IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 632 of 1983
with
CROSS OBJECTIONS

For Approval and Signature:

Hon'ble MR.JUSTICE D.C.SRIVASTAVA and

MR.JUSTICE H.K.RATHOD

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

NEW INDIA ASSURANCE CO.LTD.

Versus

AMRUTLAL KANJI SONI

Appearance:
MR R. H. MEHTA for Petitioner
NOTICE SERVED for Respondent No. 1
MR KF DALAL for Respondent No. 5

CORAM : MR.JUSTICE D.C.SRIVASTAVA and
MR.JUSTICE H.K.RATHOD

Date of decision: 31/01/2000

ORAL JUDGEMENT

(Per : D.C.Srivastava, J.)

1. This Appeal and the Cross objections, being connected, are proposed to be disposed of by a common judgment.

2. Appeal No.632 of 1983 has been filed by New India Assurance Co.Ltd. in which Soni Amrutlal Kanjibhai, respondent No.1 is the claimant, respondent No.2 Meman Gafur Mohmedyakubbhai is the owner of truck bearing No.GTF 2671, insured with the appellant. The respondent No.3 was the driver and respondent No.4 is the owner of truck No.GTB 4863 which was insured with the respondent No.5. The two claim petitions No.258/79 and 40/80 were filed claiming compensation of Rs.1,50,000/- and Rs.50,000/- respectively by Amrutlal Kanjibhai and Ibrahim Osman. Accident took place on 31.7.1979 at 11.00 p.m. on Rajkot - Jamnagar National Highway. In this accident Truck No.GTF 2671 was moving on the road and the other vehicle was stationary. Soni Amrutlal Kanjibhai took his position in the driver's cabin of the moving truck. He had tool box with him. Two more persons were also taken by the driver as passengers in the said truck. Before moving vehicle left Rajkot one person arrived and handed over a bundle containing cloths to Amrutbhai and instructed him to hand it over to cloth merchant of Padadhari and paid charges for the same to the driver of the moving vehicle. It was alleged that the moving truck No.GTF 2671 was driven rashly and negligently and it did not take notice of stationery vehicle on the road as a result of which both the vehicles collided. The two persons sustained injuries. Both were given treatment in Government Hospital, Rajkot and then they were removed to Orthopadic Hospital at Jamnagar. Compensation was, therefore, claimed on account of injuries sustained by the two injured.

3. Claim petitions were contested by the respondent No.5 as well as by the appellant.

4. The Tribunal after scrutinising the evidence, oral as well as documentary, and also medical evidence, found that the liability of the appellant under policy and on the facts and circumstances of the case was 70 % and that of the respondent No.5 was 30 %. It has been informed by Shri Mehta that no appeal has been filed against the Award in claim case No.40 of 1980. This Appeal has been filed against the Award rendered in Claim Case No.258 of 1979.

5. Main contention of Shri Mehta for the appellant has been that since the injured, respondent No.1, was travelling in a goods vehicle, namely, truck No.GTF 2671, there was no liability of the appellant - New India Assurance Co. either within the limits of the insurance policy or within the ambit of Section 95(1)(b)(i) of the Motor Vehicles Act. Shri Mehta has referred firstly to the Insurance Policy and has argued that in this policy there was a specific limitation as to use of the vehicle for the purposes of carrying passengers for hire or reward. Shri Mehta argues that since there was specific prohibition for carrying passenger for hire or reward there is no liability of the appellant company. Secondly he has referred to the Apex Court verdict in the case of Smt. Mallawwa etc. v/s. The Oriental Insurance Co. Ltd., reported in JT 1998 (8) SC 217 and has argued that this case has settled the liability of the Insurance Company in such cases and has clearly held that the vehicle cannot be said on the facts and circumstances of the case, as vehicle for carrying passengers for hire or reward.

6. None has appeared on behalf of the respondents No.2 to 4. Shri K.F.Dalal appears for the respondent No.5, but no Appeal or cross objection has been filed by the respondent No. 5.

7. On the record there is cross objection from the respondent No.1 filed by Shri H.M.Lathia, Advocate, but no progress has taken place on this cross objection. Neither the respondent No.1, who has filed this cross objection, nor his counsel is present. As such before taking up this Appeal, Cross objection can be summarily dismissed in default. Even bare perusal of the Cross Objection shows that there is no substance in it. The second prayer is for remanding the matter to the Tribunal to enable the respondent No.1 to adduce oral evidence of Dr.B.N.Desai, Neuro Surgeon at Ahmedabad to prove medical certificate issued by him. We are not inclined to consider this request for the obvious reason that there is nothing on record to show that the Tribunal prevented the respondent No.1 from examining Dr. B.M.Desai.

8. So far as the first relief in the cross objection is concerned it is stated that the claim be allowed in toto with full costs and interest at the rate of 12 % from the date of accident till realisation. In support of this relief, plea of Promissory Estoppel has been pressed in service in Para : 4 of the Cross Objections. We are unable to accept the plea of Promissory Estoppel

as against the Insurance Company. The insurance policy itself prima facie rules out that at no point of time, either orally or in writing, the appellant made promise to compensate for the injury or death of a passenger who was carried on the goods vehicle. On the other hand terms and conditions of the policy contain total restriction for carrying passengers in the goods vehicle.

9. For the aforesaid reasons cross objections are dismissed.

10. Coming to the Appeal filed by the appellant the findings recorded by the Tribunal on Point No.5, Para : 20 and 21 have been examined. Insurance Policy Exh.56 was referred by the Tribunal. There was argument from the side of the Appellant before the Tribunal that in terms of the Insurance Policy the appellant was not at all liable to pay any compensation. The findings of the tribunal seem to be self contradictory. The Tribunal has admitted, while giving this finding, that both the conditions are included in the motor policy, namely, that the use of the vehicle was limited to public carrier permit and secondly it was not permissible to use goods vehicle for conveying passengers on hire or reward. The tribunal, however, found that Amrutlal was not taken as mere passenger on hire or reward, but on the evidence lead before it, the Tribunal found that Amrutlal was travelling in the moving vehicle as caretaker of a bundle of cloth entrusted to him for the purpose of conveying the same from Rajkot to Padadhari and from this it can be said that he had hired the truck for the purpose of conveying the goods (bundle) from Rajkot to Padadhari. This finding of the Tribunal cannot be sustained nor accepted. As indicated in the foregoing portion of this judgment, it is clear that the bundle of cloth was given to the respondent No.1 while travelling from Rajkot to Padadhari. The freight for the goods and fare for the respondent No.1 was paid to the driver on the way. On these facts it cannot be said that the respondent No.1 had hired the vehicle for carrying the goods and he was simply caretaker. Even if for a moment if we proceed on the assumption that the respondent No.1 was caretaker of a bundle of cloth it can not be said that the vehicle was used for carrying passenger for hire or reward.

11. This controversy arose in number of cases before various High Courts where conflicting views were taken on the point. The controversy was whether in the case of death of the owner of goods being carried in a goods vehicle the insurer of the goods vehicle is liable to pay the compensation awarded by the Tribunal to his legal

heirs. The matter was taken up before the Division Bench of the Apex Court and the Division Bench of the Apex court thought it proper to refer this question before the larger Bench of the Apex Court viz. whether the passenger was carried in goods vehicle for hire or reward. It was laid down by the Apex Court that the correct test to determine whether a passenger was carried for hire or reward, would be whether there has been a systematic carrying of passengers. Only if the vehicle is so used then that vehicle can be said to be a vehicle in which passengers are carried for hire or reward. It would not be proper to consider a goods vehicle as a passenger vehicle on the basis of a single use or use on some stray occasions at that vehicle for carrying passengers for hire or reward.

12. From the above test laid down by the Apex Court it is clear that if a goods vehicle was used on one occasion for carrying one or two passengers, may be the owner of the goods, labourer or passenger simpliciter, it cannot be said that the vehicle was used for carrying passengers for hire or reward. Looking to this test even if on more than one occasion or on a stray occasion the goods vehicle was so used it cannot be said that it was meant or permitted to be used for carrying passengers for hire or reward.

13. Conflicting views of various High Courts were brought to the notice of the Apex Court and the Appex Court approved the view of the Full Bench of the Orissa High Court in New India Assurance Co. v/s. Kanchan Bewa & ors. reported in 1994 ACJ 138. In Para : 11 of the Judgment the Appex Court has observed that ....in our opinion the said view of the Orissa High Court is correct even otherwise also."

14. Coming to the facts of the case before us the finding of the Tribunal is that a bundle of cloth was being carried for delivery by the respondent No.1. Even if he was caretaker of bundle of cloth position does not change in any view of the matter when in view of the tests laid by the Hon'ble Supreme Court.

15. There is no evidence in this case that the goods vehicle was frequently or regularly used for carrying passengers and goods for hire or reward either as owner of the goods or as caretaker.

16. For the reasons stated above, we are of the view that the Tribunal has patently erred in holding New India Assurance Co. liable to the extent of 70 %. On the

other hand, as per the conditions of the policy and also in the light of the verdict of the Apex Court, appellant is not liable to any extent for payment of compensation to the respondent No.1. The Appeal, therefore, succeeds and has to be allowed.

17. In the result while dismissing the cross objection we allow the Appeal and set aside the Judgment and Award of the Tribunal so far as it held Insurance Company liable to pay compensation to the respondent No.1 to the extent of 70 %.

Before parting with this judgment we clarify that if the appellant has deposited any amount in compliance of the Award before the Tribunal towards compensation, cost and interest and if the same or any portion thereof has been paid to respondent No.1 and the rest is in deposit with the Tribunal, the same may be refunded to the appellant.

(D. C. Srivastava, J.)

Date : 31.1.2000

(H. K. Rathod, J.)

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