

(2008) 03 GUJ CK 0023
In the Gujarat High Court
Case No : First Appeal No. 1159 of 1994

United India Ins. Comp. Ltd.

APPELLANT

Vs

Kamuben Dinubhai Patel and Others

RESPONDENT

Date of Decision : 12-03-2008

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 110B, 110C, 13
Criminal Procedure Code, 1973 (CrPC) — Section 195
Motor Vehicles Act, 1939 — Section 105, 110C(2A), 95, 96
Motor Vehicles Act, 1988 — Section 170

Citation : (2008) 03 GUJ CK 0023

Hon'ble Judges : Sharad D. Dave, J;A.L. Dave, J

Bench : Division Bench

Advocate : Ameer Yajnik, for the Appellant; Nilesh A. Pandya, for Respondents 1 - 4 and 6 and Sunil B. Parikh, for Respondent 5, for the Respondent

Final Decision : Dismissed

Judgement

A.L. Dave, J.—The appellant-Insurance Company challenges the judgment and award rendered by the Motor Accident Claims Tribunal (Main) at Vadodara, in Motor Accident Claims Petitions No. 356/1987 and 386/1987, on 19th January, 1994, awarding compensation to the original claimants in both the claim-petitions in the sum of Rs. 5,22,000/- and Rs. 1,50,000/- respectively. The present appeal is, however, restricted to challenge the award passed in M.A.C.Petition No. 356/1987 awarding compensation of Rs. 5,22,000/-.

2. The facts of the case, in brief, can be stated thus:

Deceased Prabodhbhai, son of the claimants, was travelling in Maruti-Car No. GUV-7475, along with driver Shamun Rashid, from Vadodara to Bharuch side on National Highway No. 8. According to the claimants, the Car was being driven at a moderate speed on the left side of the road. When it reached near the place of the incident, Truck No. ADT-124 driven by opponent No. 1 was coming from the opposite direction i.e. it was proceeding from Bharuch to Vadodara side, in a rash

and negligent manner. The driver of the truck abruptly took the truck on wrong side to overtake a vehicle going ahead of it, and in doing so, dashed against the Maruti-Car, resulting into the death of driver Shamun Rashid and deceased Prabodhbhai. The claimants are the parents of deceased Prabodhbhai, who was aged 28 years and was engaged in the business under the name of "Mihir Corporation". He was also serving with A.A.& Co. and B.V.& Sons, and was an Income Tax payer. The claimants claimed compensation of Rs. 25 Lacs.

3. The claimants had made the drivers, owners and insurers of both the vehicles as party-opponents in the claim-petitions and, as such, the present appellant was served with a summons as opponent No. 5 before the Tribunal. The appellant opposed the claim-petition by filing written-statement at Exh.34 denying all the averments made in the claim-petition and raised all the available defences on the merits of the case.

4. Evidence was led before the Tribunal to show that the accident occurred because of the negligence on the part of the truck-driver. The claimants examined independent eye witness, an employee of Telephone Department, who was working as a Lineman near the place of the accident, to show that the truck went on the wrong side of the road and hence, the accident occurred. There was evidence in the form of F.I.R. and Panchnama to show that after the impact, Maruti-car was pushed backwards by several feet. It is also a part of the evidence that after the impact on the right side of the road, the driver of the truck took his truck on the left side of the road.

5. Considering these pieces of evidence, the Tribunal came to the conclusion that the driver of the truck was rash and negligent in driving the truck. The Tribunal further observed that because there was head-on collision and that because the Car was brought to Baroda for maintenance service, the possibility of Car being driven for a test-drive and it not being in a roadworthy condition, cannot be ruled out, and therefore, came to the conclusion that the drivers of both the vehicles were equally responsible for the accident and fastened liability on both the sets of the opponents equally.

6. The appellant is the insurer of the Maruti-Car, who has come in appeal to challenge the award on the ground that the negligence of the driver of the Maruti-Car was not pleaded by the claimants and there is total absence of evidence to attribute any negligence to the driver of the Maruti-Car, and despite that, the Tribunal has fastened 50% liability on the driver of the Maruti-car for the occurrence of the accident.

7. We have heard the learned advocate for the appellant; so also, learned advocate Mr.Nilesh Pandya for the original claimants, and learned advocate Mr.Sunil Parikh for the insurer of the truck.

8. Before we proceed to consider the case of the rival sides, it would be appropriate to note that though the driver of the truck has been held responsible for the accident to the extent of 50% and liability to pay the compensation to

that extent is fastened on him, the liability of the insurer of the truck is held/ fixed to be limited to Rs. 1,50,000/- by the Tribunal. We may also record that the original claimants have not preferred any appeal against these findings of the Tribunal. The insurer of the truck has not preferred any appeal either.

9. The learned advocate for the appellant has taken us through the evidence led before the Tribunal on the aspects of negligence and quantum, and almost successfully concluded his arguments on these aspects. But, when a question was raised on the maintainability of the appeal, for want of permission by the Tribunal to defend the claim-petition on all counts available to the original tortfeasors as envisaged in Section 110-C(2-A) of the Motor Vehicles Act, 1939 [= Section 170 of the Motor Vehicles Act, 1988], he conceded that no such application was given and no such order was passed. However, the learned advocate for the appellant pursued his arguments by submitting that the Section does not envisage tendering of an application and passing of a reasoned order regarding satisfaction about existence of the grounds envisaged in the said section, by the Tribunal. In the instant case, the driver and owner of the Car did not contest, as the driver had expired and owner chose not to contest. It was also contended that the Tribunal permitted the appellant-Insurance Company to cross-examine the witnesses on all counts and no objection was raised by the claimants against such cross-examination on all counts. It was, therefore, contended that there is constructive satisfaction of the Tribunal about the existence of grounds envisaged u/s 110-C(2-A) of the old Motor Vehicles Act and, therefore, this appeal may be held as legally maintainable. In support of his submission, the learned Counsel relied on the decision of the Orissa High Court in the case of *New India Assurance Co.Ltd. v. Surjyamani Padhi and Ors.* 1980 A.C.J.253.

10. Opposing the appeal, the learned advocate for the original claimants submitted that in absence of any allegation of collusion, it cannot be inferred that the Tribunal was satisfied about the collusion and, therefore, permitted cross-examination on all counts. In support of the said submission, reliance was placed on the decisions in the cases of (i) *Narendra Kumar and Another Vs. Yarenissa and Others*, , and (ii) *United India Insurance Co. Ltd. Vs. Hetalbhair C. Bagadia and Others*,

11. We have considered the rival side submissions. We propose to deal with the question of maintainability of this appeal first.

12. Since the accident occurred prior to coming into force the new Motor Vehicles Act, the claim proceedings were governed by the Old Act of 1939 and, therefore, relevant provisions of the said Act may be quoted first:

Section 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 issued by the policy, then notwithstanding, e.g.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 proceedings 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) that the policy was cancelled by mutual consent or by virtue of any provision contained therein before the accident giving rise to the liability, and that either the certificate of insurance was surrendered to the insurer or that the person to whom the certificate was issued has made an affidavit stating that the certificate has been lost or destroyed, or that either before or not later than fourteen days after the happening of the accident the insurer has commenced proceedings for cancellation of the certificate after compliance with the provisions of Section 105; or

(b) for organised racing and speed testing, or

(i) a condition excluding the use of the vehicle-

(a) for hire or reward, where the vehicle is on the date of the contract of insurance a vehicle not covered by a permit to ply for hire or reward, or

(b) for organised racing and speed testing, or

(c) for a purpose not allowed by the permit under which the vehicle is used, where the vehicle is a transport vehicle, or

(d) without side-car being attached, where the vehicle is a motor-cycle; or

(ii) a condition excluding driving by a named person or persons or by any person who is not duly licensed, or by any person who has been disqualified for holding or obtaining any licence during the period of disqualification; or

(iii) a condition excluding liability for injury caused or contributed to by conditions of war, civil war, riot or civil commotion; or

(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.

(2-A) Where any such judgment as is referred to in Sub-section(1) is obtained from a Court in a reciprocating country and in the case of a foreign judgment is, by virtue of the provisions of Section 13 of the Code of Civil Procedure, 1908 (5 of 1908) conclusive as to any matter adjudicated upon by it, the insurer being an insurer registered under the Insurance Act, 1938 (IV of 1938), and whether or not he is registered under the corresponding law of the reciprocating country shall be liable to the person entitled to the benefit to the decree in the manner and to the extent specified in Sub-section (1), as if the judgment were given by a court in India:

Provided that no sum shall be payable by the insurer in respect of any such judgment unless, before or after the commencement of the proceedings in which the judgment is given, the insurer had notice through the Court concerned of the bringing of the proceedings and the insurer to whom notice is so given is entitled under the corresponding law of the reciprocating country, to be made a party to the proceeding and to defend the action on grounds similar to those specified in Sub-section(2).

(3) 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 issued thereby reference to any conditions other than those in Clause (b) of Sub-section (2) shall as respect such liabilities such as are required to be covered by a policy under Clause (b) of Sub-section (1) of Section 95, be of no effect:

Provided that any sum paid by the insurer in or towards the discharge of any liability of any person which is covered by the policy by virtue only of this sub-section shall be recoverable by the insurer from that person.

(4) If the amount which an insurer becomes liable under this section to pay in respect of a liability incurred by a person insured by a policy exceeds the amount for which the insurer would apart from the provisions of this section be liable under the policy in respect of that liability, the insurer shall be entitled to recover the excess from that person.

(5) in this section the expression "material fact" and "material particular" mean, respectively, a fact or particular of such a nature as to influence the judgment of a prudent insurer in determining whether he will take the risk and, if so, at what premium and on what conditions, and the expression "liability covered by the terms of the policy" means a liability which is covered by the policy or which would be also covered, but, for that fact that the insurer is entitled to avoid or cancel or has avoided or cancelled the policy.

(6) No insurer to whom the notice referred to in Sub-section (2) or Sub-section(2-A) has been given shall be entitled to avoid his liability to any person entitled to the benefits of any such judgment as is referred to in Sub-section(1)

or Sub-section(2-A) otherwise than in the manner provided for in Sub-section(2) or in the corresponding law of the reciprocating country, as the case may be.

Section 110-C : Procedure and powers of Claims Tribunals;- (1) In holding any inquiry u/s 110-B, the Claims Tribunal may, subject to any rules that may be made in this behalf, follow such summary procedure as it thinks fit.

(2) The Claims Tribunal shall have all the powers of a Civil Court for the purpose of taking evidence on oath and of enforcing the attendance of witnesses and of compelling the discovery and production of documents and material objects and for such other purposes as may be prescribed and the Claims Tribunal shall be deemed to be a Civil Court for all the purposes of Section 195 and Chapter XXXV of the Code of Criminal Procedure, 1908.

[(2-A) Where in the course of any inquiry, the Claims Tribunal is satisfied that-

(i) there is collusion between the person making the claim and the person against whom the claim is made, or

(ii) the person against whom the claim is made has failed to contest the claim, it may, for reasons to be recorded by it in writing, direct that the insurer, who may be liable in respect of such claim, shall be impleaded as a party to the proceeding and the insurer so impleaded shall thereupon have the right to contest the claim on all or any of the grounds that are available to the person against whom the claim has been made.]

(3) Subject to any rules that may be made in this behalf, the Claims Tribunal may, for the purpose of adjudicating upon any claim for compensation, choose one or more persons possessing special knowledge of any matter relevant to the inquiry to assist it in holding the inquiry.

13. There is no dispute on legal position that an appeal by the Insurance Company alone would not be competent, unless a permission was granted to the Insurance Company to contest the claim-petition before the Tribunal on all counts available to the original tortfeasors. Here, in the instant case, there is also no dispute on the fact that no such application was given and no such permission was sought from the Tribunal to contest the claim on all counts by the appellant-insurer. But, an attempt is made to convince this Court that such a permission to contest the claim-petition on all counts may be inferred and on that basis, a further inference may be drawn that it was only because the Tribunal was satisfied about existence of grounds as envisaged in Section 110-C(2-A) of the Old Motor Vehicles Act that the appellant-insurer was permitted to cross-examine the witnesses on all counts. We may record that there is no dispute and even we are satisfied that cross-examination of the witnesses was conducted by the learned advocate representing the appellant-insurer before the Tribunal on all counts, more particularly on quantum aspect, as there is no allegation of negligence on the part of the driver of the Car insured by the appellant.

14. The question is, whether inference, which is suggested to be drawn, is

permissible in law. This question has been squarely dealt with and answered to by this Court in the case of United India Insurance Co. Ltd. Vs. Hetalbhai C. Bagadia and Others, , where, on an identical set of situation, the Court took a view that such an inference is impermissible. The Court held that the Tribunal cannot be said to have made any implied reasoned order permitting the Insurance Company to avail of a larger defence on merits of the case in absence of an application u/s 170 of the Motor Vehicles Act, 1988 which is equivalent to 110-C(2-A) of the Old Motor Vehicles Act, 1939. That was case where the Insurance Company had even taken a plea in the written-statement about likely collusion. This view was taken on the ground that there was nothing on the record of the proceedings in that case to show that the Tribunal had applied its mind for reaching a satisfaction that the conditions mentioned in Section 170 of the M.V.Act, 1988 [= 110-C(2-A) of the M.V.Act, 1939, as applicable in the instant case] were present and that the Tribunal had made an order much less a reasoned order, which would enable the Insurance Company to avail of a larger defence on merits. The Court observed that merely because the advocate of the Insurance Company was allowed to cross-examine the witness of the claimants, it can never be inferred therefrom that it should be treated as an order granting permission to the Insurance Company to avail of a larger defence on merits. The situation factually is identical here, may be worse, for the reason that the Insurance Company had not taken a specific plea about the existence of the conditions envisaged under the said Section in its written statement.

15. In light of the foregoing discussion, the appeal is not legally maintainable and must fail. We do not propose to enter into the merits of the case on factual aspects for this very reason. The appeal stands dismissed. No costs.