

(2019) 11 BOM CK 0108

In the Bombay High Court

Case No : First Appeal No. 1774 Of 2011

United India Insurance Company Ltd

APPELLANT

Vs

Ravindra And Ors

RESPONDENT

Date of Decision : 26-11-2019

Acts Referred:

Motor Vehicles Act, 1988 — Section 140, 147, 147(1)(b)(i), 166, 173

Motor Vehicles Act, 1939 — Section 96

Constitution Of India, 1950 — Article 142

Citation : (2019) 11 BOM CK 0108

Hon'ble Judges : Mangesh S. Patil, J

Bench : Single Bench

Advocate : Kulkarni Sudhir V., D.R. Jayabhar, V.A. Dhakne

Final Decision : Partly Allowed

Judgement

1. This is an appeal under Section 173 of the Motor Vehicles Act, 1988 by the insurer of the offending vehicle, being aggrieved and dissatisfied by the Judgment and Award passed by the Motor Accident Claims Tribunal, Beed, in Motor Accident Claim Petition No. 97/2009 dated 26.04.2011.

2. Briefly stated the facts leading to the filing of this appeal are to the effect that the deceased was the son of the respondent Nos. 1 and 2. He was aged about 22 years. On the date of the accident i.e. on 22.12.2008 he was travelling in a jeep which was owned by the respondent No. 3 and was being driven by the respondent No. 4. The jeep was insured with the appellant/Insurance Company at the relevant time. It is averred that while the deceased was travelling in the jeep the respondent No. 4 driver asked him to change the seat and while he was in the process of changing the seat, because of the rash and negligent driving of respondent No. 4-driver he was thrown out from the running jeep and sustained grievous injuries and succumbed to the injuries on 04.03.2009. The respondent Nos. 1 and 2 claimed compensation of Rs. 5,00,000/- by filing the petition under Section 166 of the Motor Vehicles Act.

3. The respondent Nos. 3 and 4 contested the petition by their written statement (Exhibit 20). They denied that the accident had occurred due to rash and negligent driving of the respondent No. 4-driver. They further contended that the respondent No. 4 was driving the vehicle cautiously and in a moderate speed. The deceased himself was rash and negligent and was responsible for causing the accident. They admitted that the jeep was owned by respondent No. 3 and was insured with the appellant at the material time and contended that it should indemnify them. They also denied the age, occupation and income of the deceased.

4. The appellant contested the petition by its separate written statement (Exhibit 22). It admitted occurrence of the accident involving the jeep but denied that it was caused by rash and negligent driving of the respondent No. 4. It admitted that the jeep was insured with it at the material time. However it contended that the accident had occurred on 22.12.2008 but the F.I.R. was lodged on 19.03.2009 by falsely involving the jeep when it was not at all involved in the accident. The claim itself was false and was filed in collusion with the owner of the jeep i.e. the respondent No. 3. It also denied the age, occupation and income of the deceased.

5. After framing issues and conducting hearing, by the impugned judgment and order, the Tribunal allowed the claim partly and directed the appellant and respondent Nos. 3 and 4 to pay to the respondents No. 1 and 2 jointly and severally Rs. 5,00,000/- including the compensation received under Section 140 of the Motor Vehicles Act together with interest at the rate of 7 % p.a. from the date of the petition. It is necessary to note that the Tribunal refuted the contention on behalf of the appellant that its liability was limited.

6. The learned advocate for the appellant fairly conceded that as far as the quantum is concerned there is no dispute and the appellant does not intend to question it. Since the respondent Nos. 1 and 2 have also not preferred any appeal being not satisfied with the quantum determined by the Tribunal, the scope of the appeal is restricted in ascertaining the liability of the appellant/ Insurance Company to indemnify the respondent No. 3 who is the owner of the vehicle.

7. By referring to the insurance policy (Exhibit 47) the learned advocate for the appellant submitted that it was an 'An act only policy' meaning thereby that the liability only in respect of the statutory liability contemplated under Section 147 of the Motor Vehicles Act which was undertaken to be indemnified by the contract of insurance. The deceased was travelling in the jeep and was thus merely a gratuitous passenger and cannot be regarded as a third party so that risk to his life could be said to have been statutorily coverable under Section 147 of the Act. He therefore submits that for this reason alone, an additional premium of Rs. 450/- was paid to cover the risk of the passengers travelling in the jeep. By such additional premium, respondent No. 3 owner has agreed that the appellant would be liable to pay only Rs. 1,00,000/- per passenger. Therefore in terms of such

contract of insurance the appellant is only liable to pay the respondent Nos. 1 and 2/indemnify the respondent No. 3 to the extent of Rs. 1,00,000/-. In support of his submission he cited following decisions.

(1) New India Assurance Company Ltd. V/s. Asha Rani; 2003 ACJ 1 (SC).

(2) United India Insurance Company Ltd. Vs. Tilak Singh; 2006 ACJ 1441 (SC).

(3) General Manager, United India Insurance Company Ltd. Vs. M. Laxmi and others, 2009 ACJ 104 (SC).

(4) Decision of the Division Bench of this Court in New India Assurance Company Limited Vs. Ranglal Punju Nikam and others; 2007 (4) Maharashtra Law Journal 321.

8. The learned advocates for the respondent Nos. 1 and 2 and for the respondent Nos. 3 and 4 vehemently submitted that no fault can be found with the direction of the Tribunal asking the appellant to indemnify the respondent No. 3. The deceased who was a passenger in the jeep could be regarded as a third party and consequently risk to him was to statutorily coverable under Section 147 of the Motor Vehicles Act.

9. The learned advocate for the respondent Nos. 1 and 2 further submitted that in view of the 'Avoidance clause' from the policy (Exhibit 47), since the risk to the deceased was also covered by paying an additional premium, the appellant having undertaken to indemnify the respondent No. 3-owner it gets a right to recover it from him. Even if the Tribunal has not allowed it to recover from him this Court may issue such a direction. In support of his submission he placed reliance on the decision in the case of Amrit Lal Sood and anr. Vs. Smt. Kaushalya Devi Thapar and Ors. AIR 1998 Supreme Court 1433 which has been subsequently followed and explained in New India Assurance Company Ltd. Vs. Vimal Devi and Ors. in Civil Appeal No. 1578-79 of 2004 decided by the Supreme Court on 05.10.2010.

The learned advocate also sought to place reliance on the decision in Shamanna and another Vs. The Divisional Manager, The Oriental Insurance Co. Ltd. and ors; (2018) 9 Supreme Court Cases 650.

10. I have carefully gone through the papers. Needless to state that since the deceased was travelling as a passenger in the jeep, he cannot be regarded as a third party. Suffice for the purpose to refer to the decision in the case of Asha Rani(Supra) wherein following observations have been made in paragraph Nos. 25, 26 and 27:

"25. Section 147 of 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's Compensation Act.

It does not speak of any passenger in a 'goods carriage'.

26. In view of the changes in the relevant provisions in 1988 Act vis-a-vis 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 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 travelling 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".

11. It is thus quite apparent that it now stands concluded that a passenger travelling in a goods vehicle does not fit in the words 'any person' contained in Section 147 of the Motor Vehicles Act, 1988. In case of Tilak Singh (supra) it has further been clarified that though the decision in the case of Asha Rani (Supra) was in respect of a situation where passengers were being carried in a goods vehicle it has been held to be applicable with equal force to gratuitous passenger in any other vehicle. The following observations from paragraph 21 are material:

"21. In our view, although the observations made in Asha Rani's case (supra) were in connection with carrying passengers in a goods vehicle, same would apply with equal force gratuitous passengers in any other vehicle also. Thus, we must uphold the contention of the appellant-insurance company that it owed no liability towards the injuries suffered by the deceased Rajinder Singh who was a pillion rider, as the insurance policy was a statutory policy, and hence it did not cover the risk of death of or bodily injury to gratuitous passengers."

12. By following both these decisions, in the case of M.Laxmi (supra) it has been held in respect of an 'Act policy' that the risk to the pillion rider on a scooter was not compulsorily required to be covered under Section 147 of the Motor Vehicles Act and it was held that the insurer of the scooter was therefore not liable to indemnify the owner of the scooter.

13. In the matter in hand there is no evidence that the deceased was travelling in the jeep for hire or reward. Therefore he should be held to be a gratuitous passenger. In view of the aforementioned decisions, the risk to the deceased who was a gratuitous passenger travelling in the jeep was not compulsorily coverable under Section 147 of the Motor Vehicles Act. Since it was an 'Act policy', the appellant/Insurance Company cannot be said to have undertaken any contractual liability to indemnify the respondent No. 3 who is the owner of the jeep in

respect of the risk to such a gratuitous passenger.

14. Admittedly, even as is evident from the insurance policy (Exhibit 47), the respondent No. 3 had paid an additional premium of Rs. 450/- to cover the risk to the unnamed passengers but the liability was limited to Rs. 1,00,000/- per passenger. Therefore there cannot be any dispute and even the learned advocate for the appellant fairly conceded that there could be no dispute as far as the liability of the appellant/Insurance Company to pay compensation to the respondent Nos. 1 and 2 to the extent of Rs. 1,00,000/- which is contractually covered by this policy (Exhibit 47) in view of payment of an additional premium.

15. Perhaps anticipating such an eventuality, the learned advocate for the respondent Nos. 1 and 2 has placed reliance on the decision in the cases of Amrit Lal Sood, Shamanna and Vimal Devi (supra) and argued that in view of the 'Avoidance clause' contained in the policy (Exhibit 47), the appellant being entitled to recover all the sums which it is required to pay it can recover from the respondent No. 3 anything which is paid by it over and above the contractual liability. He therefore submitted that the appellant could be directed to pay the entire amount of compensation to the respondent Nos. 1 and 2 and it can be held to be entitled to recover the additional compensation over and above its contractual liability of Rs. 1,00,000/- from the respondent No. 3. He further pointed out that the 'Avoidance clause' contained in policy (Exhibit 47) is similar to the avoidance clause that was in the policy in case of Vimal Devi (supra). In that case the Supreme Court had directed the Insurance Company to first pay and then to recover the money from the owner of the vehicle in view of a similar avoidance clause.

16. He would further point out that a similar course was adopted by the Division Bench of this Court also, in case of Ranglal Punju Nikam (supra) and the same may be followed.

17. The avoidance clause contained in policy (Exhibit 47) reads as under:

"Nothing in this Policy or any endorsement hereon shall affect the right of any person indemnified by this Policy or any other person to recover an amount under or by virtue of the provisions of the Motor Vehicles Act. But the insured shall repay to the Company all sums paid by the Company which the Company would not have been liable to pay but for the said provisions".

True it is that in case of Shamanna (supra) it was a matter of breach of the terms and conditions of the policy in as much as the driver of the vehicle was not holding valid and effective driving licence but still the Supreme Court had directed the Insurance Company to pay and recover it from the owner. The High Court in that matter had refused to issue such direction to the Insurance Company to pay and recover and the decision was reserved.

The following observations from paragraph no. 11 of the judgment are important:

"11- In present case, to deny the benefit of 'pay and recover', what seems to

have substantially weighed with the High Court is the reference to larger Bench made by the two-Judge Bench in *National Insurance Co. Ltd. v. Parvathneni* and another (2009) 8 SCC 785 which doubted the correctness of the decisions which in exercise of jurisdiction under Article 142 of the Constitution of India directing insurance company to pay the compensation amount even though insurance company has no liability to pay. In *Parvathneni* case, the Supreme Court pointed out that Article 142 of the Constitution of India does not cover such type of cases and that "if the insurance company has no liability to pay at all, then, it cannot be compelled by order of the court in exercise of its jurisdiction under Article 142 of the Constitution of India to pay the compensation amount and later on recover it from the owner of the vehicle". The above reference in *Parvathneni* case, has been disposed of on 17.09.2013 by the three-Judges Bench keeping the questions of law open to be decided in an appropriate case."

18. In case of *Vimal Devi* (supra), by referring to the observations from the decision in the case of *New India Assurance Company Ltd. Vs. C.M. Jaya and others*; (2002) 2 Supreme Court Cases 278 wherein there was a similar 'Avoidance clause' as it is in the matter in hand, the Constitution Bench of the Supreme Court had directed the Insurance Company to first pay and then recover the amount of compensation paid by it from the owner in view of such clause. The following observations from the decision in *Vimal Devi* are relevant:

"The Avoidance Clause came up for consideration before a three Judges Bench of this Court in *Amrit Lal Sood and Anr. V. Kaushalya Devi Thapar and Ors.* (1998) 3 SCC 744. In its decision in that case this Court observed:

13. In the policy in the present case also, there is a clause under the heading:

"AVOIDANCE OF CERTAIN TERMS AND RIGHT OF RECOVERY" which reads thus:

Nothing in this policy or any endorsement hereon shall affect the right of any person indemnified by this policy or any other person to recover an amount under or by virtue of the provisions of the Motor Vehicles Act, 1939, Section 96. BUT the insured shall repay to the Company all sums paid by the Company which the Company would not have been liable to pay but for the said provisions.

14. The above clause does not enable the insurance company to resist or avoid the claim made by the claimant. The clause will arise for consideration only in a dispute between the insurer and the insured. The question whether under the said clause the insurer can claim repayment from the insured is left open. The circumstance that the owner of the vehicle did not file an appeal against the judgment of the Single Judge of the high Court under the letters patent may also be relevant in the event of a claim by the insurance company against the insured for repayment of the amount. We are not concerned with that question here.

15. In the result, we hold that the insurance company is also liable to meet the claim of the claimant and satisfy the award passed by the Tribunal and modified by the High Court. The judgment of the High Court insofar as it exonerates the

insurance company (5th Respondent herein) from the liability, is set aside. The award passed by the Division Bench of the High Court can be enforced against the 5th Respondent also.

The appeal is allowed to the extent indicated above. The parties will bear their respective costs.

6. Mr Calla further submitted that in C.M. Jaya and Ors. a Constitution Bench of this Court indeed held that in a policy for limited liability it was not open to the Court to direct the insurance company to make any payment beyond the amount of the limited liability but it took note of the decision in Amrit Lal Sood with approval. He referred to paragraphs 10 and 16 of the judgment in C.M. Jaya where the decision in Amrit Lal Sood is noticed with approval.

7. The Avoidance Clause in the policy in this case makes all the difference and the direction of the High Court to the Appellate, insurance company to make payment of the full amount of compensation to the claimants and to recover its dues from the owner of the vehicle is directly in accordance with that Clause."

19. In view of such state of affairs, though the risk to the deceased who was travelling as a gratuitous passenger in the jeep is covered by the insurance policy (Exhibit 47) by paying an additional premium and the liability of the appellant/ Insurance Company under the contract is limited to Rs. 1,00,000/-, by virtue of the Avoidance clause, it would be appropriate to direct it to pay the entire compensation first and then to recover it from the respondent No.3-owner to the extent it would be over and above the contractual liability of Rs. 1,00,000/-

20. In the light of above, the appeal deserves to be allowed but only partly to the extent discussed herein above.

21. The appeal is partly allowed. The operative part of the impugned Judgment and Award is modified to the following extent:

The appellant and the respondent Nos. 3 and 4 shall pay to the respondent Nos. 1 and 2 Rs. 5,00,000/- (Rs. Five Lakh only) including the compensation received by them under Section 140 of the Motor Vehicles Act together with interest at the rate of 7 % p.a. from the date of the petition till realization of the entire amount. However, the appellant shall be entitled to recover the amount of compensation of Rs. 4,00,000/- (Rs. Four Lakh only) + interest thereon from the respondent No. 3-owner. No costs.