

*** HIGH COURT OF DELHI : NEW DELHI**

MAC App. No.410/2008 & CM No.10331/2008

% Judgment reserved on: 4th September, 2008

Judgment delivered on: 25th September, 2008

National Insurance Co. Ltd.,
1st Floor, Palika Bhawan,
R.K. Puram, New Delhi-66.

Also at:

DRO-II,

2E/9, Jhandewalan Extension,

New Delhi

....Appellant

Through: Mr. P.K. Seth, Adv.

Versus

1) Sh. P.V. Lonan,
S/o. Lt. Sh. P.C. Vareed,
Parekkat House, Kalliyad,
Vill: Thirumakkulam,
Post Kundoor 680734,
District Trissur (Kerala).

2) Smt. Mary Lonan,
W/o. Sh. P.V. Lonan,
Parekkat House, Kalliyad,
Vill: Thirumakkulam,
Post Kundoor 680734,
District Trissur (Kerala).

3) Shri Gurmeet Singh,
R/o. Q-214, Dilshad Garden,
New Delhi

4) Shri Naresh Kumar,
S/o. Shri. D.D. Sharma,

A-31/140, Maujpur,
Delhi

...Respondents.
Through: Nemo.

Coram:

HON'BLE MR. JUSTICE V.B. GUPTA

1. Whether the Reporters of local papers may
be allowed to see the judgment? Yes
2. To be referred to Reporter or not? Yes
3. Whether the judgment should be reported
in the Digest? Yes

V.B.Gupta, J.

National Insurance Company/appellant herein, has filed this appeal under Section 173 of the Motor Vehicles Act, 1988 (for short as 'Act') against the award dated 13th March, 2008 passed by Sh. J.P.S. Malik, Judge, MACT (for short as 'Tribunal'), New Delhi, vide which claimants were awarded compensation to the tune of Rs.3,79,968/- along with simple interest @ 9% p.a. from the date of filing of the petition till realization.

2. Brief facts of this case are that on 9th February, 2002, Late Latish Kumar was going to Mayur Vihar

Phase III from Connaught Place, New Delhi as a pillion rider on motorcycle No.DL-3SE-7813, which was being driven by Mr. Rajesh Kumar and they were proceeding via Pragati Maidan, ITO Road. It is alleged that when deceased and Rajesh Kumar reached near Nizamuddin bridge and were taking a turn towards the bridge and near the merging point, they were hit by a chartered bus No. DL-1P-A-5581, which was being driven in a rash and negligent manner. The scooter was hit by the bus from behind, due to which Rajesh Kumar and deceased fell down on the road and both of them sustained injuries. Rajesh Kumar suffered minor injuries whereas, deceased Latish Kumar suffered grievous injuries. Deceased was shifted to Jeevan Anmol Hospital, Mayur Vihar but he succumbed to his injuries and died on 9th February, 2002.

3. The offending bus was being driven by respondent No.4/Naresh Kumar and it was owned by respondent No.3/Gurmeet Singh and was insured with the appellant/Insurance Company.

4. Driver and owner of the offending bus had filed joint written statement stating that there is no cause of action against these respondents, as no accident has taken place on the given date and time. It is further stated that the deceased was a pillion rider on a two wheeler vehicle and the driver of two wheeler was very rash and negligent and was driving the same in a zig-zag manner on the Nizamuddin bridge. However, the bus driven by respondent/driver had over took the motorcycle while the bus was on the right side of the motorcycle and the motorcyclist perhaps lost his balance and struck the motorcycle on the road and sustained injuries and thus the motorcyclist himself was rash and negligent.

5. On the other hand, the appellant/Insurance Company in its written statement has stated that the accident, if any, has been caused due to rash and negligent driving of the driver of the scooter and respondent No.3/Gurmeet Singh, was not the driver of

the bus and he was not driving the above bus at the time of the accident.

6. Further, it is stated that the bus in question was not insured with the appellant at the time of the alleged accident. The respondent/owner has deposited the cheque of the premium and the appellant had issued receipt of the premium of policy, subject to realization. Later on, the cheque was dishonoured with the remarks 'insufficient fund' and the appellant had intimated respondent/owner, but the respondent/owner had not turned to deposit the amount of premium and the appellant had cancelled the policy and thus there was no privity of contact without premium, between the appellant and the respondent/owner. Hence, the appellant is not liable to pay any compensation.

7. Claimants examined four witnesses in support of their claims whereas, the appellant/Insurance Company examined R1W1, SH. A.N. Chauhan, Assitant

Divisional Manager. The owner and driver of the bus did not examine any witness in support of their case.

8. Aggrieved with the decision of the Tribunal, the appellant has filed the present appeal.

9. It has been contended by the learned counsel for the appellant that the Tribunal has failed to consider that the witness R1W1 examined by the appellant has proved the dishonour of the premium cheque issued by the owner of the bus as well as the copy of the notice issued to the insured and RTO and also the cancellation of the policy, on account of non-receipt of requisite insurance premium and this witness has not at all been cross-examined on behalf of the driver and owner i.e. respondents no. 3 and 4 respectively.

10. Further, respondents no. 3 and 4 had been contesting the petition despite having knowledge of the plea of the appellant regarding the cancellation of the policy due to dishonour of premium cheque and never challenged or refuted such allegation of the

appellant. Therefore, the Tribunal ought to have held that the allegation of the appellant, that on account of dishonor of premium cheque of the owner, the policy was cancelled under intimation to the owner and RTO, are deemed to be admitted by the owner of the vehicle.

11. Since the policy was cancelled due to dishonour of premium cheque and intimation to this effect was communicated to the owner of the offending vehicle as well as RTO, the appellant was not the insurer of the offending vehicle at the time of accident and cannot be held liable to pay the amount of compensation to indemnify the owner of the offending vehicle against the liability of the amount of award.

12. In ***Daddappa & Ors. v. National Insurance Co. Ltd., I (2008) ACC 1 (SC)***, the Apex Court has observed as under;

“Section 147 of the Act obligates the owner of the motor vehicle to get the vehicle insured in so far as the claim of third party is concerned. The Act does not deal with contract of

insurance as such. Contract of insurance is governed by the Insurance Act, 1938 (for short "the 1938 Act").

Section 64-VB of the 1938 Act provides that no risk is to be assumed unless premium is received in advance in the following terms:

'Section 64VB - No risk to be assumed unless premium is received in advance -

(1) No insurer shall assume any risk in India in respect of any insurance business on which premium is not ordinarily payable outside India unless and until the premium payable is received by him or is guaranteed to be paid by such person in such manner and within such time as may be prescribed or unless and until deposit of such amount as may be prescribed, is made in advance in the prescribed manner.

(2) For the purposes of this section, in the case of risks for which premium can be ascertained in advance, the risk may be assumed not earlier than the date on which the premium has been paid in cash or by cheque to the insurer.

Explanation.- Where the premium is tendered by postal money order or cheque sent by post, the risk may be assumed on the date on

which the money order is booked or the cheque is posted, as the case may be.

(3) Any refund of premium which may become due to an insured on account of the cancellation of a policy or alteration in its terms and conditions or otherwise shall be paid by the insurer directly to the insured by a crossed or order cheque or by postal money order and a proper receipt shall be obtained by the insurer from the insured, and such refund shall in no case be credited to the account of the agent.

(4) Where an insurance agent collects a premium on a policy of insurance on behalf of an insurer, he shall deposit with, or despatch by post to, the insurer, the premium so collected in full without deduction of his commission within twenty-four hours of the collection excluding bank and postal holidays.”

The said provision, therefore, in no unmistakable term provides for issuance of a valid policy only on receipt of payment of the premium.”

The Apex Court further observed as under;

“The question came up for consideration before this Court in Oriental Insurance Co. Ltd. v.

Inderjit Kaur and Ors., (1998) 1 SCC 371, wherein it was opined that a policy of insurance which is issued in public interest would prevail over the interest of the insurance company. In that case a bus met with an accident. The policy of insurance was issued on 30.11.1989. A letter stating that the cheque had been dishonoured was sent by the Insurance Company to the insurer on 23.1.1990. The premium was paid in cash on 2.5.1990. The accident took place 19.4.1990. Despite noticing Section 64-VB of the 1938 Act, but having regard to the underlying public policy behind the statutory scheme in respect of insurance as evidenced by Section 147 and Section 149 of the Act and in particular having regard to the fact that policy of insurance to cover the bus without receiving the premium had already been issued, this Court held that the Insurance Company was liable to indemnify the insured.

We may, however, notice that in terms of Sub-section (5) of Section 147 and Sub-section (1) of Section 149 of the Act, the Insurance Company became liable to satisfy awards of compensation in respect thereof, notwithstanding its entitlement to avoid or cancel the policy for the reason that the cheque issued for payment of

premium thereon had not been honoured.”

13. In ***New India Assurance Co. Ltd. v. Rula and Ors., AIR 2000 SC 1082***, the Apex Court observed as under;

“Normally, a liability under the contract of insurance would arise only on payment of premium if such payment was made a condition precedent to the Insurance Policy taking effect. But such a condition which is intended for the benefit of the insurer can be waived by the insurer as laid down in *Abdul Azeez & Co. v. New India Assurance Co. Ltd., AIR 1954 Madras 520 (1953) 2 MAD LJ 714*, in which a decision of the Bombay High Court in *Ocean Accident & Guarantee Corporation Company v. Patkar, AIR 1935 Bombay 236*, was followed.”

The Apex Court further observed as under;

“The subsequent cancellation of the Insurance Policy in the instant case on the ground that the cheque through which premium was paid was dishonoured, would not affect the rights of the third party which had accrued on the issuance of the Policy on the date on which the accident took

place. If, on the date of accident, there was a Policy of Insurance in respect of the vehicle in question, the third party would have a claim against the Insurance Company the owner of the vehicle would have to be indemnified in respect of the claim of that party. Subsequent cancellation of Insurance Policy on the ground of non-payment of premium would not affect the rights already accrued in favour of the third party.”

14. In ***National Insurance Co. Ltd. v. Seema Malhotra and Ors., AIR 2001 SC 1197***, the Apex Court observed as under;

“In a contract of insurance when an insurer gives a cheque towards payment of premium or part of the premium, such a contract consists of reciprocal promise. The drawer of the cheque promises the insurer that the cheque, on presentation, would yield the amount in cash. It cannot be forgotten that a cheque is a Bill of Exchange drawn on a specified banker. A Bill of Exchange is an instrument in writing containing an unconditional order directing a certain person to pay a certain sum of money to a certain person. It involves a promise that such money would be paid.

Thus, when the insured fails to pay the premium promised, or when the cheque issued by him towards the premium is returned dishonoured by the bank concerned, the insurer need not perform his part of the promise. The corollary is that the insured cannot claim performance from the insurer in such a situation.

Under Section 25 of the Contract Act an agreement made without consideration is void. Section 65 of the Contract Act says that when a contract becomes void any person who has received any advantage under such contract is bound to restore it to the person from whom he received it. So, even if the insurer has disbursed the amount covered by the policy to the insured before the cheque was returned dishonoured, the insurer is entitled to get the money back.

However, if the insured makes up the premium even after the cheque was dishonoured but before the date of accident it would be a different case as payment of consideration can be treated as paid in the order in which the nature of transaction required it. As such an event did not happen in this case, the insurance company is legally justified in refusing to pay the amount claimed by the respondents.”

15. In the present case, R1W1, Sh. A.N. Chauhan has proved copy of the insurance policy as Ex.R1W1/3 and

further deposed that policy was issued against receipt of cheque Ex.R1W1/1. R1W1 also deposed that cheque was dishonoured and notice was sent to the insured as well as RTO. Copy of notice has been proved as Ex. R1W1/6. The witness further deposed about the issuance of notice under Order XII Rule 8 of CPC to the owner as well as the driver of the offending vehicle and same has been proved as Ex.R1W1/7.

16. However, in his cross examination, R1W1 admitted that copy of the policy was not filed at the time of the filing of the written statement. Further, the courier receipt as well as the proof of delivery of notice sent to owner and RTO has also not been placed on record.

17. According to appellant's case, notice was given to the insured as well as the RTO regarding cancellation of the policy on account of dishonouring of the cheque.

18. As per statement of R1W1, notice was sent to insured as well as the RTO and the copy of the notice is Ex.R1W1/6.

19. Notice Ex.R1W1/6 reads as under;

“Re: Ab-initio cancellation of policy

Notwithstanding anything contained to the contrary, it is hereby agreed and declared that the aforementioned policy is cancelled since inception and National Insurance Company Ltd. is not on risk in respect of the Vehicle covered thereunder.”

20. In the entire notice, it is nowhere stated that the policy has been cancelled, on account of dishonouring of the premium cheque. So, as per appellant's own case, no notice was sent to the insured intimating him that the policy in respect of offending bus issued by the appellant, in favour of the insured, has been cancelled on account of dishonouring of the cheque.

21. Thus, the Tribunal was right in holding that the appellant has failed to intimate the owner as well as

RTO regarding cancellation of insurance policy on account of dishonouring of the cheque, since no witness in this regard has been examined and these facts have not been proved.

22. In view of the above discussion, no infirmity can be found with the judgment of the Tribunal. The present appeal is, thus, not maintainable and the same is, hereby, dismissed.

23. Trial court record be sent back.

September 25, 2008
rs/Bisht

V.B.GUPTA, J.