question. The evidence on record, which is not disputed, indicates that the impact was of such a magnitude that the left front mudguard of the car was dented and blood was found spattered over the bonnet of the car. No brake marks were noticed at all. It is thus established that the deceased husband of the 1st respondent died, firstly, as a direct result of the accident and secondly, the accident was the direct consequence of the negligence of the driver.

3.2. The claimants had filed a claim for damages amounting to Rs. 66,000/- whereas the Tribunal has awarded Rs. 51,000/- on consideration of the relevant material on record and also looking to the fact that the victim was aged 48 years.

4. The appellant insurer has challenged its liability to pay compensation, and has challenged its liability to meet the award in question mainly on the ground that the policy issued by it (Exh. 68) was issued by the company after the occurrence of the accident although on the same day, but was issued only on account of suppression of the material fact (as regards the occurrence of the accident) having not been disclosed by the owner and that the policy in question was, therefore, void (and not merely voidable).

5. The relevant documentary evidence on record, for the purpose of deciding the real controversy involved in the present appeal, consists of the policy of insurance at Exh. 68, the premium receipt dated 31st August, 1979 (the day after the accident) at Exh. 75, the cover note dated 30th August, 1979 (the day of the accident) at Exh. 74, the proposal form signed and submitted by the owner on the basis of which policy at Exh. 68 was issued at Exh. 73 and the last policy issued by the insurer in favour of the owner in respect of the vehicle in question at Exh. 72. The said last policy was in respect of the period from 23rd May, 1977 to 22nd May, 1978, being more than one year prior to the accident.

5.1. In the context of the proposal form (Exh. 73), we may observe at this stage that the same is dated 30th August, 1979 (the day of the accident); but was received by the insurance company on 31st August, 1979 (the next day). The proposal form has a specific question which is required to be answered by the proposer at serial number 5 of the list of questions. The said question reads as under:

What accidents (if any) have occurred to this or to any other car at any time owned or driven by the proposer during the last five years.

The column for the answer in respect of this question bears a mere horizontal stroke indicating that the answer is either "No", or that the question is not applicable to the proposer. It is further pertinent to note that the proposal form contains the declaration just above the signature of the proposer. The relevant part of this declaration reads as under:

I/We hereby declare and warrant that the above statements are true and complete.

From this it becomes clear that the owner/ proposer had not disclosed to the insurer the material and vital fact that the vehicle in question had met with an accident earlier on the same day as the making of the proposal.

5.2. It is also pertinent to note that although the proposal form is dated 30th August, 1979, the same was received by the insurer on 31st August, 1979. It is also pertinent to note that the receipt pertaining to the payment of premium in cash at Exh. 75 is also dated 31st August, 1979, both being on the day after the accident. The significance of these dates will be discussed hereinafter.

6. In order to effectively deal with the contention raised by the insurer, it is necessary to examine and also to reappraise the pertinent evidence on record with reference to the various pleadings of the parties, the inconsistencies in the pleadings and the case sought to be made out in the oral evidence.

7. We have been taken through the evidence on record including the oral evidence by the learned counsel appearing for the parties. The insurer has specifically contended in its written statement at Exh. 18 that the policy in question at Exh. 68 was in fact a policy issued by the insurer in favour of the owner in respect of the vehicle in question, but it was entitled to treat the said policy as void on the ground that the insured had obtained the said policy by suppression of material fact, viz., the fact that an accident had already occurred earlier on the same day on which the proposal for issuance of the policy had been made by him. The specific contention is clearly spelt out in paras 10 and 11 of the written statement.

7.1. It is also pertinent to note that the insurer has established by the evidence on the record that apart from Exh. 68, viz., the policy in question, the immediately preceding policy (Exh. 72) was a policy covering the period from 23rd May, 1977 to 22nd May, 1978. In fact the insurer had not only asserted this fact in the oral evidence of its employee Dineshbhai Dhulabhai Patel (Exh. 78), but had also served a notice of production upon the owner (Exh. 69) requiring the latter to produce any insurance policy issued by the insurer subsequent to the earlier and expired policy, viz., Exh. 72. Since no such policy was produced by the owner, the insurer has also submitted that an adverse inference in this regard can and should be drawn and the oral evidence of its employee at Exh. 78 should be accepted as an established fact.

8. It is pertinent to note at this stage that the case sought to be made out by the owner on the fact of issuance of the policy in question at Exh. 68 is, to some extent, contradictory to the evidence led by the insurer. The owner has deposed on oath at Exh. 64 that he had not approached the insurance agent on the day of the accident for the purpose of obtaining the policy. He has further deposed that he has not signed any document pertaining to the issuance of a policy nor signed the proposal form (Exh. 73). He has denied the issuance of a cover note (Exh.

74) by the insurer or the agent of the insurer. He has further denied that he has obtained any insurance coverage on the date of the accident by suppressing the fact that the accident had occurred earlier on the same day. It is also pertinent to note at this stage that the owner of the vehicle in his oral deposition at Exh. 64 has not only denied having made the proposal at Exh. 73, but has also denied the issuance or the existence of the policy at Exh. 68 which is the policy in question, and on the basis of which the award has been passed against the insurer. The case sought to be made out by the owner in his oral deposition is to the effect that he had obtained an insurance policy at Exh. 72, covering the period from 23rd May, 1977 to 22nd May, 1978, and that the said policy was renewed from time to time by the owner by making payment to the insurance agent in cash in respect of the successive renewals. He specifically sought to make out a case that he had made a payment in cash to the insurance agent in the month of May, 1979, for the renewal of a policy, and according to him that was sufficient to obtain coverage in respect of the day on which the accident occurred. The case sought to be made out by the owner is that since no proposal form was required to be made out or tendered in respect of the renewal of a policy, he had merely made payments of premium for the renewal, leaving it to the agent to obtain the necessary documents such as cover note or certificate of insurance as also the policy. His specific case is based on an assumption that when the last policy expired on 22nd May, 1978, the insurance company was bound to have issued a renewal up to 22nd May, 1979, since he had paid the renewal premium in cash to the insurance agent, and similarly the insurer was bound to have issued another policy in May, 1979 (covering the date of the accident) since he had paid the further renewal premium to the insurance agent in May, 1979.

8.1. Before discussing the case sought to be made out by the owner, we are obliged to take note of the fact that he specifically denies having made a proposal at Exh. 73 dated 30th August, 1979 (the day of the accident) and the consequential cover note at Exh. 74, the certificate of insurance at Exh. 38 and the policy in question at Exh. 68. In short, the owner denies that he obtained the policy at Exh. 68 on the day of the accident by paying the premium in cash on the same day. As a direct consequence of such denial on the part of the owner, we are required to consider whether the owner can seek shelter under the statutory provisions of the Motor Vehicles Act for the purpose of assigning the liability which may arise under the award in question to the insurer or whether the insurer is bound to afford coverage under such circumstances, even assuming that the policy in question at Exh. 68 is not void, as contended by the insurer. It is only on account of the fact that the insurer has admitted having issued the policy at Exh. 68 that the Tribunal has made the insurer liable to meet the award impugned in the present appeal. Since the case sought to be made out by the owner as aforesaid was sought to be established by the owner in his oral deposition at Exh. 64 which was subsequent to the written statement of the insurer at Exh. 18, obviously the insurer could not have contended in the written statement that since the owner has denied having obtained the policy in question

at his own instance, the insurer was not bound by the policy in question (even assuming that the policy is not void on the ground of suppression of material fact).

9. We have been taken through the evidence on record in considerable detail by the learned counsel for the parties and we are satisfied that the policy in question at Exh. 68 was in fact issued by the insurer conferring coverage to the owner in respect of the vehicle in question. We do not propose to enter into the controversy whether the policy in question was sought for by the owner by tendering the proposal form at Exh. 73 or whether the proposal form was tendered by the insurance agent to cover his own lapse by not obtaining a renewal of the policy supposedly existing in May, 1979, for the simple reason that this controversy is essentially between the owner and the insurance agent and no matter which view we take in this limited context, it would not affect the outcome of the matter.

10. It is in this context that we examine the oral evidence on the record of the case.

10.1. The owner of the vehicle in question Iqbal has deposed at Exh. 64. The specific case sought to be made out by him through his deposition is that he had sent his brother Dawood as usual with a cash premium to the insurance agent for the purpose of obtaining renewal of insurance coverage in the year 1979. He denies that he and/or his brother had met the insurance agent for the purpose of obtaining a fresh policy on the day of the accident at about 3.30 p.m. (the accident having occurred at about 8 a.m.). He specifically denies that he had signed any document for the purpose of obtaining an insurance policy. It appears that this denial is in the context of the proposal form at Exh. 73 pertaining to the insurance policy issued on the date of the accident. He further denies that he has suppressed the fact of the accident and obtained any insurance policy by such suppression. He further admits that the only document in his possession pertaining to any previous policy is at Exh. 63-A. This document is a certificate of insurance pertaining to the policy at Exh. 72 which expired on 22nd May, 1978. Although he claims to have paid a renewal premium in the month of May, 1979, he admits that he does not hold any receipt pertaining to this payment, nor is such payment reflected in any of his account books, nor is he in possession of any documentation pertaining to an insurance policy which may have been issued on the payment of such renewal premium. It is, therefore, obvious that the owner Iqbal cannot be believed when he states that he had paid a renewal premium in cash in the month of May, 1979, as a result of which a policy of insurance was issued to him or at least ought to have been issued to him. This finding is further strengthened in view of the deposition of Dineshbhai at Exh. 78 who is an employee of the insurer and who asserts that, apart from the policy (Exh. 68) taken out on the day of the accident, the only other prior insurance covering the owner and the vehicle in question was the earlier policy, Exh. 72, which expired on 22nd May, 1978. It is, therefore, obvious that even if we

assume for the sake of argument that the cash premium had in fact been paid by the owner to the agent for renewal of a supposed policy in May, 1979, it would be of no effect and would not bind the insurance company, nor would it oblige the insurance company to issue any policy with effect from May, 1979, since no policy was issued after the expiry of the earlier policy at Exh. 72 on 22nd May, 1978. The reason for this is obvious since there was no policy covering the period from May, 1978 to May, 1979, there was in fact no policy which could possibly have been renewed in May, 1979. It must be noted in this context that it is not the case of the owner that the premium supposed to have been paid in May, 1979, was for the issuance of a new policy, inasmuch as he admits that no proposal form was tendered along with the cash premium in May, 1979. It may also be noted that it is common ground on both the sides that no proposal form is required to be tendered to the insurer for the renewal of a policy whereas tender of proposal form is mandatory wherever a new policy is sought to be obtained.

10.2. The evidence of Dawoodbhai at Exh. 65 (brother of the owner) is of a nature similar to that of the owner and does not merit any independent assessment. He has merely reiterated that no signature was obtained by the insurance agent when he had tendered the cash premium in May, 1979. He also admits that he had not demanded any receipt for the payment of such cash premium. He further admits that no policy has been received by himself or his brother (the owner) in respect of the premium supposed to have been paid in May, 1979. He further admits that he has no other corroborative documentary proof to indicate payment of the cash renewal premium in May, 1979. He further admits that he has no documentary evidence pertaining to any policy which may have existed prior to May, 1979. It is significant to note that he also admits that the RTO demands proof of the vehicle having been insured on the date when the RTO tax is tendered to the RTO before the same is accepted by the latter. He has not tendered any proof although he was asked that RTO tax has been paid by them in respect of the year 1978-79 or 1979-80.

11. From the state of this evidence on record we have no hesitation in concluding that after the expiry of the earlier policy at Exh. 72 on May 22, 1978, no further insurance policy was obtained by the owner from the insurer-appellant. Therefore, there cannot be any question of making payment of any cash premium for the renewal of a policy in May, 1979. The deposition of the insurance agent Dineshbhai at Exh. 78 must, therefore, be accepted to the extent where he states that he was approached at about 3.30 p.m. on the date of the accident (the accident having occurred at about 8 a.m.), that the proposal form at Exh. 73 was tendered and the cash premium was accepted by him at that point of time, viz., at 3.30 p.m., as a consequence of which the policy in question at Exh. 68 was issued bearing the date of the accident.

12. In the light of the above finding we are required to consider the plea of the insurer to the effect that although the policy in question was issued on the date

of the accident, the same is void inasmuch as it has been obtained by suppression of material fact as regards the accident having occurred earlier on the same day. As aforesaid, we have examined the written statement of the insurer and we find that this plea has been specifically taken. We note that the written statement does not refer to any specific statutory provision in this regard, but merely asserts the proposition that contracts of insurance are contracts based on utmost good faith and that such contracts are void and not merely voidable if they have been obtained by suppression of material facts. We, however, feel that merely because no reference has been made to any statutory provision in this regard, we cannot shut our eyes to such provision if the same exists on the statute book. We find that the legislature in its wisdom has incorporated this principle by making a specific provision in the Motor Vehicles Act, 1939, in Section 96 (2) (c). This provision specifically contemplates the contingency where an insurer is entitled to avoid liability under the circumstances specified in Clause (c).

Section 96 (1) and (2) of the Motor Vehicles Act, 1939, reads as under:

96. Duty of insurers to satisfy judgments against persons insured in respect of third party risks.-(1) If, after a certificate of insurance has been issued under Sub-section (4) of Section 95 in favour of the person by whom a policy has been effected, judgment in respect of any such liability as is required to be covered by a policy under Clause (b) of Sub-section (1) of Section 95 (being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then, notwithstanding that the insurer may be entitled to avoid or cancel or may have avoided or cancelled the policy, the insurer shall, subject to the provisions of this section, pay to the person entitled to the benefit of the decree any sum not exceeding the sum assured payable thereunder, as if he were the judgment-debtor, in respect of the liability, together with any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments.

(2) No sum shall be payable by an insurer under Sub-section (1) in respect of any judgment unless before or after the commencement of the proceedings in which the judgment is given the insurer had notice through the court of the bringing of the proceedings, or in respect of any judgment so long as execution is stayed thereon pending an appeal; and an insurer to whom notice of the bringing of any such proceeding is so given shall be entitled to be made a party thereto and to defend the action on any of the following grounds, namely:-

(a) xxx xxx xxx (b) xxx xxx xxx (c) that the policy is void on the ground that it was obtained by the non-disclosure of a material fact or by a representation of fact which was false in some material particular.

13. Before moving on to the consideration of the impact of Section 96 (2) (c) upon the coverage afforded by the policy at Exh. 68, we may also observe, as already stated hereinabove, that although the proposal form is dated 30th

August, 1979, i.e., the date of the accident, it was received by the insurance company on 31st August, 1979. Similarly, the receipt for the cash premium is also issued by the insurer on 31st August, 1979. Under the circumstances we cannot but observe and note the doubtful validity of the policy in fact issued on 30th August, 1979, i.e., on the day prior to receipt of the proposal form as also prior to the receipt of the premium. Section 64-VB of the Insurance Act, 1938, specifically prohibits an insurance company from issuing any policy according coverage in respect of any day prior to the receipt of the premium. However, since this aspect of the matter is not vital to the determination of the issues, we do not propose to examine the impact of a probable violation of Section 64-VB of the Insurance Act, 1938. We also refrain from examining this question since the same has not been raised by the learned counsel for the insurer.

14. The learned counsel for the claimants and for the owner and driver have sought reliance on a number of decisions for the purpose of countering the submissions made by the learned counsel for the insurer.

14.1. Reliance was placed on a decision of the Madras High Court in the case of Jaikrishandas v. Chiruthai Ammal 1984 ACJ 530 (Madras). We find that this decision is of no assistance inasmuch as the scope, effect and impact of Clause (c) of Section 96 (2) was neither involved on the facts of the case nor was it considered. This decision does not take into consideration the distinction between Clause (a) and Clause (c) of Section 96 (2).

14.2. Reliance was also placed on the decision in the case of Maya Devi v. Hoob Raj 1988 ACJ 478. This decision also is of no utility inasmuch as Clause (c) of Section 96 (2) has not been considered, nor has the question of suppression of material fact been considered. This decision does not indicate whether the insurer in that case had taken such a plea or not.

14.3. Similarly, reliance was sought to be placed on a decision of the Allahabad High Court in the case of Jaddoo Singh v. Malti Devi 1983 ACJ 747 (Allahabad), which again is of no assistance inasmuch as the question involved in that case was as to when and at what point of time would the transfer of vehicle have the effect of affecting the liability of the insurer qua the original owner. In this case there was no question of any fraud being involved and no question as regards the policy being void under Clause (c) of Section 96 (2) was required to be raised or considered.

14.4. Similarly, reliance was placed on a decision in the case of Hindustan General Ins, Society Ltd. v. Kausalya Rani Das 1972 ACJ 13 , which in substance merely declares a salutary principle of a general nature to the effect that the claimants in motor accident cases who are third parties should not be permitted to suffer on account of a contractual deficiency, and such contractual deficiency does not defeat third party claims inasmuch as the relevant and material parts of the Motor Vehicles Act can be regarded to be a beneficial piece of legislation. We have no doubt that the principle is applicable in general terms to the motor

accident claims and particularly claimants who are third parties. However, this decision has not taken into consideration what may be regarded to be a statutory exception incorporated in Clause (c) of Section 96 (2). The legislature in its wisdom has specifically permitted an insurer to avoid liability in spite of a policy of insurance having been issued, on the necessary facts being established as regards suppression of material fact. We have no hesitation in holding that in those cases where facts of a case justify the application of Clause (c) of Section 96 (2), the aforesaid general principle cannot have an overriding effect and the statute must be given effect to.

14.5. Reliance was also placed on the decision of the Supreme Court in the case of New India Assurance Co. Ltd. Vs. Ram Dayal and Others, < material suppression question indicates decision 4 3 paras reference particular decision, said considered nor pleaded neither (c) (2) 96 reason simple hand controversy light throw does> 14.6. For the same reasons the decision of a single Judge of this court in the case of Kantilal Nagarbhai Khristi Vs. Kantibhai Punjabhai Thakor and Another, rat), is of no assistance.

14.7. We may state in general that all the aforesaid decisions pertain to a different issue altogether. The aforesaid decisions concern themselves with dealing with the controversy as to when the coverage commences under a contract of insurance, where the accident occurred prior in point of time though on the same day of the issuance of the policy. These decisions only lay down the principle that coverage would commence on and at the immediately preceding midnight of the day on which the policy is issued. Clearly this is not the controversy on the facts of the present case. Firstly, the insurer has not pleaded nor even argued that the policy in question would not cover the accident because the policy was taken out later on on the day of the accident, whereas the accident was prior in point of time, and secondly, because the owner had denied making a proposal for issuance of the policy in question. The latter aspect is relevant in this context inasmuch as the owner does not claim coverage under the policy in question, but claims to be covered by a policy which, according to him, ought to have been issued earlier in May, 1979, when he claims to have paid a renewal premium.

15. The learned counsel for the insurer has placed reliance upon decision in the case of The British India General Insurance Co. Ltd. Vs. Seth Ramnath and Others, . In our opinion this decision squarely covers the controversy at hand and is based on the principle (the relevant portion being para 15) that on the failure on the part of the owner to disclose a material fact, the insurer is entitled to disclaim liability even if the policy has in fact been issued.

16. In the context of the aforesaid decisions, we may also observe that the learned counsel for the owner as also for the claimants have limited their submissions to claiming coverage under the policy in question, and such coverage is claimed irrespective of the fact that the accident had occurred at an earlier point of time on the same day the policy was issued. No submission has

been made by these counsel on the aspect of the policy being void on account of suppression of material fact, nor was any submission made on the scope or applicability of Clause (c) of Section 96 (2).

17. Under the circumstances, we are obliged to hold that the insurance policy in question, issued on 30th August, 1979, is void on account of suppression of material fact on the part of the owner, the same not having been disclosed in the proposal form, and the insurer is not liable to meet the award that may have been passed against the owner and the driver of the vehicle in question. We further hold that the award is not disturbed as regards the quantum of damages awarded to the claimants, and that only the owner and the driver of the vehicle in question are liable to meet the award.

18. Accordingly this appeal by the insurer is allowed. The award in question shall stand modified only to the extent that the insurer shall not be liable under the said award. Appeal allowed with no order as to costs. Decree accordingly.

19. Our judgment is based mainly on the questions of fact and no substantial question of law of general importance arises in this matter. We, therefore, reject the request of Mr. Surti to grant certificate of fitness under Article 134-A of the Constitution to appeal to the Supreme Court.