
(2013) 07 MP CK 0255

In the Madhya Pradesh High Court

Case No : Miscellaneous Appeal No. 936/07

United India Insurance Company Ltd.

APPELLANT

Vs

Jagannath and Others

RESPONDENT

Date of Decision : 18-07-2013

Acts Referred:

Motor Vehicles Act, 1988 — Section 147, 147(1), 147(1)(b), 147(1)(b), 147(b)(1)

Citation : (2013) ILR (MP) 1671 : (2013) 3 JLJ 390 : (2014) 1 MPHT 431 :
(2013) 3 MPLJ 540

Hon'ble Judges : G.D. Saxena, J

Bench : Single Bench

Advocate : Arvind Agrawal, for the Appellant; Amit Lahoti, Advocate for
Respondent Nos. 1 to 3 and Shri O.P. Singhal, Advocate, for the Respondent

Final Decision : Allowed

Judgement

G.D. Saxena, J.—The United India Insurance Company has come up with the present appeal, feeling aggrieved by the award dated 14th August, 2007 passed by the Additional Member of the Motor Accidents Claims Tribunal, Chachoda, district Guna in Claim Case No. 14/2006 whereby the learned Claims Tribunal has directed the Insurance Company to pay the amount to the claimants/respondents No. 1 to 3 of the deceased and recover the same from the owner of the vehicle. Indisputably, respondents No. 4 and 5, owner and driver of the offending vehicle did not prefer any appeal nor file any cross-objection against the Award assailing the impugned findings in this appeal. Same is the situation with respondents No. 1 to 3/claimants because they did not prefer any appeal for enhancement of compensation. Further there is no dispute about quantum of Award by either of the parties.

2. Admitted facts of the case are that on 22nd May 2006, in night, deceased Badambai alongwith her husband went in a tractor-trolley bearing registration No. MP08/H-9294, driven by Suraj (Respondent No. 5) and owned by Babulal (Respondent No. 4). In mid-way, due to negligence and rash driving on the part

of the driver, the said tractor and trolley turned turtle. Consequently, Smt. Badambai, wife of Jagannath died on the spot. On reporting the above accident, the crime was registered against the driver and charge-sheet was filed before the criminal court. It is also admitted that at the time of accident, the offending tractor was only registered under "Farmer"s Package Insurance with the Insurer Company/appellant, herein, and the driver of the offending vehicle was having the valid driving licence. The learned claims tribunal after considering the evidence adduced from both the sides and after hearing them issued an Award in favour of the claimants in the sum of Rs. 1,77,000/- (Rs. One Lac Seventy Seven thousand Only) in all heads. While recording the aforesaid findings, the tribunal, however, exonerated the Insurance Company on the ground of violation of the terms of policy known as "Farmer"s Package Insurance" but was directed on the principles of "pay and recover" to satisfy the awarded amount and then recover the same from the owner of the offending vehicle. Being aggrieved, the Insurance Company has submitted the present appeal.

3. Learned counsel appearing for the appellant-Insurance Company submitted that the deceased had travelled as a passenger in the vehicle, which is in violation of the provisions of Section 147(b)(1) of the Motor vehicles Act and the learned tribunal in this manner has rightly chosen to consider the submissions put forth while fixing liability on the part of the owner of the vehicle.

4. Learned counsel further submitted that the principle of "pay and recover" will arise only in the circumstances where the Insurance Company is successful in its defence available to them u/s 149. If there is any statutory violation u/s 147 by allowing a person to travel in a vehicle as an unauthorised passenger, then absolutely there is no contract between the insured and the insurer to pay the amount. It is the submission of the learned counsel that in this case, the owner of the vehicle, by permitting the deceased to travel in the vehicle as an unauthorised passenger has committed statutory violation. Therefore, u/s 147(b) (1) of the Motor Vehicles Act, the Insurance Company cannot be held responsible to pay the compensation and the doctrine of "pay and recover" does not arise in the cases of statutory violation.

5. Further submission put forth on behalf of the appellant is that except the offending tractor, no other attachment parts such as trolley or agricultural implements were insured vide insurance policy (Ex. D/1). It is submitted that at the time of accident, the offending tractor and attached trolley were used for transporting the stone flooring chips while carrying the persons for commercial purposes. No additional premium for carrying such persons or workers for agricultural purpose was paid by the owner and so the offending vehicle was driven in utter violation of the terms and conditions of specified insurance policy. Under these circumstances, it is prayed that the finding of the Tribunal on the principle of "pay and recover" is not legally sustainable and is liable to be set aside by allowing the present appeal.

6. Per contra, learned counsel appearing for the claimants/respondent No. 1 to 3

submitted that as on date, there is an Award in favour of the claimants by the Tribunal. When there is an award in favour of the claimants by the Tribunal, u/s 149, the Insurer shall pay to the person entitled to the benefit of the decree and even if there is any violation, the appellant, after paying the amount to the claimants, can recover the same from the owner of the vehicle. He accordingly prayed for early payment of the awarded amount to the claimants in accordance with law.

7. The respondents No. 4 and 5, i.e., owner and driver of the offending vehicle, on the other hand, submitted that the vehicle was at the time of accident was used for agricultural purposes for transporting the stone flooring chips for construction of boundaries of agricultural field and the persons were hired as masonry labourers on the trolley. Hence, according to them, the tractor-trolley was being driven within the sphere of the insurance policy and in such circumstances, the Insurance Company was fully responsible for satisfaction of the award passed in favour of the claimants by the tribunal. On the aforesaid pleadings as well as grounds, it is prayed that the appeal may be dismissed.

8. Heard the learned counsel for the parties and perused the materials.

9. In view of the submissions made by the learned counsel on either side, now the question that arises for consideration is:-

Whether the learned tribunal has any statutory power to direct insurer to pay amount of compensation for which it is exonerated from liability in view of fundamental breach of the policy conditions, and direct that it may be subsequently recovered from the insured?

10. Before discussing the issue with regard to the doctrine of "pay and recover", it could be appropriate to extract the relevant provisions of the Motor Vehicles Act.

S.147. Requirements of policies and limits of liability:- (1) In order to comply with the requirements of this Chapter, a policy of insurance must be a policy which-

(a) is issued by a person who is an authorised insurer; and

(b) insures the person or classes of persons specified in the policy to the extent specified in sub-section (2)--

(i) against any liability which may be incurred by him in respect of the death of or bodily injury to any person including, owner of the goods or his authorised representative carried in the vehicle or damage to any property of a third party caused by or arising out of the use of the vehicle in a public place.

149. Duty of insurers to satisfy judgments and awards against persons insured in respect of third party risks.-(1) If, after a certificate of insurance has been issued under sub-section (3) of Section 147 in favour of the person by whom a policy has been effected, judgment or award in respect of any such liability as is

required to be covered by a policy under clause (b) of sub-section (1) of Section 147 (being a liability covered by the terms of the policy) or under the provisions of section 163-A is obtained against any person insured by the policy then, notwithstanding 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 judgment. (2) No sum shall be payable by an insurer under sub-section (1) in respect of any judgment or award unless, before the commencement of the proceedings in which the judgment or award is given the insurer had notice through the Court or, as the case may be the Claims Tribunal of the bringing of the proceedings, or in respect of such judgment or award 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 there has been a breach of a specified condition of the policy, being one of the following conditions, namely:-

(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 organized 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 a driving 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

(b) 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 is some material particular.

...

(4) Where a certificate of insurance has been issued under sub-section (3) of Section 147 to the person by whom a policy has been effected, so much of the policy as purports to restrict the insurance of the persons insured thereby by

reference to any conditions other than those in clause (b) of sub-section (2) shall, as respects such liabilities as are required to be covered by a policy under clause (b) of sub-section (1) of Section 147, 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 subsection shall be recoverable by the insurer from that person.

(5) 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.

11. In *National Insurance Co. Ltd. Vs. V. Chinnamma and Others*, , the Hon. Apex Court has observed as follows:-

There is nothing on records to show that the owner of the tractor had produced any insurance cover in respect of the trolley. It is furthermore not disputed that the tractor was insured only for the purpose of carrying out agricultural works. The representative of the Insurance Company Mr. Hari Singh Meena on cross-examination merely accepted the suggestion that cutting the earth and levelling the field with earth would be an agricultural work but respondent No. 1 himself categorically stated in his claim petition before the Tribunal stating that the earth had been dug and was being carried in the trolley to the brick-kiln. Evidently the earth was meant to be used only for the purpose of manufacturing bricks. Digging of earth for the purpose of manufacture of brick-kiln indisputably cannot amount to carrying out of the agricultural work. On above facts Apex court considered the above facts and observed as follows:-

16. Furthermore, a tractor is not even a goods carriage. The "goods carriage" has been defined in Section 2(14) to mean "any motor vehicle constructed or adapted for use solely for the carriage of goods, or any motor vehicle not so constructed or adapted when used for the carriage of goods" whereas "tractor" has been defined in Section 2(44) to mean "a motor vehicle which is not itself constructed to carry any load (other than equipment used for the purpose of propulsion); but excludes a road-roller". The "trailer" has been defined in Section 2(46) to mean "any vehicle, other than a semi-trailer and a side-car, drawn or intended to be drawn by a motor vehicle.

17. A tractor fitted with a trailer may or may not answer the definition of goods carriage contained in Section 2(14) of the Motor Vehicles Act. The tractor was meant to be used for agricultural purposes. The trailer attached to the tractor, thus, necessarily is required to be used for agricultural purpose, unless registered otherwise. It may be, as has been contended by Mrs. K. Sharda Devi, that carriage of vegetables being agricultural produce would lead to an inference that the tractor was being used for agricultural purposes but the same by itself would not be construed to mean that the tractor and trailer can be used for

carriage of goods by another person for his business activities. The deceased was a businessman. He used to deal in vegetables. After he purchased the vegetables, he was to transport the same to market for the purpose of sale thereof and not for any agricultural purpose. The tractor and trailer, therefore, were not being used for agricultural purposes. However, even if it be assumed that the trailer would answer the description of the "goods carriage" as contained in Section 2(14) of the Motor Vehicles Act, the case would be covered by the decisions of this Court in *Asha Rani (supra)* and other decisions following the same, as the accident had taken place on 24.11.1991, i.e., much prior to coming into force of 1994 amendment.

12. In *Oriental Insurance Co. Ltd. Vs. Brij Mohan and Others*, it is observed as follows:-

10. Furthermore, respondent was not the owner of the tractor. He was also not the driver thereof. He was merely a passenger traveling on the trolley attached to the tractor. His claim petition, therefore, could not have been allowed in view of the decision of this Court in *New India Assurance Co. Ltd. Vs. Asha Rani and Others*, wherein the earlier decision of this Court in *New India Assurance Company Vs. Shri Satpal Singh and Others*, was overruled. In *Asha Rani (supra)* it was, *inter alia*, held:-

25. Section 147 of the 1988 Act, *inter alia*, prescribes compulsory coverage against the death of or bodily injury to any passenger of "public service vehicle". Proviso appended thereto categorically states that compulsory coverage in respect of drivers and conductors of public service vehicle and employees carried in a goods vehicle would be limited to the liability under the Workmen Compensation Act. It does not speak of any passenger in a "goods carriage".

26. In view of the changes in the relevant provisions in the 1988 Act vis-?-vis the 1939 Act, we are of the opinion that the meaning of the words "any person" must also be attributed having regard to the context in which they have been used i.e. "a third party". Keeping in view the provisions of the 1988 Act, we are of the opinion that as the provisions thereof do not enjoin any statutory liability on the owner of a vehicle to get his vehicle insured for any passenger traveling in a goods vehicle, the insurers would not be liable therefor.

27. Furthermore, sub-clause (i) of clause (b) of sub-section (1) of Section 147 speaks of liability which may be incurred by the owner of a vehicle in respect of death of or bodily injury to any person or damage to any property of a third party caused by or arising out of the use of the vehicle in a public place, whereas sub-clause (ii) thereof deals with liability which may be incurred by the owner of a vehicle against the death of or bodily injury to any passenger of a public service vehicle caused by or arising out of the use of the vehicle in a public place.

13. In *National Insurance Co. Ltd. Vs. Baljit Kaur and Others*, , the Hon. Apex Court observed as follows:-

20. It is, therefore, manifest that in spite of the amendment of 1994, the effect of the provision contained in S. 147 with respect to persons other than the owner of the goods or his authorised representative remains the same. Although the owner of the goods or his authorised representative would now be covered by the policy of insurance in respect of a goods vehicle, it was not the intention of the Legislature to provide for the liability of the insurer with respect to passengers, especially gratuitous passengers, who were neither contemplated at the time the contract of insurance was entered into, nor any premium was paid to the extent of the benefit of insurance to such category of people.

21. The upshot of the aforementioned discussions is that instead and in place of the insurer the owner of the vehicle shall be liable to satisfy the decree. The question, however, would be as to whether keeping in view the fact that the law was not clear so long such a direction would be fair and equitable. We do not think so. We, therefore, clarify the legal position which shall have prospective effect. The Tribunal as also the High Court had proceeded in terms of the decisions of this Court in Satpal Singh (supra). The said decision has been overruled only in Asha Rani (supra). We, therefore, are of the opinion that the interest of justice will be sub-served if the appellant herein is directed to satisfy the awarded amount in favour of the claimant if not already satisfied and recover the same from the owner of the vehicle. For the purpose of such 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 and the issue is decided against the owner and in favour of the insurer. We have issued the aforementioned directions having regard to the scope and purport of S. 168 of the Motor Vehicles Act, 1988 in terms whereof it is not only entitled to determine the amount of claim as put forth by the claimant for recovery thereof from the insurer, owner or driver of the vehicle jointly or severally but also the dispute between the insurer on the one hand and the owner or driver of the vehicle involved in the accident inasmuch as can be resolved by the Tribunal in such a proceeding.

14. In National Insurance Co. Ltd. Vs. Prembai Patel and Others, it is observed as follows:-

The insurance policy being in the nature of a contract, it is permissible for an owner to take such a policy whereunder the entire liability in respect of the death of or bodily injury to any such employee as is described in sub-clauses (a) or (b) or (c) of proviso (i) to Section 147(1)(b) may be fastened upon the insurance company and insurance company may become liable to satisfy the entire award. However, for this purpose the owner must take a policy of that particular kind for which he may be required to pay additional premium and the policy must clearly show that the liability of the insurance company in case of death of or bodily injury to the aforesaid kind of employees is not restricted to that provided under the Workmen's Act and is either more or unlimited depending upon the quantum

of premium paid and the terms of the policy.

It is thus clear that in case the owner of the vehicle wants the liability of the insurance company in respect of death of or bodily injury to any such employee as is described in clauses (a) or (b) or (c) of proviso (i) to Section 147(1) (b) should not be restricted to that under the Workmen's Act but should be more or unlimited, he must take such a policy by making payment of extra premium and the policy should also contain a clause to that effect. However, where the policy mentions "a policy for Act Liability" or "Act Liability", the liability of the insurance company qua the employees as aforesaid would not be unlimited but would be limited to that arising under the Workmen's Act.

15. In the case of Bhav Singh Vs. Smt. Savirani and Others, Full bench of this court observes as follows:-

10. Sub Section (5) of Section 147 of the Act, however provides that notwithstanding anything contained in any law for the time being in force, an insurer issuing a policy of insurance u/s 147 of the Act shall be liable to indemnify a person or classes of persons specified in the policy in respect of any liability which the policy purports to cover in the case of that person or classes of persons. Thus if the policy of insurance covers any liability in addition to the liability u/s 147(1) of the Act, the insurer will be liability to indemnify the insured in case of any liability not because of the provisions of sub section (1) of section 147 but because of the terms and conditions of contract of insurance between the insurer and the insured. Therefore, if the contract of insurance provides for a liability to a passenger or to an employee other than the liabilities provided under sub section (1) of the Section 147 of the Act, the insurer would be liable to indemnify the insured against such liability.

16. Recently, in S.M. Sharmila Vs. National Insurance Company Ltd. and Others, the Hon. Apex Court considered where the appellant, the owner of vehicle and her workman were traveling in the offending vehicle. The workman claimed compensation contending that accident arose out of and in course of employment. So, liability was fixed on respondent insurance company. In appeal High Court concluded that vehicle involved in accident was not insured with the insurer on the date of accident and fixed the liability on the owner of the vehicle, which was held to be justified.

17. A reading of the above judgments would show that only in a case, where the Insurance Company is successful in its defence u/s 149, it may yet be required to pay the amount to the claimant and thereafter, it may recover from the owner of the vehicle. When the insurance company is not statutorily required to cover the liability in respect of a passenger in a vehicle u/s 147 unless such passengers is the owner or agent of the owner of the goods accompanying such goods absolutely there is no need for the Insurance Company to pay compensation since there is no contractual liability under the statute to pay the amount to the gratuitous passenger traveling in the goods carriage vehicle. Under such

circumstances, in the opinion of this court, a direction could not be given to the Insurance Company to pay to the claimants and recover from the owner of the vehicle.

18. Thus, from an analysis of the statutory provisions as explained by Hon. Supreme Court in various decisions rendered from time to time, the following picture emerges:

(i) The Insurance Policy is required to cover the liability envisages u/s 147, but wider risk can always be undertaken.

(ii) Section 149 envisages the defences which are open to the Insurance Company. Where the Insurance Company is not successful in its defence, obviously it is required to satisfy the decree and the award. Where it is successful in its defence, it may yet be required to pay the amount to the claimant and thereafter recover the same from the owner under such circumstance envisaged and enumerated in Section 149(4) and Section 149(5).

(iii) u/s 147 the Insurance Company is not statutorily required to cover the liability in respect of a passenger in a goods vehicle unless such passenger is the owner or agent of the owner of the goods accompanying such goods in the concerned goods vehicle.

(iv) Since there is no statutory requirement to cover the liability in respect of a passenger in a goods vehicle, the principle of "pay and recover", as statutorily recognised in Section 149(4) and Section 149(5), is not applicable ipso facto to such cases and, therefore, ordinarily the Court is not expected to issue such a direction to the Insurance Company to pay to the claimant and thereafter recover from the owner.

(v) Where, by relying upon the decision of Hon. Supreme Court in Satpal Singh's case, either expressly or even by implication, there has been a direction by the Trial Court to the Insurance Company to pay, the appellate court is obviously required to consider as to whether such direction should be set aside in its entirety and the liability should be fastened only on the driver and the owner or whether the Insurance Company should be directed to comply with the direction regarding payment to the claimant and recover thereafter from the owner.

(vi) No such direction can be issued by any trial court to the Insurance Company to pay and recover relating to liability in respect of a passenger traveling in a goods vehicle after the decision in Baljit Kaur's case merely because the date of accident was before such decision. The date of the accident is immaterial. Since the law has been specifically clarified, no trial court is expected to decide contrary to such decision.

(vii) Where, however, the matter has already been decided by the trial court before the decision in Baljit Kaur's case, it would be in the discretion of the appellate court, depending upon the facts and circumstances of the case, whether the doctrine of "pay and recover" should be applied or as to whether the

claimant would be left to recover the amount from the person liable, i.e., the driver or the owner, as the case may be.

19. Now, turning to the case at hand, on perusal of the record, it appears that the offending vehicle "tractor" was insured by the insured vide insurance policy Ex. D/1 (Cover-note) under "Farmer's package Insurance" but no documents relating to the insurance of the attachments like trolley or any terms or conditions of the insurance in relation therewith are placed on record. The cover note (Ex. D/1) contained in the record indicates that a lump sum premium amount of Rs. 5919/- was paid for the period during 31st January 2006 to 30th January 2007. So, upon carefully going through the pleadings vis-?-vis evidence on record, it is gathered that Jagannath, son of Kishore, husband of deceased appeared as AW-1 before the tribunal. He deposed that at the time of accident, the stone floor chips were loaded and carried for the purpose of construction of the boundary of agriculture field and the persons traveling in the offending vehicle were going for the labour work. The record of the case clearly shows that no premium was received in respect of any non-fare paying non-employees. Witness Jagannath (AW-1) also admitted in his evidence that neither he nor his wife had paid any charges for traveling in the tractor. The Insurance Company is bound to compensate but where owner of the vehicle or others are proposed to be covered, an additional premium is required to be paid for covering their life and property. So far as this case is concerned, there is a statutory violation u/s 147 of the Act. Therefore, following the principles laid down in Baljit Kaur's case (supra), this court is of the view that the Insurance Company is not liable to pay compensation. When there is no statutory liability to pay compensation by the Insurance Company to the deceased who had travelled as an un-authorised passenger in the vehicle, the Insurance Company cannot be directed to pay the compensation amount and recover the same from the owner of the vehicle.

20. Therefore, this court has no hesitation to hold that there is an excess of jurisdiction by the learned tribunal. In the light of the decisions of the Hon. Supreme Court on the issue, the direction of the Tribunal fastening the liability on the appellant-Insurance Company to pay compensation and to recover the same from the owner is liable to be set aside and accordingly set aside. For the reasons stated above, the miscellaneous appeal stands hereby allowed. The respondents No. 4 and 5 are directed to make the payment of the amount of award to the claimants alongwith interest @ 6% per annum from the date of filing of claim petition, else the amount shall carry penal interest @ 9% per annum.

No costs.