**(2010) 09 GUJ CK 0122**

**In the Gujarat High Court**

**Case No :** First Appeal No. 1214 of 1993

United India Insurance Co. Ltd. — APPELLANT

Vs

Merunben Babubhai Dosani — RESPONDENT

**Date of Decision :** 27-09-2010

**Acts Referred:**

Constitution of India, 1950 — Article 142
Motor Vehicles Act, 1939 — Section 95
Motor Vehicles Act, 1988 — Section 147, 166, 173

**Citation :** (2010) 09 GUJ CK 0122

**Hon'ble Judges :** S.R. Brahmbhatt, J

**Bench :** Single Bench

**Advocate :** Vibhuti Nanavati, for the Appellant; Yogesh S. Lakhani, for Defendants 1, 1.2.1, 1.2.2, 1.2.3 and 1.2.4, for the Respondent

## Judgement

S.R. Brahmbhatt, J.—The appellant, original opponent No. 2 Insurance Company in Motor Accident Claim Petition No. 27 of 1991 has moved this Court u/s 173 of Motor Vehicles Act 1988, challenging the judgment and award dated 31/12/1993 passed by Motor Accident Claim Tribunal, Amreli. The respondents herein above were awarded compensation of Rs. 1,20,000/ - with running interest at 12% per annum from the date of accident till its realisation, together with proportionate cost, on the grounds mentioned therein.

2. Facts leading to filing of this appeal deserves to be set out as under.

3. The claimants were constrained to file the Motor Accident Claim Petition for recovering an amount of Rs. 3.00 lakhs u/s 166 of M.V. Act, as on 8/12/1990 the deceased Babubhai Hasambhai Dosani, whose heirs have filed the claim petition, had died on account of accident involving tempo rickshaw No. GRV-6533 and said tempo rickshaw was driven by opponent No. 1 being the driver and owner of the vehicle. The claim was brought against opponent No. 1 as well as against the insurer of the vehicle. The Tribunal, after framing relevant issues and answering them, concluded that the claimants were entitled to recover Rs. 1,25,000/ - from

the opponents jointly and severally and made the award accordingly on 31/12/1992. The said award is impugned in this appeal as stated herein above, on the ground that the opponent No. 2, i.e. appellant herein above, insurer of the vehicle was not liable to indemnify as there was clear breach of terms and conditions of the contract between opponent No. 1 and insurer of the vehicle which would render them not liable for indemnifying the amount in question. The Tribunal has erred in fastening the liability for indemnifying upon the opponent Nos. 1 and 2 jointly and severally. At this stage it is required to be noted that the appellant has joined original opponent No. 1- owner cum driver of the vehicle in question/ respondent No. 5 herein in this appeal, who has remained through out absent in the claim proceedings before the Claims Tribunal as well as the appeal proceedings.

4. Learned advocate for the appellant has submitted that the date of accident is 8/12/1990 and the date of award is 31/12/1992. At the relevant time the law applicable was that he goods carriage vehicle was not to carry any passenger and, if the passenger is carrying, then the insurer was not liable to indemnify the damage or owner of the insured vehicle. The amendment in the relevant Section 147 of the Act was brought about only on 14/11/1994 and prior to 14/11/1994 the law applicable was absolutely clear on the point. The Apex Court had an occasion to deal with this kind of claim in the matter of Smt. Mallawwa Etc. Vs. The Oriental Insurance Co. Ltd. and Others, wherein Apex Court''s observations were absolutely clear with regard to liability of the insurer in such a situation. This Court''s attention was invited to paragraph No. 13 of the judgment, which reads thus:

13. The 1939 Act is now replaced by the 1988 Act. Section 147 which corresponds to old Section 95 has been substantially altered by the Legislature. Therefore, the above interpretation of Section 95 of the 1939 Act will govern the cases which have arisen under the 1939 Act. According to our interpretation of Section 95(1)(b)(i) and the proviso, the appeals filed by the Insurance Company are allowed....

5. Learned advocate appearing for the appellant thereafter invited this Court''s attention to the judgment in case of Oriental Insurance Co. Ltd. v. Tulsiben Panalal Joshi reported in 2001 (1) G.L.H. 237 , as well as the judgment of this Court in case of Oriental Insurance Co. Ltd. Vs. Jagdishchandra Kanchanlal Parikh and Others, and submitted that Gujarat High Court has followed the principle in case of Smt. Mallawwa (supra) in exonerating the insurance company of its liability which was erroneously fastened upon it by the concerned Tribunal.

6. Learned advocate appearing for the appellant further submitted that, this Court while admitting the appeal has passed the interim order in Civil Application No. 2302 of 1993 in First Appeal No. 1214 of 1993, where under an arrangement is made for disbursement of Rs. 20,000/ - to the original claimant No. 1 Smt. Merunben Babubhai Dosani and Rs. 5,000/ - to be paid to Smt. Nurbanben Hasambhai Dosani, and the balance amount was ordered to be invested in such a

 

way that interest accrues thereon quarterly, and the same shall be paid to the respective claimants. It was further ordered that the investment of the amount has to be on usual terms and conditions, and that the bank shall not permit to encumber on the fixed deposit etc. Accordingly, the claimants in fact had been receiving interest on the balance amount of deposit.

7. Shri Nanavati, learned advocate appearing for the appellant further submits that the appellant may not insist for recovering the amount which is already disbursed in favour of the claimants as per order dated 21/10/1994, nor would they claim recovering of the amount of interest already disbursed to the claimants as ordered by this Court in the order dated 21/10/1994 in Civil Application No. 2302 of 1993, but balance principal amount be atleast ordered to be refunded to the appellant. When insurance company has established that it is not liable to pay the compensation in question, the liability ought not to have been fastened upon it, and even the question with regard to directions given by the Court for making insurance company to pay first, and enabling them to later on recover it from vehicle owner is, in fact subject of consideration by Larger Bench of the Apex Court in case of National Insurance Co. Ltd. v. Parvathneni and Anr. reported in 2009 (3) G.L.H. 377.

8. Learned advocate appearing for the respondents claimants herein above could not canvass any submission contrary to what has been canvassed on behalf of the appellant, as it is the established position of law as on date. Therefore, learned advocate for the opponent claimants made only one submission that the amount be permitted to be withdrawn by the claimants and the insurance company may be at liberty to recover the same from the original opponent No. 1. Though, advocate for the claimants could not canvass this submission with support of any other decision of the Apex Court, except the decision of the Court in case of Sardari and Ors. v. Sushil Kumar and Ors. reported in (2008) 17 SCC 208.

9. This Court heard learned advocate for the parties and perused the record. This Court need not elaborately go into other aspects of the matter. Suffice it to say that when there was no dispute with regard to status of the deceased in the vehicle accident, and when the fact is not disputed that the vehicle in question was a goods transport vehicle and the incident of accident occurred prior to the amendment in Section 147 of the M.V. Act, the insurance company, i.e. present appellant could not have been fastened with liability to indemnify the insured and or indemnify the amount in question. The decisions cited at the Bar on behalf of the appellant clinch the issue and therefore, it needs no elaborate discussion at this stage. Suffice it to say that the award of the Tribunal, so far as it holds the appellant responsible and liable to indemnify the amount, is required to be quashed and set aside and is accordingly quashed and set aside. The Court hastens to add here that so far as the award against original opponent No. 1, i.e. present respondent No. 5 is concerned, same is not disturbed. It is only the insurance company which is exonerated of its liability to indemnify the awarded

amount. The decisions cited at Bar on behalf of respondents claimants in case of (2008) 17 SCC 208 in case of Sardari and Ors. (supra) would be of no avail in view of the fact that, this Court would not be in a position to make any order that insurance company may recover the amount from the original owner in view of the decision in case of 2009 (3) G.L.H. 377, National Insurance Co. Ltd. v. Parvathneni and Anr. (supra), in view of further fact that the propriety of issuing such a direction even under Article 142 of the Constitution of India to pay the compensation amount and later on recover it from the owner of the vehicle was questioned by the Bench of Apex Court, and the matter was referred to Larger Bench. In view of this, this Court would not be in a position to accept the submission of learned advocate for the claimants. However, it is clarified that the amount as already disbursed to the claimants shall not be recovered, as well as the amount of interest which has been periodically disbursed in favour of the claimants shall also not be recovered from the claimants. The appeal according stand disposed of. The award in question is modified. Now the owner of the vehicle respondent No. 5 herein Rajakbhai Dedubhai will be solely responsible for meeting the liability arisen out of the award and, therefore, the present appellant insurance company is exonerated. Order accordingly.

10. At this stage Shri Nanavati, learned advocate appearing for the insurance company submits that let there be a direction for refund of rest of the amount. It is needless to pass such direction, as it is understood that the Court has said that the appellant insurance company is exonerated of its liability which is wrongly fastened upon it, and when there is elaborate discussions with regard to not acceding to the request of the learned advocate for the claimants to disburse the amount first by the insurance company and recover it from respondent No. 5 Rajakbhai Dedubai; the amount will have to be refunded to the insurance company lying in the fixed deposit. Order accordingly.