

(2017) 12 BOM CK 0004

BOMBAY HIGH COURT

Case No: 329 of 2004

United India Insurance
Co. Ltd.

APPELLANT

Vs

Kusum W/o Sitaram
Idole

RESPONDENT

Date of Decision: Dec. 19, 2017

Acts Referred:

- Indian Penal Code, 1860, Section 279, Section 337, Section 304-A - Rash driving or riding on a public way - Causing hurt by act endangering life or personal safety of ot

Citation: (2017) 12 BOM CK 0004

Hon'ble Judges: K.K. Sonawane

Bench: SINGLE BENCH

Advocate: S.G. Chapalgaonkar, A.M. Gaikwad, A.N. Ansari

Final Decision: Dismissed

Judgement

1. The appellant - United India Insurance Company Ltd. By resorting to remedy under section 173 of the Motor Vehicles Act, 1988 (for short " Act of 1988") preferred the present appeal, agitating validity and propriety of the judgment and award dated 20-03-2003 passed by Motor Accident Claims Tribunal, Nanded (for short "Tribunal"), in Motor Accident Claim Petition No. 51 of 2000 imposing monetary liability to pay compensation to the original petitioners/claimants.

2. Factual matrix of the appeal in brief is that, on 05-12-1999 the deceased Sitaram Ramji Idole was travelling in the vehicle mini passenger bus bearing registration No. MH-26-B/481 from Nanded to Bhjavaninagar, Kandhar. The driver of the mini passenger bus was very negligent and rash while driving the bus. When the vehicle came in the vicinity of Vishnupuri village, the driver lost control on the wheels of the vehicle and get

the vehicle plunged at the Babhul tree aside the road. Thereafter, the vehicle mini passenger bus turned turtle on the left side of the road. The deceased Sitaram received fatal injury and died on the spot itself. The information of the accident was passed on to the concerned Police of Nanded Police Station. Crime No. 237 of 1999 under sections 304-A, 279, 337 of the Indian Penal Code (for short "IPC") came to be registered. The police arrived at the spot, drawn spot panchnama, inquest panchnama on the dead body of deceased Sitaram. Thereafter, corpse of the deceased was referred to post-mortem to ascertain the exact cause of death. The medical experts opined that the deceased Sitaram died due to head injury following depressed fracture of skull vault with subdural hemorrhage. The claimants being widow and children of the deceased Sitaram blamed the driver of mini passenger bus for the death of their family member. Therefore, they filed the claim petition under section 166 of the Act of 1988 for compensation.

3. Despite service of notice, respondent No. 1-owner of mini passenger bus did not secure his presence before the Tribunal. He remained absent in the proceedings. The Tribunal passed order to proceed *ex parte* against the owner of offending vehicle. However, respondent No. 2-appellant-Insurance Company appeared in the proceeding and raised the objection. It has been contended that driver of the offending vehicle was not holding valid driving licence. There were 60 to 70 passengers travelling in the bus at the relevant time. According to appellant-Insurance Company there was breach of condition of Insurance Policy and the appellant - Insurance Company could not be held responsible to indemnify the insured in this case. Hence, no liability would be fastened on the Insurance Company.

4. After considering rival submissions, the Tribunal framed requisite issues to determine the controversy on merit. In order to support the claim, claimant Kusum, widow of the deceased stepped into the witness box and adduced her evidence on oath. The claimants also produced voluminous documents comprising Police record, post - mortem report, salary certificate of the deceased etc. on record. The claimants also examined P.W-2-Vasant Gulabrao Salunke, Administrator of the CIDCO to prove the salary certificate of the deceased produced on record. However, respondent-Insurance Company did not prefer to adduce any evidence nor produced any document in support of its claim. The Tribunal appreciated the entire circumstances on record and arrived at the conclusion that the death of deceased Sitaram Idole was caused due to rash and negligent driving of the driver of mini passenger bus. The Tribunal concluded that owner and insurer of the vehicle are jointly and severally liable to pay compensation of Rs.8,90,000/- with interest to the claimants. Accordingly, the Tribunal passed impugned judgment and award, which is subject matter of the present appeal.

5. In support of appeal, learned counsel for the appellant - Insurance Company contends that the Tribunal did not appreciate the facts and circumstances of the matter in its proper perspective and committed error in imposing monetary liability jointly and severally on the owner and insurer of offending vehicle. According to learned counsel, the Tribunal lost

sight that there was breach of condition of the Insurance Policy. The driver of the offending vehicle was not holding valid licence at the time of accident. Moreover, as per the terms and conditions of policy, the passengers 21+2 are only allowed to be an passenger in the mini bus. But, at the time of accident 60 to 70 passengers were found travelling in the vehicle, in contravention of the Insurance Policy. Therefore, appellant-Insurance Company would not be held liable to indemnify the insured in this case. Learned counsel for appellant gave much more emphasis on the provisions of section 149(2) of the Act of 1988 and urged that in view of statutory defence, it would justifiable for the appellant -Insurance Company to avoid its liability to pay compensation in this case.

6. Learned counsel for respondents attempted to raise objection to the contentions propounded on behalf of appellant on the ground that there are no material available on record to establish that there was a breach of condition of the Insurance Policy on the part of Insured.

7. The question arises before this Court for deliberation in this appeal is in regard to locus standi of the appellant to repudiate the liability of payment of compensation in respect of accident by the vehicle insured with it, on the ground of breach of condition of the Insurance Policy.

8. Admittedly, since beginning the appellant - Insurance Company is clamouring about the breach of terms and conditions of the contract of Insurance. It has been alleged that the driver of offending vehicle did not possess valid driving licence at the relevant time of accident as well as the vehicle was carrying more number of passengers than the permitted under Insurance Policy. Therefore, the appellant-Insurance Company seeks relief to avoid liability to indemnify owner of the vehicle by availing remedy provided under section 149(2) of the Act of 1988. The provisions of section 149 (2) of the Act is reproduced as below:- 149: Duty of insurers to satisfy judgments and awards against persons insured in respect of third party risks.:

(1) XXX XXX XXX XXX 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) xxx xxx xxx xxx xxx xxx

9. Moreover, Their Lordship of Hon"ble Apex Court in the case of National Insurance Co. Ltd. Vs. Nicolletta Rohtagi reported in (2002) 7 SCC 456 dealt with scope of provisions of Section 149(2) of the Act of 1988 and observed in paragraph No. 13 as under :

"13. To answer the question, it is necessary to find out on what grounds the insurer is entitled to defend/contest against a claim by an injured or dependents of the victims of a motor vehicle accident. Under Section 96(2) of the 1939 Act which corresponds to Section 149(2) of the 1988 Act, an insurance company has no right to be a party to an action by the injured person or dependents of the deceased against the insured. However, the said provisions gives the insurer the right to be made a party to the case and to defend it. It is, therefore, obvious that the said right is a creature of the statute and its content depends on the provisions of the statute. After the insurer has been made a party to a case or claim, the question arises, what are the defences available to it under the statute? The language employed in enacting sub-section (2) of Section 149 appears

to be plain and there is no ambiguity in it. It shows that when an insurer is impleaded and has been given notice of the case, he is entitled to defend the action on grounds enumerated in the sub-section, namely, sub-section (2) of Section 149 of the 1988 Act, and no other ground is available to him. The insurer is not allowed to contest the claim of the injured or heirs of the deceased on other ground which is available to an insured or breach of any other conditions of the policy which do not find place in sub-section (2) of Section 149 of the 1988 Act. If an insurer is permitted to contest the claim on other grounds it would be adding more grounds of contest to the insurer than what the statute has specifically provided for."

10. In the case of National Insurance Company Ltd. Vs. Swaran Singh and others reported in (2004) 3 SCC 297 it was held that the insurer, who alleges breach of terms and conditions of the contract of Insurance must establish the factum of breach by cogent and succinct evidence. The degree of proof to prove the breach of Insurance Policy on the part of insured, would depend upon facts and circumstances of each cases and if there are sufficient material on record to draw inference about breach of condition of Insurance of contract, the Tribunal may absolve the insurer from the liability to indemnify the insured. In paragraph Nos. 69 and 70 Their Lordship observed as under :

"69. The proposition of law is no longer *res integra* that the person who alleges breach must prove the same. The insurance company is, thus, required to establish the said breach by cogent evidence. In the event the insurance company fails to prove that there has been breach of conditions of policy on the part of the insured, the insurance company cannot be absolved of its liability. (See *Sohan Lal Passi*).

70. Apart from the above, we do not intend to lay down anything further i.e. degree of proof which would satisfy the aforementioned requirements inasmuch as the same would indisputably depend upon the facts and circumstances of each case. It will also depend upon the terms of contract of insurance. Each case may pose a different problem which must be resolved having regard to a large number of factors governing the case including conduct of parties as regards duty to inform, correct disclosure, suppression, fraud on the insurer etc. It will also depend upon the fact as to who is the owner of the vehicle and the circumstances in which the vehicle was being driven by a person having no valid and effective licence. No hard-and-fast rule can, therefore, be laid down. If in a given case there exists sufficient material to draw an adverse inference against either the insurer or the insured, the Tribunal may do so. The parties alleging breach must be held to have succeeded in establishing the breach of conditions of the contract of insurance, on the part of the insurer by discharging its burden of proof. The Tribunal, there cannot be any doubt. Must arrive at a finding on the basis of the materials available on records."

11. In view of aforesaid legal guidelines delineated by the Hon"ble Apex Court, it is evident that the defence of the Insurance Company is confined to the grounds enumerated under section 149(2) of the Act of 1988. The Contract of Insurance must be as per terms and conditions embodied in the policy. In the instant case, the appellant - Insurance Company came forward with specific allegation that, the driver was not holding valid driving licence as well as under the policy the vehicle was to be used for carrying 21+2 passengers only, but at the relevant time of the accident, the driver was carrying more than 60 to 70 passengers in the vehicle. These circumstances demonstrate that there was a breach of condition of the policy, therefore, Insurer is entitled to repudiate liability in this case.

12. In order to ascertain crux of the allegations about breach of Insurance policy by the insured, it would find justifiable to explore the facts and circumstances of the case brought on record. The claimant Kusum wd/o Sitaram Idole adduced her evidence at (Exhibit-25). She was cross- examined on behalf of appellant-Insurance Company on the aspect of quantum of salary of the deceased Sitaram, who was employed as Extension Officer in the District Rural Development Department, Nanded. The claimant also examined P.W.2 Vasant Gulabrao Salunke, Administrator of the CIDCO, who was Project Officer at the relevant time in Rural Development Department at Nanded. He proved the contents of the salary certificate of deceased Sitaram produced on record at (Exhibit-32). The respondent except written statement on record (Exhibit-15) did not painstaking to adduce evidence on record, so that the adverse inference can be drawn in regard to breach of condition of the Insurance Policy. There were no documents produced on behalf of appellant to point out the circumstances that the driver was not holding valid driving licence at the time of accident. Moreover, offending mini passenger bus was overloaded at the time of accident and there were more passengers than the permitted numbers under the cover note of the Insurance Policy. In absence of cogent and satisfactory evidence on record, it would be cumbersome to accept the allegations of violation of terms of the Insurance Contract as nurtured on behalf of appellant- Insurance Company.

13. Learned counsel for the appellant placed reliance on the document of First Information Report (for short "FIR") as well as police record and urged that the FIR and Police record categorically reflects that the mini passenger bus involved in the accident was overloaded and there were exceed number of passengers in the bus. Therefore, adverse inference can be drawn on the basis of police report that the bus was carrying more passengers than number of passengers permitted under the policy. He claimed violation of terms of contract of Insurance.

14. The contentions advanced on behalf of learned counsel for the appellant-Insurance Company appears, not supported by any sort of evidence on record. It is worth to mention that, the very object and purpose of lodging FIR was to set the criminal law in motion. The contents of the FIR cannot be appreciated as substantive evidence. In absence of

evidence of particular witness who lodged the FIR, it would be hazardous to act upon the contents of the FIR. The recitals of the FIR are required to be confronted to the witness prior to appreciate circumstances verbalized in it. In the instant case, as referred supra, there were no efforts on the part of appellant-Insurance Company to examine any witness who were travelling at the relevant time in the offending vehicle. The complainant, who lodged the FIR did not come forward to depose in favour of insurer on the aspect of number of passengers in this case. In such circumstances, it is hard to believe that there was a breach of condition of the Insurance Policy.

15. In view of exposition of law laid down in the aforesaid Swaran Singh's case, it is incumbent on the part of appellant - Insurance Company to establish the breach of condition of the Policy, with cogent and reliable evidence. There must be some material available on record to draw adverse inference against Insurer. In case the insurer succeeded to show that there was breach of terms of Insurance Policy, it has also necessary to establish that the insured had willfully and intentionally violated the terms and conditions of the Contract of Policy. In the instant case, there are no such circumstances on record to favour the appellant-Insurance Company for avoiding the liability toward insured. Therefore, there is no propriety to nod in favour of appellant. The appeal being devoid of merit deserves to be dismissed. No interference in the findings of the Tribunal at the behest of appellant-Insurance Company is warranted.

16. In the result, in view of aforesaid discussion, the appeal stands dismissed. No order as to costs. Pending civil application does not survive and stands disposed of accordingly.