
(2008) 08 BOM CK 0115
In the Bombay High Court
Case No : First Appeal No. 1618 of 2007

United India Insurance Co. Ltd.	Vs	APPELLANT
Sayaji Shinde and Others		RESPONDENT

Date of Decision : 04-08-2008

Acts Referred:

Motor Vehicles Act, 1988 — Section 147, 46, 95

Citation : (2008) 5 ALLMR 731 : (2008) 5 BomCR 35

Hon'ble Judges : P.R. Borkar, J

Bench : Single Bench

Advocate : A.B. Gatne, for the Appellant; P.S. Agrawal, for the Respondent

Judgement

P.R. Borkar, J.—Shri A.B. Gatne, Advocate for the appellant and Shri P.S. Agrawal, Advocate for respondent Nos. 1 to 6 are present. With the consent of the parties this appeal is heard finally at the stage of admission.

2. This is an appeal preferred by the insurance company, which is original opponent No. 2 being aggrieved by the judgment and award passed by the Member, Motor Accident Claims Tribunal, Hingoli in M.A.C.P. No. 176 of 2001 decided on 10.10.2005. Respondent Nos. 1 to 6 are the original claimants. They are legal heirs of deceased Gajanan s/o. Sayaji Shinde, who was son of respondent No. 1 and 2, husband of respondent No. 3 and father of respondent Nos. 4 to 6. Respondent No. 7 is the insured and owner of truck No. MP-09-KA-9549.

3. It is original case of the claimants that on 22.01.2001 the deceased Gajanan was travelling in Truck No. MP-09-KA-6549 and went to Chor Pangra. He was on duty as a cleaner. One Shaikh Abdul was the driver of the said truck. When the truck was returning back, it was being driven rashly & negligently and in excessive speed. When the truck came near Ganeshpur, the driver lost his control and suddenly he applied breaks. Due to severe jerk and fast speed of the truck, the deceased was thrown on road and had sustained severe injuries and

fractures on various parts of the body and become unconscious. He was taken to the hospital at Risod, but died on the next day. In the claim petition it is also mentioned that deceased Gajanan had gone to Chor Pangra for taking Jawar and Wheat. Thus the original case made out in the claim petition is that Gajanan was on duty as a cleaner and as such an employee of owner of the truck respondent No. 7-Pankajkumar Gandhi.

4. It is argued on behalf of the present appellant that in-fact, Gajanan was one of the members of a marriage party which was illegally being transported in the truck. Gajanan was sitting on "Falka" (rear side of wooden gate of the truck). As he was hit against a branch of a tree, he fell down from the truck and sustained injuries. In the truck, passengers were being carried illegally. There was breach of terms and conditions policy and as such the appellant is not liable. The appellant does not dispute the award of compensation of Rs. 2 lakhs to respondent Nos. 1 to 6. It is stated that the owner of the truck is liable and the appellant insurance company is not liable to reimburse the owner of said compensation due to breach of terms and conditions of the policy.

5. It is also argued before this Court that the Trial Court has not considered this aspect while deciding the matter inspite of the fact that there was evidence led by the appellant. The written statement filed by the appellant is at Exh.12 and it is specifically stated that deceased Gajanan was not on duty as a cleaner. He was not carrying any goods like Wheat and Jawar. When the written statement was filed, necessary particulars of the policy were not given. Therefore, it is also stated that the policy was not obtained, but now it is admitted position that the policy was obtained. It is further stated in para 19 that there was breach of policy terms as passengers were carried in the goods truck.

6. Girjabai (respondent No. 3) is examined at Exh.27. She stated that the incident took place at about 7 1/2 years ago. On that day along with her husband, she and respondent No. 1 had gone to Chor Pangra to see her ailing maternal uncle. They purchased one quintal Wheat and one quintal Jawar from her uncle and kept it in the truck which was to come to Chor Pangra. Near Ganeshpur, when they were travelling with the goods, the truck was in high speed and due to negligence of the driver, the deceased fell down from the truck and sustained injury on the head.

7. So, the case that the deceased was employee of the truck owner and was on duty as a cleaner is not at all stated by the witness of the claimants. In para 3, respondent No. 3-Girjabai stated that the deceased was doing work as a "Hamal" (coolie), but in the same breath she stated that elder brother of the deceased owned an Adat Shop and the deceased was working as a "Hamal" with him and was getting Rs. 150/- to Rs. 175/- per day. It is contrary to what is stated in the claim petition. In cross-examination the witness admitted that she had given instructions to her advocate and accordingly the claim petition was filed. She also said that the claim petition is filed on the basis of police papers. She admitted that she had not stated in the claim petition that her husband was

working as a "Hamal" with his brother.

8. At Exh.30 Shivaji Shinde - brother of the deceased is examined. He was not eye-witness to the incident, but he said that the deceased was working as a "Hamal" in his shop. It falsifies the case made out in the claim petition that the deceased was working as a cleaner on the truck.

9. On behalf of the appellant, Advocate Shri Mahendra Gaikwad is examined as a witness at Exh.32. He was appointed as an Investigator in the matter. He collected copies of F.I.R., spot panchanama, statements of the witnesses and produced them with his report. His investigation showed that the deceased and his wife with other persons were travelling in the said truck, free of costs, along with bride and bridegroom, who were sitting in the cabin. The deceased was sitting on wooden "Falka". He fell down and died on the spot. The witness proved his report at Exh.33.

10. In this case Arun Jawanjal, Branch Manager of the appellant-insurance company is examined at Exh.34. He produced copy of insurance note at Exh.35. He also proved the letter appointing Advocate Shri Mahendra Gaikwad as an Investigator.

11. In this case the petitioners have produced certified copies of the F.I.R., spot panchanama and inquest panchanama. Since they are certified copies, they can be read in evidence without any additional proof. Those are public documents. Along with Exh.23, certified copies of F.I.R., spot panchanama, inquest panchanama, post mortem notes and statements of witnesses recorded by the police are produced by the appellant. The certified copy of the F.I.R. clearly shows that deceased Gajanan was a member of the marriage party which was being transported in the goods truck No. MP-01-KA-6549. It is mentioned in the complaint lodged by Head Constable Khandalkar that on investigation he came to know that deceased Gajanan had gone to Chor Pangra for attending a marriage and he was returning after marriage in the truck along with other persons. The bride, bridegroom and ladies were sitting in cabin and other were sitting in the back side. The deceased fell down from the truck.

12. In my considered opinion, the Trial Court could not have ignored the change in the case made out by the appellant. It is no more disputed that the truck in question was a goods carriage vehicle and not a passenger carrier vehicle and as such question arises whether risk of death of passenger is covered. Absolutely, there is no evidence to show that the deceased was travelling in the truck as an owner of goods. The original case made out in the petition that deceased was travelling as a cleaner has been given complete go-by by petitioner Girjabai. She has made out a new case. In the circumstances the defence cannot be lightly brushed aside. Since Motor Accident Claims Tribunal is a tribunal, strict rules of evidence are not applicable and the Tribunal can very well consider what was the case made out before the Police after the incident. This Court can take into consideration the certified copies of various documents on record.

13. In support of their argument, the learned advocates for the appellant and the respondents cited few cases. The case of *Oriental Insurance Co. Ltd. v. Premlata Shukla and Ors.* AIR 2007 SCW 3591 is cited for the proposition that where party brings on record certain documents, such party cannot be permitted to contend that only part of the contents of the documents should be read which are convenient to it and rest part should not be read in evidence. Once document is admitted in evidence, it can be read as a whole. In this case, the petitioner has filed certified copies of the F.I.R. on record and now it does not lie in the mouth of respondent Nos. 1 to 6 that the same should not be considered merely because its contents are against the case made out by them. The petitioner wants this Court to rely on certified copies produced by respondent Nos. 1 to 6 to hold that deceased Gajanan, who was travelling in the truck in question fell down from the truck and died as a result of injuries sustained. They also want this Court to rely on the copy of the policy on record to show that respondent No. 7 was the owner and the appellant was the insurer of the truck in question.

14. In the case of *National Insurance Co. Ltd. Vs. Prakash Sakhambar Dudhankar and Others*, death of passenger travelling in goods vehicle had occurred and it was held that the insurance company cannot be made liable to pay compensation if the passenger is travelling in the goods vehicle. It was not relevant as to whether the passenger was travelling as fare paying passenger or as a gratuitous passenger. The learned advocate for respondent Nos. 1 to 6 wanted this Court to rely on para 6 in which direction was given to the insurance company to satisfy the award and then recover the same from owner of the vehicle. In that case the direction was also given for the purpose of said recovery that it would not be necessary for the insurer to file separate suit, but it may initiate proceeding before the executing court as if dispute between insurer and owner was subject matter for determination before the Tribunal.

15. Reliance was placed on the case of *New India Assurance Co. Ltd. v. Asha Rani and Ors.* AIR 2002 SCW 5259. In that case, in para 9 the following observations are made:

9...If the Motor Vehicles Amended Act of 1994 is examined, particularly Section 46 of Act 6 of 1991 by which expression "injury to any person" in the original Act stood substituted by the expression "injury to any person including owner of the goods or his authorised representative carried in the vehicle" the conclusion is irresistible that prior to the aforesaid Amendment Act of 1994, even if widest interpretation is given to the expression "to any person" it will not cover either the owner of the goods or his authorised representative being carried in the vehicle. The objects and reasons of Clause 46 also states that it seeks to amend Section 147 to include owner of the goods or his authorised representative carried in the vehicle for the purposes of liability under the Insurance Policy. It is no doubt true that sometimes the legislature amends the law by way of amplification of an inherent position which is there in the statute, but a plain meaning being given to the words used in the statute, as it stood prior to its

amendment of 1994, and as it stands subsequent to its amendment in 1994 and bearing in mind the objects and reasons engrafted in the amended provisions referred to earlier, it is difficult for us to construe that the expression "including owner of the goods or his authorised representative carried in the vehicle which was added to the pre-existed expression "injury to any person" is either clarificatory or amplification of the pre-existing statute. On the other hand it clearly demonstrates that the legislature wanted to bring within the sweep of Section 147 and making it compulsory for the insurer to insure even in case of a goods vehicle, the owner of the goods or his authorised representative being carried in a goods vehicle when that vehicle met with an accident and the owner of the goods or his representative either dies or suffers bodily injury. The judgment of this Court in Satpal's case, therefore must be held to have not been correctly decided and the impugned judgment of the Tribunal as well as that of the High Court accordingly are set aside and these appeals are allowed.

16. In this case accident had occurred on 22.01.2001. Even in the case of National Insurance Co. Ltd. Vs. Bommithi Subbhayamma and Others, , it is held that where gratuitous passenger is travelling in goods vehicle, insurance company is not liable.

17. The learned advocate for the respondent stated that in view of the observations of para 11 in the case of National Insurance Co. Ltd. Vs. Prakash Sakharam Dudhankar and Others, , this Court should direct the insurance company to pay the amount and recover it from the owner. The learned advocate for the appellant relied upon case of Oriental Insurance Co. Ltd. v. Rashanna Laxmanrao Biradar 2007(3) Bom.C.R.377, in which after referring to various authorities it is observed that directions given by the Supreme Court in AIR 2007 SCW 3734 and National Insurance Co. Ltd. Vs. Baljit Kaur and Others, cannot be construed as ratio laid down in that behalf. The same powers, which are available to the Apex Court under Article 136 and under Article 142 of the Constitution, are not available to the Tribunal or High Court. The Apex Court did not, however, lay down that in all such cases, the insurer shall first be liable to pay and then recover it from the insured.

18. Considering the facts and circumstances of the case I am inclined to allow the appeal and also inclined to give direction similar to one given in the case of National Insurance Co. Ltd. v. Prakash Sakharam Dudhankar (Supra), so far amounts already received by the respondent Nos. 1 to 6. However, I agree with observations made by this Court in para 19 & 20 of United India Insurance Co. Ltd. Vs. Anubai Gopichand Thakare and Others, . The law is correctly enunciated therein.

19. In this case the insurance company has produced insurance policy at Exh.35 and limitations are typed on the insurance certificate. The certificate makes it clear that "(2) The policy does not cover use whilst drawing a trailer except the towing (other than reward) of any one disabled mechanically propelled vehicles. (3) Use for carrying passengers in the vehicle except employees (other than

driver) not exceeding six in number coming under the purview of the Workmen's Compensation Act, 1923. Use only for carriage of goods within the meaning of the Motor Vehicles Act, 1988." These limitations clearly show that the gratuitous passengers are not included. What is included is risk of six employees and obviously that is provision for coolies or "Hamals" taken for loading and unloading. This appears to be the reason for the petitioners to take plea that deceased was a "Hamal" (coolie) or that he was a cleaner.

20. This Court is not satisfied that the deceased was in any way employed by respondent No. 7 who was stationed at Indore and doing business at Indore. Now, it is well settled law that passengers cannot be carried in a goods carriage vehicle. In-fact, it is an offence to carry passengers in a goods carriage vehicle under the Motor Vehicles Act, 1988.

21. I may refer to paras 13 & 14 of National Insurance Co. Ltd. v. Prema Devi and Ors. AIR 2008 SCW 2023, which are as follows:

13. The difference in the language of "goods vehicle" as appear in the old Act and "goods carriage" in the Act is of significance. A bare reading of the provisions makes it clear that the legislative intent was to prohibit goods vehicle from carrying any passenger. This is clear from the expression "in addition to passengers" as contained in definition of "goods vehicle" in the old Act. The position becomes further clear because the expression used is "goods carriage" is solely for the carriage of goods. Carrying of passengers in a goods carriage is not contemplated in the Act. There is no provision similar to Clause (ii) of the proviso appended to Section 95 of the old Act prescribing requirement of insurance policy. Even Section 147 of the Act mandates compulsory coverage against death of or bodily injury to any passenger of "public service vehicle". The proviso makes it further clear that compulsory coverage in respect of drivers and conductors of public service vehicle and employees carried in goods vehicle would be limited to liability under the Workmen's Compensation Act, 1923 (in short "WC Act."). There is no reference to any passenger in "goods carriage".

14. The inevitable conclusion, therefore, is that provisions of the Act do not enjoin any statutory liability on the owner of a vehicle to get his vehicle insured for any passenger travelling in a goods carriage and the insurer would have no liability therefore.

22. Taking into consideration all circumstances and clear mention in the insurance certificate that no passenger is to be carried and the use only should be for carriage of goods within the meaning of Motor Vehicles Act, I hold that there is breach of conditions of the policy. The insurance company is not liable to pay.

23. In the result the appeal is allowed. The order of the Motor Accident Claims Tribunal, Hingoli, as against the appellant is hereby set aside. The award is, however, confirmed against respondent No. 7 - Pankajkumar s/o. Champaklal Gandhi (owner of the truck in question).

At the same time it is directed that if already the amount is deposited by the appellant and paid to respondent Nos. 1 to 6, in that case the insurance company is directed to recover the amount paid to respondent Nos. 1 to 6 from the owner of the vehicle i.e. respondent No. 7 and for the purpose of said recovery, it would not be necessary for the insurer to file a separate suit, but it may initiate a proceeding before the executing Court as if the dispute between the insurer and the owner was the subject matter of determination, before the Tribunal.

24. The appeal is disposed of accordingly. Parties to bear their own costs.

After pronouncement of the judgment as above, Advocate Shri Gatne pointed out that already N.F.L. amount is deposited and paid to respondent Nos. 1 to 6. However, rest of the amount is only deposited and there is no order of payment. Considering the two cases of this Court referred to above, this Court is of the opinion that when already the amount is deposited and paid to the L.Rs., it is preferable that the insurance company should proceed against the owner of the vehicle to recover the same as he would be primarily liable to pay the said amount to the claimants. Otherwise, there would be two proceedings, one by the insurance company against the claimants for recovery and another for recovery by claimants against the owner. Whenever, the amounts are not paid to the claimants, it is not proper that the insurance company should be asked to bear the liability and then recover it from the owner as if the insurance company is an agent of the claimant to recover the amount. In the circumstances, if any amount is deposited by the appellant/insurance company in the Court and not paid to the claimants, the same may be refunded back to the insurance company. Such amount which is not paid already, can be recovered by the claimants from the owner of the vehicle.