Niti

IN THE HIGH COURT OF BOMBAY AT GOA

FIRST APPEAL NO.78 OF 2019
AND
MISC. CIVIL APPLICATION NO.601 OF 2019

1. Shri. Aniket Shet,
S/o Anand Shet,
r/o H.no. 720/Q,
Nandan, Merces, Vaddem, Vasco, Goa,
(Driver of Verna Car
Bearing no. GA-06-9086)

2. Smt. Neelam Sheth,
W/o Shri Pratap Sheth,
r/o H.No. 384, near Santosi
Mata Temple, New Vaddem ,
Vasco (Owner of Verna car
Bearing No.GA-06-D-9086) … Appellants

Versus

1. Shri Allabaksh Immamsab Shaikh
Son of Immamsab Shaikh,
Aged 28 years, married,
Pvt. Service, R/o House No. 391,
Nr. Maruti Temple, Mangor Hill,
Vasco-Goa 403802.
7350143078.

2. The Manager,
The National Insurance Company Ltd.,
Souza Towers, 2nd Floor, Dr. Roque
D'souza Road, Nr. Municipal Garden,
Panaji-Goa. …. Respondents

Mr. S.S. Kantak, Senior Advocate with Mr. Simoes Kher Ceazer John, Ms. Neha Kholkar and Ms. Saicha Desai,

Advocate *for the Appellants.*
Mr. Iftikhar Agha with Mr. Ketan Morajkar, Advocate *for Respondent No.1.*
Mr. Amey Kakodkar with Mr. Pankaj Shirodkar, Advocate *for Respondent No.2.*

CORAM: M. S. SONAK, J.

DATE : 12th AUGUST 2022

JUDGMENT :

1. Heard learned Counsel for the parties.

2. The appellants, driver, and owner of Verna car bearing registration no.GA-06-D-9086 (offending vehicle) challenge the judgment and award dated 05.12.2018 in Claim Petition No.161/2014, to the extent the impugned award has directed the Insurance Company to pay the claimant compensation of ₹4,70,000/- with interest at the rate of 9% per annum but after that recover the said amount from the appellant no.2 (owner) with interest. Thus, the challenge in this appeal is to the *'pay and recover'* order.

3. Mr. Kantak learned Senior Advocate for the appellants made it clear that the appellants were restricting this appeal to the issue of pay and recovery. He submitted that there was no warrant to make such an order in the facts of the present case and the law on the subject.

4. Mr. Kantak submitted that the Insurance Company raised no proper defense about the breach of any of the terms and conditions of the insurance policy. Further, the Insurance Company neither led any evidence nor bothered to produce the insurance policy to demonstrate any alleged breach. Finally, he submitted that the ground about the driver not possessing an effective license was neither proved nor was the same accepted by the Tribunal.

5. Mr. Kantak submitted that the ground about the driver being under the influence of alcohol was not shown to be any ground available to repudiate the insurance policy. In any case, the evidence on record, at the highest, indicated the presence of 10mg of alcohol in the blood sample. He referred to Section 185 of the MV Act to submit that the permissible limits were 30mg.

6. Mr. Kantak finally submitted that the defenses raised by the Insurance Company were not defenses permissible under Section 150 of the MV Act as amended. Mr. Kantak relied on ***Bharati Axa General Insurance Co. Ltd. V/s. Geeta & Ors.***[1] and ***National Insurance co. Ltd. V/s. Swaran Singh & Ors.***[2] in support of his contentions.

1 2017 SCC OnLine Kar 6242

2 (2004) 3 SCC 297

7. Mr. Kakodkar, learned Counsel for the Insurance Company, submitted that the grounds now raised by Mr. Kantak were neither raised before the Tribunal nor are these the grounds in the memo of appeal. He offered that even though the Insurance Company may not have led any evidence based on the evidence brought on record by the claimants and through cross-examination, it was apparent that the driver was under the influence of alcohol. He submitted that Section 150 of the MV Act or Section 149 of the MV Act, before its amendment, applies only where the Insurance Company seeks total exoneration. He submits that here the Tribunal has only made an order for pay and recover; therefore, the provisions of Section 149 or 150 will not apply. He submitted that a strict view has to be taken to discourage drunk driving. He referred to the evidence of Chandrashekhar Ganjya (CW3), the Pancha witness, who stated that the driver could not walk properly because he was under alcohol. Mr. Kakodkar relied on ***K. Muthu V/s. C. Chandrasekar & Anr.***[3] in support of his contentions. For all these reasons, Mr. Kakodkar submitted that this appeal may be dismissed.

8. The rival contentions now fall for determination.

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3 2000 (III) CTC 21

9. In their appeal memo, the appellants have not only urged that the impugned award is contrary to law and records but have specifically challenged the findings about the driver being under the influence of alcohol or drunk. Besides, in this case, though the Insurance Company raised the defense about the fundamental breach of the terms and conditions of the insurance policy, neither was any evidence led by or on behalf of the Insurance Company nor was the insurance policy produced on record to demonstrate a breach of any of its terms and conditions.

10. In *Swaran Singh* (supra), the Hon'ble Supreme Court has held that the statutory provision limits the defenses available to an Insurance Company. Furthermore, the insurer must establish a breach on the part of the insured. The party that alleges the breach must prove the same. The Insurance Company is thus required to establish a breach of any of the insurance policy terms by cogent evidence. If the Insurance Company fails to prove that there has been a breach of the insurance policy conditions, then the Insured Company cannot be absolved of its liability.

11. Of course, 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. However, the parties alleging breach must be held to have succeeded in establishing the breach of conditions of the contract of insurance on the insurer's part by discharging its burden of proof. The Tribunal must arrive at such a finding based on the records available. The Court also held that it is trite that where the insurers, relying upon the provisions of law by the assured, take exception to pay the assured or a third party, they must prove a willful violation of the law by the assured. In some cases, violation of criminal law, particularly violation of the provisions of the Motor Vehicles Act, may result in absolving the insurers. Still, the same may not necessarily hold good in the case of a third party. In any event, the exception applies only to acts done intentionally or "so recklessly as to denote that the assured did not care what the consequences of his act might be."

12. In this case, as noted earlier, the Insurance Company neither led any evidence nor bothered to produce on record the insurance policy. Thus, there is no clarity about whether there were any terms and conditions in the insurance policy about driving under the influence of alcohol. The Insurance Company at least, in this case, has not discharged the burden that the law had placed upon it.

13. In ***Narcinva V. Kamat V/s. Alfredo Antonio Doe Martins***[4], the Hon'ble Supreme Court has held that where the Insurance Company complains of breach of terms of contract which would permit it to dishonor its liability, the burden is clearly on it to prove such breach. The test in such a situation would be who would fail if no evidence is led.

14. On the aspect of the driver not having an effective license, there is no evidence. Accordingly, the Tribunal, quite correctly, has not accepted the Insurance Company's case about any breach on the ground that the driver of the offending vehicle did not possess an effective license.

15. However, the Tribunal has made the pay and recovery order based almost entirely on the following observations/finding in paragraph 58 of the impugned award that reads as follows :

> *"58. In the case at hand, the alcohol estimation report, at Exh.91, proves that the respondent no.1 was under the influence of alcohol at the time of the accident and therefore proves the defence of the respondent no.3."*

16. The above finding, in my judgment, is vulnerable because the Insurance Company, in this case, had not even produced the

4 (1985) 2 SCC 574

insurance policy on record to demonstrate any condition about the insurer being absolved if a driver drove the insured vehicle under the influence of alcohol. Mr. Kakodkar, however, submitted that drunk driving is an offense under Section 185 of the MV Act. Therefore the non-production of the Insurance policy was not fatal to their defense.

17. Section 185 of the MV Act, *inter alia,* provides that whoever while driving or attempting to drive a motor vehicle has in his blood alcohol exceeding 30 mg per 100 ml of blood detected in a test by a breath analyzer or is under the influence of a drug to such an extent as to be incapable of exercising proper control over the vehicle shall be punishable for the first offense with imprisonment for a term which may extend to six months, or with fine which may extend to two thousand rupees, or with both.

18. Therefore, even if Mr. Kakodkar's contention is to be accepted, the question is whether Exhibit 91 relied upon by the Tribunal even *prima facie* attracts provisions of Section 185 of the MV Act. Exhibit 91, which is the report of blood alcohol, records the following conclusion:

"REPORT OF BLOOD ALCOHOL
10 mg % of alcohol is present in given sample of blood.

Sd/-
2.08.2013
SEEMA S. PALAV
CHIEF BIO-CHEMIST
HOSPICIO HOSPITAL
Margao-Goa."

19. Section 185 of the MV Act refers to driving a motor vehicle by a person who has in his blood alcohol exceeding 30 mg per 100 ml of blood detected in a test by a breath analyzer. Exhibit 91 offers no clarity about the sample size because it refers to a sample size of 10 CC of blood in a fluoride bulb. That apart, Exhibit 91 refers to 10 mg % of alcohol present in the given blood sample. At least, *prima facie* material does not attract the provisions of Section 185 of the MV Act relied upon by Mr. Kakodkar.

20. The appellants have taken out a Misc. Civil Application No.601/2019 for producing additional evidence on record. The additional evidence sought to be produced, is the judgment and order dated 21.04.2015 in Criminal Case No.24/S/2014/A, by which the driver of the offending vehicle was acquitted. Mr. Kantak submitted that he does not press for this application because an acquittal is not *per se* relevant before the Tribunal, given that the standard of proof before the Tribunal is that of the preponderance of probability.

21. However, Mr. Kakodkar submitted that this acquittal order should be considered because Dr. Sulakshana Naik (PW7), who deposed in this matter, clarified that 10 mg of alcohol in the blood of the driver was a mistake and 100 mg of alcohol was detected in the sample.

22. The acquittal recorded by the Magistrate is not very relevant in the summary proceedings before the Tribunal. In any case, the Magistrate has noted a contradiction between the testimony of Seema Palav (PW3), who had issued the report (Exhibit 91), and PW7. The Magistrate held that the benefit of such contradictory evidence must go to the accused and not to the prosecution. Besides, the Magistrate noted that Seema Palav (PW3) and Sulakshana Naik (PW7) both agreed about the small quantity of alcohol consumed by the accused.

23. Admittedly, the Insurance Company did not lead any evidence in this matter. The Insurance Company did not summon Dr. Sulakshana Naik or Dr. Seem Palav to depose in this matter. The blood report produced in Exhibit 91 does not support the case of the Insurance Company. The Tribunal failed to read the report in the context of the provisions of Section 125. The Tribunal also did not ascertain the effect of non-production of the insurance policy.

24. The above reasons are sufficient to upset the finding in paragraph 58 of the impugned award. Since such finding is the sole basis for making pay and recover order, such order also becomes vulnerable and warrants interference.

25. Accordingly, even without going to the issue of limited defenses available to the insurance company or other grounds urged by Mr. Kantak, no case is made out to interfere with the pay and recover order. This means that the Insurance Company will have to pay the awarded amount, but it cannot recover the amount from the appellants.

26. In *K. Muthu* (supra), the insurance policy was produced on record and marked as Exhibit R-1. The Court noted that there was a specific clause that the Insurance Company was not liable to make any payment in respect of accidental loss or damage suffered while the insured or any person driving with the knowledge and consent of the insured was under the influence of intoxicating liquor or drugs only in respect of damage to the property. The Court, however, noted that when it comes to a third party, who sustained injuries in the accident, the Insurance Company cannot be wholly absolved for violations of the conditions of the policy. The Insurance Company must pay such a third party but can recover the amount from the insured after that.

27. In this case, since no insurance policy was produced, it is difficult to ascertain whether any such condition existed in the insurance policy. In *K. Muthu* (supra), the condition referred to the driver driving the insured vehicle under the influence of intoxicating liquor or drugs with the knowledge and consent of the insured. Therefore, the decision in K. Muthu (supra) does not assist the Insurance Company in the present case.

28. The appeal is, therefore, allowed and the impugned award to the extent it permits the Insurance Company to recover the amount from the appellants is quashed or modified. There shall be no order for costs. Misc. Civil Application No.601/2019 also does not survive, and the same is disposed of.

M. S. SONAK, J.