IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No. 2736 of 2001

For Approval and Signature:

HONOURABLE MR.JUSTICE KS JHAVERI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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UNITED INDIA INSURANCE CO. LTD - Appellant(s)
Versus
RAMUBHAI KALIDAS PATEL & 2 - Defendant(s)

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Appearance :

MR VIBHUTI NANAVATI for Appellant(s) : 1,
MR RC JANI for Defendant(s) : 1 - 2.
SERVED BY RPAD - (N) for Defendant(s) : 3,

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CORAM : HONOURABLE MR.JUSTICE KS JHAVERI

Date : 30/04/2012

ORAL JUDGMENT

1. By way of this appeal under Section 173 of the Motor Vehicles Act, 1939, the appellant has challenged the

judgement and award dated 09.06.2000 passed by the Motor Accident Claims Tribunal (Aux), Valsad in M.A.C.P No. 368 of 1990 whereby the Tribunal directed the original opponents to jointly pay compensation to the tune of Rs. 86,400/- along with interest at 12% per annum and proportionate costs.

2. The aforesaid claim petition arose out of the accident which occurred on 26.12.1989 when Shri Amrutbhai Patel was riding his bicycle near Vapi GIDC. At that time a tempo bearing registration no. MCY 5146 being driven by the original opponent no. 1 in a rash and negligent manner hit the bicycle as a result of which Shri Amrutbhai fell down and expired. The original applicants had filed claim petition seeking compensation. The Tribunal after hearing the parties passed the aforesaid award.

3. Mr. Vibhuti Nanavati, learned advocate appearing for the appellant has contended that the present appellant ought to have been held not liable to pay the compensation amount as a specific contention was raised by the insurance company before the Tribunal in the written statement that at the time of accident, the tempo bearing no. MCY 5146 was not insured with the insurance company. He submitted that the Tribunal has wrongly relied upon Ex. 31 which is only the registration certificate issued by RTO Office, Thane wherein the insurance policy number was referred as 537346 which actually is not the policy number.

3.1 Mr Nanavati has placed reliance on the decisions of this Court in order to substantiate his contentions. He has relied upon the decision in the case of **The New India Assurance**

Co. Ltd. vs. Modi Narayanbhai Maganbhai & Others reported in 1986(2) GLR 1185 and in the case of **Oriental Insurance Co. Ltd. vs. Tulsiben Panalal Joshi reported in 2001(1) GLH 237**

4. Mr. R.C. Jani, learned advocate appearing for the original claimants has supported the award passed by the Tribunal and submitted that the Tribunal has rightly considered Ex. 22 & Ex. 31 and came to the conclusion that the insurance company is liable to pay compensation to the claimants. He submitted that it is the duty of the insurance company to act fairly and produce the insurance policy. In support of his submissions, Mr. Jani has relied upon a decision of the Apex Court in the case of **National Insurance Company Ltd. vs. Jugal Kishore reported in AIR 1988 SC 719 (=1988(1) SCC 626)** and in the case of **Laxmibai Vs. Karnataka State Road Transport Corporation, Banglore reported in 2001(5) SCC 59.** Reliance is also placed on a decision of the Kerala High Court in the case of **New India Assurance Co. Ltd. vs. V.N. Thankappan and Others reported in AIR 1995 KERALA 40.**

5. Heard learned counsel for the parties. I have gone through the averments made in the appeal and documents placed on record including the award of the Tribunal. From the perusal of the award, it is clear that the present appellant had strongly contended before the Tribunal that it is absolved from the liability of paying compensation in view of the fact that the vehicle alleged to have been involved in the accident being MCY 5146 was not insured with the original opponent no. 2 insurance company on the date of accident. The

claimants did not produce the insurance policy on record. The Tribunal has observed the same in para 13 of the impugned award.

5.1 Ex. 22 is the panchnama and Ex. 31 is the registration certificate of the RTO Office, Thane wherein the vehicle number is referred as 537346. The Tribunal has specifically observed in the impugned award that the applicants have not produced any insurance policy and that the insurance company has not led any evidence to rebut the claim of the claimants.

5.2 A perusal of the decisions relied on by the learned counsel for the either side is relevant at this stage. In the case of The New India Assurance Co. Ltd. (supra) it is held in para 3 as under:

> "3. Now, as the appeal is being withdrawn by the appellant, ordinarily I would not have passed a speaking order, but it is necessary to do so for the guidance of the Tribunals. In the present case, neither the claimant not the owner of the vehicle gave any details about the policy of Insurance so as to enable the Insurance Company to trace from their records whether the vehicle was insured with the Insurance Company at any time. It was not possible for the Insurance Company to trace from their records whether the vehicle was insured with the said Insurance Company on the date of this accident, if at all it was insured with the said Company. The Tribunal also did not call upon the owner of the vehicle to produce the policy of insurance or any other document showing that the vehicle was insured or any other document showing that the vehicle was insured on the date of this incident with this Insurance Company. Inspite of the fact that no material was produced before the Tribunal showing that the vehicle was insured with the appellant Insurance Company, the learned Tribunal passed an award against the Insurance Company, The relevant contention in this regard has been discussed by the Tribunal at para 8 of the

judgment under appeal. The learned Tribunal has observed that the Insurance Company was trying to avoid its liability. The learned Tribunal has also observed that the Insurance Company being a pubic body was expected to act in a fair manner and should not act to avoid its liability by coming out with such a vague allegation. The learned Tribunal has observed that though sufficient time was given to the Insurance Company, the Insurance Company could not trace the policy. The Tribunal has also observed that there was gross negligence on the part of the Insurance Company. The learned Tribunal has taken the view that the Insurance Company did not come forward with a specific say that the vehicle was not insured with them even though sufficient time was given to them to ascertain this fact and, therefore, it cannot be believed that the vehicle was not insured with them. This view of the learned Tribunal, with respect, was not a correct one. The approach of the learned Tribunal was not proper. **The Tribunal ought to have called upon the applicant-claimant as well as the owner of the vehicle to give details of the insurance so to enable the Insurance Company to search their records and come forward with a say whether the vehicle was insured with them on the date of the incident or not. It will be very difficult, well-neigh impossible, for an Insurance Company to search their huge records and find out whether a particular vehicle was insured with them unless some material is supplied to the Insurance Company to make search in their records. The Insurance Companies have got several branches throughout the country and unless it is known as to with which branch the vehicle was insured and for what period and in whose name, it will be difficult, well-nigh impossible, for the Insurance Companies to search their records to ascertain whether the vehicle was insured with them and hence the Insurance Company naturally cannot come forward with positive statement that the vehicle was not insured with them. Simply because a petition for compensation under the provisions of the Motor Vehicles Act is filed against an insurance Company, it cannot be presumed in absence of some material on record that the vehicle was insured with that Company on the relevant date i.e. the date of accident simply because the petitioner and even owner of the vehicle come forward with a say that the vehicle**

was insured with a particular Insurance Company on the date of the accident. Instead of finding fault with the Insurance Company, if the Tribunal had called upon the opponent-owner to produce the certificate of insurance or any other document showing that the vehicle was insured with this Insurance Company on the date of the accident, then the owner would have certainly produced the same, as has been done in this appeal. The Insurance Company would have in that case admitted after searching their record that the vehicle was insured with them. I would also like to mention here that it was not proper on the part of the learned Tribunal to have made passing and sweeping observations against the Insurance Company. The Insurance Company was not at all interested in denying the Claim if, in fact, the vehicle was insured with the said Company. Simply because the Insurance Company was not able to trace their records for want of necessary information, it cannot be said that the Insurance Company waned to avoid the liability. The Insurance Company, on the contrary, has been very fair to this extent that no sooner the opponent-owner produced before this Court yesterday the Certificate of Insurance, inquiry was made immediately and today Mr. Mehta fairly conceded that no interference was called for with the award passed by the Tribunal in these circumstances and the very fairly withdrawn the appeal, as stated in the beginning. The Insurance Companies are responsible bodies and their officers are responsible officers who cannot have any reason to deny the factum of insurance if the vehicle is, in fact, insured with the concerned Company. It would not be fair to the Insurance Companies and their officers to make observations criticising. Them as was done in the present case by the learned Tribunal I hope that the Tribunals working under the Motor Vehicles Act will make proper approach in such cases and instead of finding fault with the Insurance Companies and their officers and instead of saddling the Insurance Companies with liabilities without any material on record, see that necessary material is brought on record an order is passed against an Insurance Company."

[Emphasis Supplied]

5.3 In the case of Oriental Insurance Co. Ltd. (supra), it is

held in para 10 as under:

> “10. Before appreciating the above contention, we propose to dispense some of the arguments raised by Mr. Pandya. His first contention has been that the insurance company has not examined any witness from its side and as such, adverse inference is to be drawn against the insurance company. He has placed reliance upon two verdicts of the Supreme Court in the case of Ishwarbhai C. Patel v. Harihar Behera (1999) 3 SCC 457 and in case of Vidhya-dhar v. Manikrao (1999) 3 SCC 573. On the face of these two cases, it can be said that the law laid down by the Apex Court in these two cases is not applicable to the facts of the case before us. What the Apex Court has laid down in these two cases is that if a party, may be a plaintiff or a defendant, does not enter the witness-box to support his case and does not allow an opportunity to cross-examine him, an adverse inference can be drawn against such party. Here, there was no occasion for the insurance company to examine the officers of the same. The reason is that the insurance company admitted that the truck No. RRG 5902 was insured with it. It is well settled law that a fact which is admitted need not be proved. Since the insurance company admitted that the truck aforesaid was insured with it, there was no requirement for the appellant to examine any officer to prove the insurance policy or the copy of the insurance policy. It is a matter of common knowledge that the original policy is handed over to the owner of the vehicle. The owner of the vehicle, as mentioned earlier, did not file any written statement nor appeared before the Tribunal in response to the summons issued to him by the Tribunal. Consequently, there was no obligation on the part of the insurance company to summon the original policy from the owner of the truck. **On the other hand, the law is quite settled that if the claimants want to claim compensation either from the owner of the vehicle or from the driver of the vehicle or from the insurer of the vehicle, it is for them to establish following things:**
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> **(i) That the accident took place, in which the motor vehicle was involved.**
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> **(ii) Such accident took place due to rash and negligent driving of the vehicle by its driver.**
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> **(iii) That the driver of the vehicle had valid licence for driving heavy vehicle in the case where the**

truck was involved in the accident.

(iv) That injury either personal or fatal was caused to the victim. Unless these ingredients are established by the claimants they cannot succeed in claiming any compensation. Thus, the initial burden lies upon the claimants to establish that the vehicle was insured. For that, they have to summon the insurance policy from the owner. As such, there cannot be any shifting of burden of proof upon the insurance company to summon the original policy from the owner, more particularly when the insurance company had admitted the factum of insurance and has relied upon the copy of the insurance policy placed on the file by the insurance company. In these set of facts we are unable to accept the contention of Mr. Pandya that the copy of the insurance policy is not proved, hence it could not be read in evidence and mere marking of paper is not enough and this copy of policy could not be admitted in evidence or read in evidence unless it was exhibited. On this technicality, more particularly when factum of insurance of the vehicle is admitted by the insurance company, the case of the appellant cannot be turned down."

[Emphasis Supplied]

6. As far as the decisions cited by learned advocate for the respondent is concerned, in the case of National Insurance Company Ltd. (supra) the Apex Court has observed in para 10 as under:

> "10. Before parting with the case, we consider it necessary to refer to the attitude often adopted by the Insurance Companies, as was adopted even in this case, of not filing a copy of the policy before the Tribunal and even before the High Court in appeal. In this connection what is of significance is that the claimants for compensation under the Act are invariably not possessed of either the policy or a copy thereof. This Court has consistently emphasised that it is the duty of the party which is in possession of a document which would be helpful in doing justice in the cause to produce the said document and such party should not

> be permitted to take shelter behind the abstract doctrine of burden of proof. This duty is greater in the case of instrumentalities of the State such as the appellant who are under an obligation to act fairly. In many cases even the owner of the vehicle for reasons known to him does not choose to produce the policy or a copy thereof. **We accordingly wish to emphasise that in all such cases where the Insurance Company concerned wishes to take a defence in a claim petition that its liability is not in excess of the statutory liability it should file a copy of the insurance policy along with its defence.** Even in the instant case had it been done so at the appropriate stage necessity of approaching this Court in Civil Appeal would in all probability have been avoided. Filing a copy of the policy, therefore, not only cuts short avoidable litigation but also helps the Court in doing justice between the parties. The obligation on the part of the State or its instrumentalities to act fairly can never be over- emphasised."
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> [Emphasis Supplied]

6.1 In the case of New India Assurance Co. Ltd. (supra) the Kearla High Court has held that duty to produce the policy of insurance is on the insurance company incase the owner of vehicle involved fails to produce it.

6.2 The Apex Court in the case of Laxmibai (supra) held that Tribunal therein on the basis of evidence both oral and documentary produced in support of the case of the appellant and withholding of the documentary evidence by the respondent was right in holding that the bus was involved in the accident.

7. As a result of hearing and perusal of records and in view of the decision of the various Courts, I am of the opinion that the contentions raised by the appellant is required to be

accepted. The contention raised by the insurance company that policy number which was a sixteen digit number was not referred anywhere and that the vehicle was not insured with the insurance company and that the policy number which was mentioned as 537346 was given by the RTO office, Thane was not sufficient to establish that the vehicle was insured with the insurance company.

7.1 An attempt has been made by learned advocate for the respondent claimants that it is the pious duty of the insurance company to prove that the vehicle was not insured with it. In view of this Court the negative claim cannot be proved by the insurance company unless some specific details are given by the claimants. It shall be impossible for the insurance company to verify on abstract claims. In fact the claimants could have called upon the owner or the insurance company to produce the register maintained for the relevant period or the policies which started a month back of the date of policy the claimants were claiming. In that view of the matter, considering the aforesaid decisions of this Court which are squarely applicable to the present case, the award of the Tribunal is required to be modified by not holding the present appellant liable for the compensation payable to the original claimants. The Tribunal has committed an error in not exonerating the insurance company from the claim.

7.2 As far as the decisions cited by learned advocate for the claimants is concerned, in the case of National Insurance Company Ltd. (supra) the issue involved therein was that the insurance company's liability is not in excess of the statutory liability. Here in the present case, the issue is altogether

different and therefore the said decision cannot be applicable on the facts of the present case. The decision in the case of New India Assurance Co. Ltd. (supra) is also on the same lines and therefore cannot be applied in the present case. Moreover, the decisions relied upon by the learned advocate for the claimants is before the Division Bench decision of this Court.

8. In the premises aforesaid, the appeal is allowed. The award of the Tribunal is quashed and set aside qua liability of the insurance company-present appellant. The amount deposited by the insurance company shall be refunded. However, if the amount is withdrawn by the original claimants, the same shall not be recovered. It will be open for the insurance company to recover the same from the owner and if the amount is not paid to the claimants it will be open for the claimants to recover the same from the owner. The award of the Tribunal is modified accordingly. No order as to costs.

(K.S. JHAVERI, J.)

Divya//