(2016) 05 GUJ CK 0019

In the Gujarat High Court

Case No : Special Civil Application No. 6377 of 2016 with Special Civil Application No. 6386 of 2016

Varshaben Deepakbhai Vaghasiya APPELLANT

Vs

Driver-Cum-Owner RESPONDENT

Date of Decision : 05-05-2016

Acts Referred:
Motor Vehicles Act, 1988 — Section 149(2), Section 170

Citation : (2017) 2 ACC 268 : (2016) 4 GLR 3397 : (2017) 1 TAC 602

Hon'ble Judges : Mr. S.G. Shah, J.

Bench : Single Bench

Advocate : Rule Served by D.S, for the Respondent No. 2; Mr. Tushar L. Sheth, Advocate, for the Petitioner No. 1; Jigneshkumar M. Nayak and Vijay H. Nangesh, Advocates, for the Respondent No. 1

Final Decision : Allowed

Judgement

Mr. S.G. Shah, J. - Heard Ld. Advocates Mr. Tushar Sheth for the petitioners and Mr. Jigneshkumar Nayak for the respondent nos. 1 and 2 in both the petitions, whereas insurance company was though duly served, remained absent. Though both the petitions are arising out of two different impugned orders in two different M.A.C. Petitions under the Motor Vehicles Act [for short ''the Act''] considering the fact that practically issue involved in both the petitions is common that ''whether insurance company can be permitted to contest the claim petition on all grounds pursuant to provisions of sections 149[2] and 170 of the Act or not and that practically both the impugned orders are passed by the same M.A.C. Tribunal on same day, except difference in factual details of both the cases, practically the impugned orders are pari-meteria same in verbatim. Therefore, both these petitions are disposed of by this common judgment.

2. In S.C.A. No. 6377/2016 order dated 29/2/2016 below exh. 21 in M.A.C. Petition No. 2/2012 is under challenge, whereby the application under section 170 of the Act is allowed permitting the insurance company to contest the claim

on all grounds. Whereas in S.C.A. No. 6386/2016 similar order dated 29/2/2016 below exh. 28 in M.A.C. Petition No. 536/2012 is under challenge.

3. In both the applications, the sum and substance of said applications under section 170 of the Act by the insurance company is to the effect that from the written statement and other conduct of the driver and owner of the vehicle, it appears that there is collusion between the claimants on one hand and driver and owner on the other hand and, therefore, it may be granted permission to contest the claim without prejudice to the provisions contained in sub-section [2] of section 149 on all the grounds that are available. Such applications have been contested by the claimants by filing their reply at exh. 24 in M.A.C. Petition No. 2/2012 and exh. 30 in M.A.C. Petition No. 536/2012, wherein the claimants of both the claim petitions have contended, disclosing relevant exhibit of documents, that driver and owner of the vehicle in question have appeared through advocate and they have filed their reply contesting the claim petitions and when evidence of the claimants has been recorded, the advocate for the driver and owner has in fact cross examined the witness of the claimants and, therefore, it cannot be said that the driver and owner are not contesting the claim petitions. Copies of the written statements filed by the driver and owner are also produced on record which are at exh. 9 in M.A.C. Petition No. 2/2012 and exh. 20 in M.A.C. Petition No. 536/2012. Perusal of written statement makes it clear that the driver cum owner has not admitted any averments of the claim petitions and flatly denied each and every pleadings of the claim petitions, but in the alternative, it is contended in the reply that since their vehicles have been insured with the concerned insurance company, if at all they are held liable to pay compensation, then insurance company be directed to satisfy the award. Therefore, prima-facie it cannot be said that the driver and owner are not contesting the claim petitions or that they are in collusion with the claimants. Similarly the claimants'' witness has been cross examined by the advocate for driver and owner. If we peruse exh. 23 in M.A.C. Petition No. 2/2012 i.e. S.C.A. No. 6377/2016, so also exh. 29 in M.A.C. Petition No. 536/2012 i.e. S.C.A. No. 6386/2016, they categorically disclose that the claimant has been cross examined on different dates by the advocate of the driver and owner, so also by the advocate of the insurance company and unfortunately, thereafter there is an endorsement that now there is an application under section 170 of the Act by the insurance company, further cross examination is kept pending. Therefore, when insurance company is permitted to cross examine the witness and when witness was cross examined by the advocate for driver and owner at length, there is no substance or reason for the insurance company to allege that the driver and owner are in collusion with the claimants and, therefore, they may be permitted to take all the objections that may be available to any other litigant in contesting the claim petition. For the purpose, the application under section 170 has been filed on 10/7/2015 in M.A.C. Petition No. 2/2012 and on 29/7/2013 in M.A.C. Petition No. 536/2012. If we peruse said applications, as aforesaid, the only ground pleaded by the insurance company is regarding collusion of driver and

owner with the claimants.

4. As against that, the claimants have filed a detailed reply at exh. 24 in M.A.C. Petition No. 2/2012 and at exh. 30 in M.A.C. Petition No. 536/2012 explaining all factual and legal aspects of the matter, contending that as per statute, the insurance company cannot be made a regular party except having notice of commencement of such proceedings. It is further contended that permission can be granted only if driver and owner are not contesting the claim petition or in fact they are in collusion with the claimants. Therefore, it is submitted that when driver and owner are contesting the petition and when they have filed appearance, so also written statement and cross examined the claimants extensively and thereafter advocate for the insurance company has also cross examined the witnesses, practically permission to defend the claim petition has been granted, but so far as allowing the insurance company to take all defences is concerned, in absence of any evidence regarding collusion or non-action by the driver and owner, considering the provisions of the Act, the insurance company cannot be allowed to take all the objections and defences because the provisions of law specifically restrict such liberty. For the purpose, the petitioners are relying upon provisions of sections 149 [2] and 170 of the Act, which read as under :

"149. Duty of insurers to satisfy judgments and awards against person insured in respect of third party risks-

(1) xxx xxx xxx

(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 organised 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 nondisclosure of a material fact or by a representation of fact which was false in some material particular.

(3) xxx xxx xxx

(4) xxx xxx xxx

(5) xxx xxx xxx

(6) xxx xxx xxx

(7) xxx xxx xxx"

"170. Impleading insurer in certain cases. - Where in the course of any inquiry, the Claims Tribunal is satisfied that -

[a] there is collusion between the person making the claim and the person against whom the claim is made, or

[b] the person against whom the claim is made has failed to contest the claim, it may, for reasons to be recorded in writing, direct that the insurer who may be liable in respect of such claim, shall be impleaded as a party to the proceeding and the insurer so impleaded shall thereupon have, without prejudice to the provisions contained in sub-section [2] of section 149, the right to contest the claim on all or any of the grounds that are available to the person against whom the claim has been made."

5. Bare perusal of above two sections, makes it clear that the insurance company can defend the claim petition only on limited grounds as enumerated in section 149[2] viz., breach of policy conditions or if policy is void on the date of accident. Whereas section 170 makes it clear that the insurance company can be impleaded as party only if there is collusion between the claimant and driver/ owner or when driver and owner of vehicle in question fail to contest the claim.

6. In the present case, when there is positive evidence that the driver and owner have appeared to contest the claim petitions by filing written statement and cross-examining the witnesses of the claimants and more particularly when there is no defence regarding breach of policy conditions by the insurance company, considering the fact that the driver of the truck had collided with motor cycle and in such incident, motor cyclist had succumbed to his injuries, in absence of any positive defence to prove that there is breach of any condition of the policy, so also in absence of positive evidence regarding negligence in contesting the claim or collusion by the driver and owner of the vehicle in question, the insurance company has no right to be made a party to the claim petition or to defend the

same as opponent except notice of commencement of such proceedings by the Tribunal.

7. In view of the above facts and circumstances, if we peruse the impugned judgments and orders, it seems that the Tribunal has failed to appreciate the pleadings and submissions before it by the claimants in granting permission to the insurance company to defeat the claim on all grounds. This may be the reason that the insurance company has chosen not to appear.

8. In the result, when the impugned orders are resulting into injustice to the innocent victims of road accident though there are specific provisions of law to restrict the insurance company from defeating such claim petitions, present petitions are allowed, as prayed for. Thereby, the impugned orders, both dated 29/2/2016, are quashed and set aside.

9. Rule is made absolute accordingly.