(2024) 07 GUJ CK 0050

In the Gujarat High Court

Case No : First Appeal No. 4401, 4402, 4403, 4404, 4405, 4406, 4407, 4408, 4409, 4410, 4411, 4412, 4413, 4414, 4415 of 2009

United India Ins Co Ltd Versus APPELLANT

Vs

Navinbhai Pilubhai Kunkna & Ors. RESPONDENT

Date of Decision : 23-07-2024

Acts Referred:
Motor Vehicles Act, 1988 — Section 147, 173

Citation : (2024) 07 GUJ CK 0050

Hon'ble Judges : Sandeep N. Bhatt, J

Bench : Single Bench

Advocate : Vibhuti Nanavati, Bhavin S Raiyani, Dhara M Shah,

Final Decision : Partly Allowed

Judgement

Sandeep N. Bhatt, J

1. The present appeals are filed by the appellant – Insurance Company under Section 173 of the Motor Vehicles Act, being aggrieved by and dissatisfied with the common judgment and award dated 31.1.2009 passed by the Motor Accident Claims Tribunal, (Main) at Valsad in Motor Accident Claim Petition No.1118 of 2002 and allied matters, by which, the learned Tribunal has partly allowed the claim petitions and awarded compensation as mentioned in the said judgment and award, to be paid to claimant/s, by holding opponents liable, jointly and severally.

2. The facts of the present appeal are as under :

2.1 The claim petitions were filed by the original claimants stating that the deceased were going on 29.4.1997 in tempo no.GJ-15-X -318 driven by opponent no.1 and when they reached Jogvel, Ta.Dharampur seam, the opponent no.1 drove the tempo in a rash and negligent manner and capsized the tempo, due to which the deceased sitting in the tempo suffered serious injuries and they died. Therefore, the claimants filed the claim petitions claiming compensation.

2.2 On service of notice to the opponents, the opponents nos.1 and 2 filed their written statement and the opponent no.3-insurance company also filed its written statement and specifically denied all the averments and allegations made in the claim petitions. Oral and documentary evidence was led before the learned Tribunal. After hearing the submissions made by the rival parties, the learned Tribunal has passed the impugned judgment and award and awarded the compensation to the claimants of the claim petitions.

2.3 Hence, the insurance company has filed the present appeals before this Court.

3. Learned advocate for the appellant – Insurance Company has submitted that the vehicle involved in the accident was a goods carrying commercial vehicle and the deceased were travelling in the goods vehicle as passengers and therefore, the owner of the vehicle has committed breach of the terms of the policy and therefore the insurance company is not liable to pay the compensation; that as per the insurance contract between the owner of the vehicle and insurance company is for goods vehicle and the accident has occurred when live persons were travelling in the said goods vehicle; that the deceased were travelling as unauthorized passengers in the goods vehicle; that the learned Tribunal has discussed in this direction, but at the end, has fastened the liability jointly and severally on the opponents: that the insurance company may be exonerated from the liability of paying the compensation; that the learned Tribunal has erred in passing the order of holding all the opponents jointly and severally liable to pay the compensation. He submitted that the order of `pay and recover' is not required to be passed and the interest of the insurance company is required to be taken care. He, therefore, prayed to allow these appeals by relying on the various judgments of the Hon'ble Apex Court on this point.

Reliance is placed on the following citations:

1. United India Insurance Co.Ltd. V/s Mahesh Kanubhai and others reported in 2016 ACJ 557.

2. National Insurance Company Limited V/s Rattani reported in 2009(2) SCC 75.

3. M/s National Insurance Co.Ltd. V/s Baljit Kaur and others, reported in AIR 2004 SC 1340.

4. United India Insurance Company Limited V/s Lilaben W/o Decd.Bhikhabhai Premjibhai Kathiriya reported in 2014(1) GCD 686.

4. Per Contra, learned advocate for the respondents-claimants has submitted that the claimants have lost their near and dear ones in the said accident for no fault of theirs and therefore, the learned Tribunal has granted the compensation as per the calculation made in the impugned judgment and award, which is not required to be modified in these appeals. She has relied on the following citations:

1. Tahirbhai Ismailbhai Ansari V/s Valjibhai Lakhabhai Rathod reported in 2023(0) AIJEL-HC 247629.

2. New India Assurance Co Ltd. V/s Urmilaben Jamnabhai Gamit reported in 2022(0) AIJEL-HC 243987.

3. New India Assurance Co Ltd. V/s Raningbhai Rajabhai reported in 2023(0) AIJEL-HC 247668.

5. Learned advocate appearing for the respondents-driver and owner of the vehicle in question has submitted that the vehicle was insured with the insurance company, the insurance policy was in existence at the time of the accident, the liability of the insurance company is unlimited and the learned Tribunal has rightly come to the conclusion, by considering the provisions of law, that all the opponents are jointly and severally liable to pay the compensation. He, therefore, submitted that order of `pay and recover' should not be passed in these appeals and the appeals are required to be dismissed.

6. I have considered the submissions made by the respective parties. I have perused the record and proceedings. I have gone through the impugned judgment and award passed by the Tribunal. I have also considered the pleadings of the parties before the Tribunal. The only contention raised in these appeals is that the insurance company should have been exonerated from paying the compensation to the claimants as there is breach of the terms of the insurance policy.

7. It is an undisputed fact that the deceased died in the accident that occurred; that the motor vehicle is involved in the accident; that the opponent no.1 was driving the vehicle and the opponent no.2 is the owner of the vehicle and it was insured with the opponent no.3-insurance company; that the policy was in existence at the time of the accident. With regard to the contention raised in these appeals, if the impugned judgment and award is perused, the learned Tribunal has discussed the point of liability in paragraph 40 of the impugned judgment, wherein it has discussed the evidence produced on record, the submissions made by learned advocate appearing for the insurance company and also observed that as the deceased were sitting in a goods vehicle and travelling, there is breach of terms of the insurance policy; the law laid down in the judgment in the case of National Insurance Company Ltd. V/s Baljit Kaur and Others reported in 2004(2) GLR page 1071 and mentioned that the insurance company shall first pay the compensation to the third party and thereafter recover the same from the owner of the vehicle; and also discussed that it is the duty of the Tribunal to see that the claimants do not suffer for the breach of the conditions committed by the owner relying on the judgment in the case of Nagamma V/s R.Chandrama Karnataka, ACJ.2009 page no.264, however, at the end, held all the opponents liable to pay the compensation.

8. From the discussion made in paragraph 40 of the impugned judgment with regard to the liability, the discussion goes to suggest that the owner only is liable

to pay the compensation and the insurance company is not liable, which is correct, just and proper as there is a clear-cut breach of the terms of the insurance policy, however, in the operative portion of the order, it is mentioned that all the opponents are jointly and severally liable to pay the compensation to the claimants.

9. Considering the facts of the case, the insurance policy, the depositions of the claimants, it is clear that the claimants were travelling in the vehicle in question, which is registered as a goods vehicle, as passengers, which was not permissible as per the insurance policy and therefore there is clear breach of terms of policy. The vehicle in question is insured with the insurance company-appellant herein, however, when there is breach of the terms of the policy, the insurance company cannot be held liable to pay the compensation but the owner is liable for the same. However, the manifest object of the provisions of the MV Act is to ensure that the party, who suffers injuries due to the use of the motor vehicle, and may be able to get the damages for the injuries sustained/death. If the goods vehicle is used for carrying the passengers, against the terms of insurance policy, as is in the case on hand, the claimants cannot suffer for the technicalities of whether the owner/insurance company should pay the amount. As the vehicle is insured with the insurance company and the policy was in existence at the time of the accident, the insurance company shall first pay the compensation and it is for the insurance company to recover from the owner, if it so wishes. The citations relied on by learned advocate for the appellant are not helpful in the facts of the present case as the facts of those cases and the facts of the case of the hand are different. In the cases cited by learned advocate for the claimants, where also there is no breach of policy, as the case is in the case on hand, the order of `pay and recover' is passed by this Court.

10. A reference to the following decisions would be fruitful at this stage:

In the case of Shamanna v. Oriental Insurance Co. Ltd., (2018) 9 SCC 650, it is held in paragraphs 12 to 14 as under:

“12. The above reference in Parvathneni case [National Insurance Co. Ltd. v. Parvathneni, (2009) 8 SCC 785 : (2009) 3 SCC (Civ) 568 : (2009) 3 SCC (Cri) 943] has been disposed of on 17- 9-2013 [National Insurance Co. Ltd. v. Parvathneni, (2018) 9 SCC 657] by the three-Judge Bench keeping the questions of law open to be decided in an appropriate case.

13. Since the reference to the larger Bench in Parvathneni case [National Insurance Co. Ltd. v. Parvathneni, (2009) 8 SCC 785 : (2009) 3 SCC (Civ) 568 : (2009) 3 SCC (Cri) 943] has been disposed of by keeping the questions of law open to be decided in an appropriate case, presently the decision in Swaran Singh case [National Insurance Co. Ltd. v. Swaran Singh, (2004) 3 SCC 297 : 2004 SCC (Cri) 733] followed in Laxmi Narain Dhut [National Insurance Co. Ltd. v. Laxmi Narain Dhut, (2007) 3 SCC 700 : (2007) 2 SCC (Cri) 142] and other cases hold the field. The award passed by the Tribunal directing the insurance

company to pay the compensation amount awarded to the claimants and thereafter, recover the same from the owner of the vehicle in question, is in accordance with the judgment passed by this Court in Swaran Singh [National Insurance Co. Ltd. v. Swaran Singh, (2004) 3 SCC 297 : 2004 SCC (Cri) 733] and Laxmi Narain Dhut [National Insurance Co. Ltd. v. Laxmi Narain Dhut , (2007) 3 SCC 700 : (2007) 2 SCC (Cri) 142] cases. While so, in our view, the High Court ought not to have interfered with the award passed by the Tribunal directing the first respondent to pay and recover from the owner of the vehicle. The impugned judgment [Shamanna v. Laxman, 2016 SCC OnLine Kar 6928] of the High Court exonerating the insurance company from its liability and directing the claimants to recover the compensation from the owner of the vehicle is set aside and the award passed by the Tribunal is restored.

14. So far as the recovery of the amount from the owner of the vehicle, the insurance company shall recover as held in the decision in Oriental Insurance Co. Ltd. v. Nanjappan [Oriental Insurance Co. Ltd. v. Nanjappan, (2004) 13 SCC 224 : 2005 SCC (Cri) 148] wherein this Court held that : (SCC p. 226, para 8)

"8. … For the purpose of recovering the same from the insured, the insurer shall not be required to file a suit. It may initiate a proceeding before the executing court concerned as if the dispute between the insurer and the owner was the subject -matter of determination before the Tribunal and the issue is decided against the owner and in favour of the insurer."

In the case of Manuara Khatun v. Rajesh Kr. Singh, (2017) 4 SCC 796, it is held in paragraphs 11 to 16 as under:

"11. In reply, the learned counsel for the respondents (insurance companies) supported the impugned order and contended that no case is made out to interfere in the impugned judgment. It was his submission that once it is held and rightly that the insurance company is not liable because the victims were travelling in the offending vehicle as "gratuitous passengers", there did not arise any occasion to pay the awarded sum to the claimants by the insurance company and nor the principle "pay and recover" could be applied against the insurance company in such circumstances thereby making them liable to pay the awarded sum to the claimants.

12. Having heard the learned counsel for the parties and on perusal of the record of the case, we find force in the submission of the learned counsel for the appellants (claimants).

13. The only question, which arises for consideration in these appeals, is whether the appellants are entitled for an order against the insurer of the offending vehicle i.e. (Respondent 3) to pay the awarded sum to the appellants and then to recover the said amount from the insured (owner of the offending vehicle Tata Sumo) Respondent 1 in the same proceedings.

14. The aforesaid question, in our opinion, remains no more res integra. As we

notice, it was the subject-matter of several decisions of this Court rendered by three-Judge Bench and two-Judge Bench in the past viz. National Insurance Co. Ltd. v. Baljit Kaur [National Insurance Co. Ltd. v. Baljit Kaur, (2004) 2 SCC 1 : 2004 SCC (Cri) 370] , National Insurance Co. Ltd. v. Challa Upendra Rao [National Insurance Co. Ltd. v. Challa Upendra Rao, (2004) 8 SCC 517 : 2005 SCC (Cri) 357] , National Insurance Co. Ltd. v. Kaushalaya Devi [National Insurance Co. Ltd. v. Kaushalaya Devi, (2008) 8 SCC 246 : (2008) 3 SCC (Cri) 467] , National Insurance Co. v. Roshan Lal [National Insurance Co. Ltd. v. Roshan Lal, (2017) 4 SCC 803] and National Insurance Co. Ltd. v. Parvathneni [National Insurance Co. Ltd. v. Parvathneni, (2009) 8 SCC 785 : (2009) 3 SCC (Civ) 568 : (2009) 3 SCC (Cri) 943] .

15. This question also fell for consideration recently in National Insurance Co. Ltd. v. Saju P. Paul [National Insurance Co. Ltd. v. Saju P. Paul, (2013) 2 SCC 41 : (2013) 1 SCC (Civ) 968 : (2013) 1 SCC (Cri) 812 : (2013) 1 SCC (L&S) 399] wherein this Court took note of entire previous case law on the subject mentioned above and examined the question in the context of Section 147 of the Act. While allowing the appeal filed by the insurance company by reversing the judgment [Saju P. Paul v. National Insurance Co., 2011 SCC OnLine Ker 3791 : 2012 ACJ 1852] of the High Court, it was held on facts that since the victim was travelling in offending vehicle as "gratuitous passenger" and hence, the insurance company cannot be held liable to suffer the liability arising out of accident on the strength of the insurance policy. However, this Court keeping in view the benevolent object of the Act and other relevant factors arising in the case, issued the directions against the insurance company to pay the awarded sum to the claimants and then to recover the said sum from the insured in the same proceedings by applying the principle of "pay and recover".

16. R.M. Lodha, J. (as his Lordship then was and later became CJI) speaking for the Bench held in paras 20 and 26 as under : (Saju P. Paul case [National Insurance Co. Ltd. v. Saju P. Paul, (2013) 2 SCC 41 : (2013) 1 SCC (Civ) 968 : (2013) 1 SCC (Cri) 812 : (2013) 1 SCC (L&S) 399] , SCC pp. 52 & 55)

"20. The next question that arises for consideration is whether in the peculiar facts of this case a direction could be issued to the Insurance Company to first satisfy the awarded amount in favour of the claimant and recover the same from the owner of the vehicle (Respondent 2 herein).

***

26. The pendency of consideration of the above questions by a larger Bench does not mean that the course that was followed in Baljit Kaur [National Insurance Co. Ltd. v. Baljit Kaur, (2004) 2 SCC 1 : 2004 SCC (Cri) 370] and Challa Upendra Rao [National Insurance Co. Ltd. v. Challa Upendra Rao, (2004) 8 SCC 517 : 2005 SCC (Cri) 357] should not be followed, more so in a peculiar fact situation of this case. In the present case, the accident occurred in 1993. At that time, the claimant was 28 years old. He is now about 48 years. The claimant was a driver

on heavy vehicle and due to the accident he has been rendered permanently disabled. He has not been able to get compensation so far due to the stay order passed by this Court. He cannot be compelled to struggle further for recovery of the amount. The Insurance Company has already deposited the entire awarded amount pursuant to the order of this Court passed on 1-8- 2011 [National Insurance Co. Ltd. v. Saju P. Paul [National Insurance Co. Ltd. v. Saju P. Paul, (2013) 2 SCC 41, 55 (footnote 14)]] and the said amount has been invested in a fixed deposit account. Having regard to these peculiar facts of the case in hand, we are satisfied that the claimant (Respondent 1) may be allowed to withdraw the amount deposited by the Insurance Company before this Court along with accrued interest. The Insurance Company (the appellant) thereafter may recover the amount so paid from the owner (Respondent 2 herein). The recovery of the amount by the Insurance Company from the owner shall be made by following the procedure as laid down by this Court in Challa Upendra Rao [National Insurance Co. Ltd. v. Challa Upendra Rao, (2004) 8 SCC 517 : 2005 SCC (Cri) 357] ."

11. In the judgment in the case of Shivaraj V/s Rajendra and another reported in 2018 ACJ 2755, the Hon'ble Apex Court has held in paragraph 10 as under:

"10. At the same time, however, in the facts of the present case the High Court ought to have directed the insurance company to pay the compensation amount to the claimant(appellant) with liberty to recover the same from the tractor owner, in view of the consistent view taken in that regard by this court in National Insurance Co.Ltd. V.Swaran Singh, 2004 ACJ 1(SC); Mangla Ram v.Oriental Insurance Co.ltd., 2018 ACJ 1300(SC); Rani v.National Insurance Co.ltd., 2018 ACJ 2430(SC) and Manuara Khatun v.Rajesh Kumar Singh, 2017 ACJ 1031 (SC). In other words, the High Court should have partly allowed the appeal preferred by the respondent No.2, Appellant may, therefore, succeed in getting relief of direction to respondent No.2 insurance company to pay the compensation amount to the appellant with liberty to recover the same from the tractor owner (respondent No.1)."

12. In view of the above discussion, these appeals are partly allowed. The common judgment and award dated 31.1.2009 passed by the Motor Accident Claims Tribunal, (Main) at Valsad in Motor Accident Claim Petition No.1118 of 2002 and allied matters is modified to the extent that the insurance company shall first pay the amount of compensation awarded and it is for the insurance company to recover from the insured in view of the case of Shri Nanjappan (supra), if it so wishes.

13. The insurance company is directed to deposit the amount of awarded amount along with proportionate costs and interest before the learned Tribunal within a period of four weeks from the date of receipt of this order. On such deposit, the Tribunal shall disbursed the amount to the claimants as per the operative portion of the impugned judgment and award, by account payee cheque/RTGS/NEFT, after proper verification and after following due procedure, within a period of six

weeks thereafter.

Rest of the award remains as it is. Modified decree be drawn accordingly.

Record and proceedings be sent back to the concerned Tribunal, forthwith.