
(2007) 09 BOM CK 0121
In the Bombay High Court
Case No : First Appeal No. 374 of 2003

United India Insurance Co. Ltd.

APPELLANT

Vs

Kamal Maruti Darekar and Others

RESPONDENT

Date of Decision : 21-09-2007

Acts Referred:

Motor Vehicles Act, 1988 — Section 146, 149, 149(2), 149(3), 149(4)

Citation : (2008) ACJ 1940 : (2007) 6 ALLMR 392 : (2007) 6 BomCR 752 :
(2007) 109 BOMLR 2064 : (2008) 1 MhLj 318

Hon'ble Judges : V.R. Kingaonkar, J

Bench : Single Bench

Advocate : A.B. Gatne, for the Appellant; A.K. Gugale and N.C. Garud for
respondent Nos. 1 to 4, for the Respondent

Judgement

V.R. Kingaonkar, J.—This appeal arises out of award rendered by Motor Accident Claims Tribunal, Ahmednagar, in M.A.C.P. No. 1025 of 1994.

2. There is no dispute about the fact that on 04.12.1993 a motor-cyclist by name Maruti Keshav Darekar was knocked down due to dash of jeep vehicle No. MH-20-9485, which came from opposite direction. The accident occurred on Supa-Pune Road. It was fatal accident. Maruti was admitted in Civil Hospital for treatment of accidental injuries. He died as a result of such injuries on the same day. He was a Supervisor working in P.W.D. at Pune. At the relevant time, he was returning from Shirdi on Bajaj Motor Cycle No. MH-12-H-4056 (Bajaj Kawasaki). There is no dispute about the fact that original claimants, who are his wife, minor sons and mother have lost dependency due to his death. The Tribunal determined compensation at Rs. 2,12,000/-. There is also no dispute about fairness of the compensation. The offending jeep vehicle was insured with the appellant and was owned by respondent No.5 Vithal. Respondent Nos.1 to 4 were claimants before the Tribunal.

3. The owner of offending jeep vehicle i.e. respondent No.5 did not file his written statement. He remained ex-parte in the proceedings held before the

Tribunal.

4. The appellant resisted the claim petition mainly on the ground that the jeep vehicle was being driven without valid licence. The appellant asserted that the owner of the jeep vehicle committed fundamental breach of the terms and conditions of the insurance policy and therefore no liability can be fastened on the insurer to pay the compensation. The appellant contended that respondent No.5-Vithal himself was driving the jeep vehicle without licence and therefore the insurer is not legally bound to satisfy the award. On these grounds, the appellant claimed immunity from the liability to pay the compensation amount to the original claimants/respondent Nos.1 to 4 herein.

5. The parties went to trial before the Tribunal on issues framed below Exh.14. They adduced oral and documentary evidence. The Tribunal held that the jeep vehicle was being driven by the owner-respondent No. 5 (Vithal) at the relevant time without driving licence. The Tribunal held that the insurer (appellant) is not legally liable to pay the compensation. Even so, the Tribunal rendered award holding that the owner (insured) and insurer both would be liable jointly and severally to satisfy the award though the appellant (insurer) can recover the amount paid to the claimants along with interest " 9% p.a. from the owner of the vehicle i.e. respondent No.5-Vithal. Feeling aggrieved, the insurer preferred this appeal.

6. Upon hearing learned advocates for the parties, it is explicit that the controversy centres around only following points.

(i) Whether there was fundamental breach of the conditions of the insurance policy, because the offending jeep vehicle No. MH-20-9485 was being driven by the owner himself without having driving licence?

(ii) Whether the Tribunal committed patent error while holding that the appellant and the jeep owner are jointly and severally liable to pay compensation amount to the claimants and that subsequently the appellant may recover the same from the owner of the vehicle? My findings on the above points are: (i) YES (ii) PARTLY YES, though appellant is not jointly liable to pay compensation, yet, initial liability to pay the compensation can be fastened as per Section 149 of the M.V. Act, with direction to recover such amount in the same proceedings from the owner of the jeep vehicle (insured). The reasons are discussed hereinafter.

7. Mr. Gatne, learned Advocate appearing for the appellant, strenuously argued that the appellant is exonerated from liability to pay compensation under the terms of the contract when the owner admittedly committed fundamental breach of the condition enumerated in the policy. He would point out that the owner was driving the jeep vehicle at the time of the accident is a proved fact. He would further point out that the owner of the jeep vehicle did not hold any driving licence is also duly proved from evidence tendered by DW-1 (Rameshwar) and DW-2 (Murlidhar). They corroborated record of Regional Transport Office. There is clear evidence on record to support the Certificate (Exh.43) issued by the Dy.

Regional Transport Officer regarding absence of driving licence with the jeep vehicle owner. That apart, the recitals of the First Information Report (Exh.57) would clearly disclose admission of respondent No.5-Vithal regarding absence of any driving licence with him. He informed that he was driving the jeep vehicle at the relevant time. He categorically stated in the report that there was licensed driver in his jeep vehicle, but he himself was driving the jeep vehicle at the relevant time. He informed, unequivocally, that he did not possess driving licence. Needless to say, the offending jeep vehicle's owner committed fundamental breach of terms of the Insurance Policy Certificate (Exh.56). A bare perusal of insurance certificate (Exh.56) reveals that the insurance contract was subject to use of the jeep vehicle by a person having effective driving licence and one who was not disqualified from holding or obtaining such a licence. There is no escape from conclusion that respondent No.5-Vithal is guilty of committing fundamental breach of terms of the insurance contract.

8. Mr. Gatane would submit that the Tribunal committed error in directing the appellant to pay compensation to the claimants and then to recover the same from the owner. He argued that distinction ought to have been made in two types of cases. First, in the cases wherein there is absolutely no driving licence with the driver and negligence of the owner is duly established. Secondly, in the cases where there is a driving licence about which the owner satisfied himself but it was found to be fake after certain investigation or that the licence was defective. Mr. Gatane would submit that the direction to satisfy the award in the class of cases falling in second category may be issued. But, such direction cannot be issued in respect of the cases which fall within the former category. He contended that the Proviso to Sub-section (4) of Section 149 of the Motor Vehicles Act is not properly interpreted by the Tribunal. He seeks to rely on National Insurance Corporation Ltd. Vs. Mrs. Kanti Devi and Others, .

9. In National Insurance Corp. Ltd. v. Kanti Devi and Ors. (Supra), the Apex Court held that defence can be raised by insurer about licence being fake. It is further held that it will be for the insurer to prove that insured did not take adequate care and caution about genuineness of the licence held by the driver. The Apex Court came to the conclusion that the decisions rendered by the High Court and M.A.C.T. required consideration, because both the decisions were rendered prior to "Swaran Singh's case" AIR 2004 SCW 663. The Apex Court, therefore, remitted the matter to M.A.C.T. for fresh decision. This authority is hardly of any help in the context of present case. The Apex Court, no doubt, held that the insurer could raise defence regarding breach of the policy condition due to fake nature of the driving licence held by driver of the offending vehicle. It needs to be seen in such cases whether the vehicle owner had knowledge about fake nature of driving licence. That is matter of evidence.

10. Mr. Gatane would rely on United India Insurance Co. Ltd. Vs. Gian Chand and others, . He would submit that the Tribunal committed patent error of law in passing the impugned order against the appellant, though it is proved that the

jeep vehicle was being driven by the owner himself and that too without having any driving licence. He contended that when owner himself committed fundamental breach of the policy condition, then insurer stands absolved from liability to pay the compensation. Mr. Gatne would submit, therefore, that the present case stands on different footing than those cases wherein it can be said that owner of the vehicle had taken due caution although driving licence subsequently was found to be defective or fake. He invited my attention to paragraph 8 of the judgment in the case of Gian Chand and Ors. (Supra).

11. The Apex Court in Gian Chand's case held that when the insured had handed over the vehicle for being driven by un-licensed driver, the insurance company would get exonerated from liability to meet the claims from third party who might have suffered on account of vehicular accident caused by such unlicensed driver. The Apex Court held that the claim petition was liable to be rejected against insurance company due to commission of fundamental breach of terms of the insurance policy by insured (owner). Mr. Gatane also placed reliance on New India Assurance Co. Shimla v. Kamla and Ors. AIR 2001 SCW 1340. The Apex Court observed:

25. The position can be summed up thus: The insurer and insured are bound by the conditions enumerated in the policy and the insurer is not liable to the insured if there is violation of any policy condition. But the insurer who is made statutorily liable to pay compensation to third parties on account of the certificate of insurance issued shall be entitled to recover from the insured the amount paid to the third parties, if there was any breach of policy conditions on account of the vehicle being driven without a valid licence. Learned Counsel for the insured contended that it is enough if he establishes that he made all due enquiries and believed bona fide that the driver employed by him had a valid driving licence, in which case there was no breach of the policy condition. As we have not decided on that contention it is open to the insured to raise it before the Claims Tribunal.

12. At this juncture, I may refer to Clause (2)(a)(ii) of Section 149 of the Motor Vehicles Act, 1988. It reads thus:

149. Duty of insurers to satisfy judgments and awards against persons insured in respect of third party risks. - (1) x x x x x x x x x

(2) No sum shall be payable by an insurer under Sub-section (i) x x x x x x x x namely:

(a) that there has been a breach of a specified condition of the policy, being one of the following conditions, namely:

(i) x x x x x

(a) x x x x x

(b) x x x x x

(c) x x x x x

(d) x x x x x

(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 driving licence during the period disqualification; or x x x x x a of

(iii) x x x x x

(b) x x x x x

13. The relevant provisions contained in Chapter XI of the Motor Vehicles Act, 1988, cannot be read in isolation. The third party risk is required to be insured as per Section 146. There is statutory requirement to insure a vehicle against third party risk. The conditions of policy are that of contract between the insurer and insured. The provisions of the Motor Vehicles Act have purpose to safeguard interest of third party. It is a beneficial legislation. The third parties cannot be left without protective umbrella only because the insured had agreed to abide himself by certain conditions which he did not follow in letters and spirit. The third parties have certain rights as enumerated in Section 150 of the Motor Vehicles Act. Therefore, harmonious construction of all these provisions is required to be made.

14. In National Insurance Co. Ltd. v. Swaran Singh and Ors. AIR 2004 SCW 663, the Apex Court considered the relevant provisions of Sub-sections (2) and (3) of Section 149 of the Motor Vehicles Act, 1988 along with other provisions. The Apex Court took survey of catena of judicial decisions. The Apex Court held that where the driver of the vehicle admittedly did not hold any licence and the same was allowed consciously to be driven by the owner of the vehicle by such person, the insurer is entitled to succeed in its defence and avoid liability. The matter, however, may be different where a disputed question of fact arises as to whether the driver had a valid licence or where the owner of the vehicle committed a breach of the terms of the contract of insurance as also the provisions of the Act by consciously allowing any person to drive a vehicle who did not have a valid driving licence. In a given case, the driver of the vehicle may not have any hand at all, e.g. a case where an accident takes place owing to mechanical fault or vis-major. The Apex Court held:

The right to avoid liability in terms of Sub-section (2) of Section 149 is restricted as has been discussed hereinbefore. It is one thing to say that the insurance companies are entitled to raise a defence but it is another thing to say that despite the fact that its defence has been accepted having regard to the facts and circumstances of the case, the Tribunal has power to direct them to satisfy the decree at the first instance and then direct recovery of the same from the owner. These two matters stand apart and require contextual reading.

15. The Apex Court clearly distinguished between two concepts, namely, defence to avoid legal responsibility to pay compensation due to breach of the terms of

the insurance policy and exoneration from the liability to initially satisfy the decree at first instance and later-on to recover the same from the insurer. It is held that the insurer is statutorily liable to satisfy the decree at first instance. The Apex Court observed :

The liability of insurer is statutory one. The liability of insurer to satisfy the decree passed in favour of third party is also statutory. The insurance company cannot shake off its liability to pay compensation only by saying that at the relevant point of time the vehicle was driven by a person having no licence.

16. From the above observations, it is amply clear that the insurer may legally establish defence to avoid liability and cannot be held jointly liable to pay compensation amount to the claimants, if such defence is duly proved within the meaning of Section 149(2), but even in such a case the insurer is statutorily liable to satisfy the award in the first instance qua the claimants, who are third parties. In view of the fact that special protection is made available to third parties under statutory provisions of the Motor Vehicles Act, third parties are not concerned with terms of the contract between insurer and insured. They cannot be, therefore, denied fruits of the award rendered by the Tribunal and cannot be compelled to seek recovery only from the owner of the vehicle, due to absence of legal liability of the insurer or on account of faults committed by the insured.

17. Considering the foregoing reasons, it will have to be said that the Tribunal committed patent error while holding that the appellant is jointly and severally liable to pay compensation to the original claimants. The final order rendered by the Tribunal in this context is erroneous. However, the appellant is liable to satisfy the award in the first instance and then recover the same from the insured (owner), in the same proceedings as per the settled procedure. The impugned judgment, therefore, needs modification only to the extent mentioned above.

18. In the result, the appeal is partly allowed. The direction given by the Tribunal that "The opponent Nos. 1 & 2 shall jointly and severally pay the amount of compensation" is set aside. Instead, it be substituted by the sentence "The opponent No. 1 (i.e. present respondent No.5 - Vithal) is liable to pay compensation of Rs. 2,12,000/- (inclusive of No Fault Liability amount) to the applicants with interest " 9% p.a." The appellant shall however, satisfy the award in the first instance and may recover the compensation amount from the owner in the same proceedings as per the procedure laid down under the Law. The impugned award be accordingly modified. No costs.