IN THE HIGH COURT OF BOMBAY AT GOA

FIRST APPEAL NO. 288 OF 2007

1. National Insurance Co.Ltd.,
Subraya Chambers, 1st Floor,
Francisco Luis Gomes Road,
Vasco Da Gama, Goa. ….Appellants.

V e r s u s

1. Shri Saber Sheikh
S/o. Late Asebari Seikh,
53 years old, labourer,
R/at Syed Kulut Village,
P.O. Shapur,
District Murshidabad,
West Bengal.

2. Smt. Tuktuki Bibi Seikh
D/o. Late Jabber Seikh,
40 years old, housewife,
R/at Syed Kulut Village,
P.O. Shapur,
District Murshidabad,
West Bengal.

3. Shri Mohan Bablo Maulinkar,
driver of B us No. GA-01/V-5686
R/at House No.E-39,
Porvorim Bazar,
Porvorim, Bardez, Goa.

4. Shri Rajendra VasantNaik,
Owner of Bus No.GA-01/V-5686,
R/at House No.1, Vancio Wado,
Guirim, Bardez, Goa. …. Respondents

Mr. E. Afonso, Advocate for the Appellants.

Mr. Sahil Sardessai, Advocate for the Respondent nos.1 and 2.

Mr. J. Godinho, Advocate for the Respondent nos.3 and 4.

Coram :- **SMT. M. S. JAWALKAR,J.**

Reserved on : 4th December 2020

Pronounced on: 17th December, 2020

JUDGMENT

1. Heard Mr. E. Afonso, the learned Counsel for the appellants, Mr. Sardessai, the learned Counsel for the respondent nos. 1 and 2 and Mr. J. Godinho, the learned Counsel for the respondent nos.3 and 4.

2. The present appeal is filed by original respondent no.3, being aggrieved by the judgment and award dated 21st May, 2005 in Claim Petition No. 30 of 2003, passed by the Motor Accident Claims Tribunal, Mapusa.

3. The case of the claimants before the Claims Tribunal was as under :

That Yusuf, since deceased, aged 22 years, was doing the work of embroidery and working with one Naseerudin Anjawar earning Rs.5,000/- per month. On 10.03.2003, when he was walking completely left edge of the tar road, the respondent no.1 driving the bus bearing no. GA-01 V-5686 proceeding from Porvorim to Mapusa, went completely on the edge of the road and came behind the deceased and further crushed him under its wheels. It caused the instantaneous death of Yusuf. He claimed compensation form all the respondents.

4. The respondent nos.1 and 2 denied the contents in the Claim Petition. It is contended that the respondent no.1 driver was not rash and negligent and deceased himself was responsible for his death. It is also contended by respondent no.2-owner of the vehicle that the vehicle was insured with respondent no.3 since several years and respondent no.2 had deposited a cheque favouring the respondent no.3. The respondent contacted the office of the respondent no.3, who had informed that the cheque was not realised and demanded money which was paid by the respondent no.2 and, therefore, respondent no.3 is liable to pay.

5. Respondent no.3 took the specific plea that the bus involved in the accident was not insured with them on the date of the accident i.e. 10.03.2003 and they were not liable to pay any compensation to the claimants.

6. After considering the evidence on record, the learned Tribunal awarded compensation of Rs.2,68,500/- to the claimants and made respondent nos.2 and 3 jointly and severally liable to pay the compensation.

7. The insurance company filed the present appeal mainly on the ground that Tribunal erred in holding insurance company liable to pay along with respondent nos.2 and 3 jointly and severally specifically when there was no policy covering period of accident. The impugned judgment and award is founded on unwarranted presumptions and unsustainable inferences. The Tribunal erred in not ordering the respondent nos.3 and 4 (original respondent nos.1 and 2) to reimburse the appellant the amount paid by the appellant to respondent no.1 and 2 (original claimants) in satisfaction of award under Section 140 of the Motor Vehicles Act. The

Tribunal erred in holding that the appellant is liable to pay the compensation when the issue no.4 is answered in the negative as against the original respondent nos.1 and 2 and issue no.5 in the affirmative in favour of the appellant.

8. Learned Advocate for the appellant, Mr. E. Afonso, submitted that the judgment and award passed by the learned Claims Tribunal is patently illegal and requires to be set aside so far as it holds respondent no.3 liable to pay the compensation jointly and severally with respondent no.2. The learned Tribunal gave its negative finding against the issue that whether the respondent nos.1 and 2 prove that the vehicle bearing registration GA-01/V-5686 was having a valid insurance cover on the date of accident. It also gave finding against issue no.5 in favour of the appellant i.e. whether the respondent no.3 proves that the bus bearing registration no.GA-01 V-5686 was not insured on the date of the accident. After recording these findings, the learned Tribunal ought to have exempted insurance company from any liability. It is contention of the appellant that from the Claim Petition itself, it can be seen against clause no.17 that the reference of policy

number is shown valid from 15.03.2003 to 14.03.2004. As such, the said policy was not in effect on the date of the accident. It is the case of the Insurance Company that the policy was issued in the name of one Pravin Parsekar against the deposit of cheque of the said vehicle. The said cheque was dishonoured and the said Pravin Parsekar was duly intimated about the dishonour of cheque. Subsequently, on 15.03.2003, on cash payment, a fresh policy was issued of the said vehicle in the name of owner of the vehicle, original respondent no.2.

9. It is contended by learned Counsel Shri Afonso that there is no duty of insurer to give any notice in view of amended Act. It is further his contention that one Pravin Parsekar came with the cheque issued by Rajendra Naik and the policy was issued in the name of Pravin Parsekar. It is not the responsibility of the insurance company to see who is the owner. Insurance Company only accepts the amount and issues the policy. Pravin Parsekar is not a party. There is no policy issued in the name of respondent no.2-Rajendra Vassant Naik covering the day of accident. There is no

complaint either by Mr. Parsekar or Rajendra Naik that policy is issued in wrong name. On dishonour of cheque, notice was duly issued to said Pravin Parsekar. As accident occurred after issuance of notice, there is no liability of insurance company to pay any compensation. In view of amended Act, in fact, there is no notice required on dishonour of cheque and it is one of the condition of the policy that on dishonour of cheque, the policy will stand cancelled. On cash payment subsequently, new policy was issued which was in effect from 15.03.2003. The earlier policy was issued on 20.02.2003 in the name of Pravin Parsekar. The contention of respondent no.2/owner, that next day when he went to collect the policy,company neither issued policy nor handed over the dishonoured cheque which shows that he was having knowledge that on next day itself the cheque was dishonoured. At one place owner contended that after the accident when he went to collect the policy, it was informed that the cheque was dishonoured and policy was issued on payment of premium in cash.

10. Learned Counsel relied on the following citations :

1. Deddappa & Ors. vs. Branch Manager, National Insurance Company Ltd., 2008(2) SCC 595

2. Judgment of Gujarat High Court in First Appeal 2067 of 2005 to First Appeal no.2070 of 2005 decided on 31.01.2017 in United India Insurance Company vs. Anilaben Ashok Kumar Patel & Ors.

3. ***Oriental Insurance Company Ltd. vs. Prakash Chunilal Mirgany & Ors. 2004(6) BCR 422***

4. National Insurance Company Ltd., vs. Daljeep Kaur & Ors. 2004(2) SCC 1

11. Learned Counsel for original respondent no.2, Shri Godinho, has submitted that no copy of policy which was issued on 20.02.2003 is placed on record. It is contended that it is issued in the name of one Pravin Parsekar. However, there is nothing on record to show that the said policy was issued in the name of Parsekar. Even if it is presumed that intimation of dishonour of cheque is given though there is no proof of such intimation received by said Pravin Parsekar,

admittedly, it is not issued to the respondent no.2 who is having the vehicle registered in his name and even cheque was issued from his account. When these documents are within the knowledge of the insurance company, the insurance company was duty bound to place it on record. There is nothing on record to show that any copy of policy dated 20th February 2003 was handed over to said Parsekar. It is nothing but attempt on the part of the insurance company to cover up their mistake and shirk of the liability of payment of compensation to third party. As there was no intimation to the owner of vehicle cancelling the policy, the insurance company is liable to pay the amount of compensation.

12. Learned Counsel Shri Godinho, relied on the following citation :

1. United India Insurance Company Ltd. vs. Laxmamma 2012(5) SCC 234.

2. Oriental Insurance Company Ltd., vs. Inderjeet Kaur & Ors. 1998(1) SCC 371

13. The rival contentions now fall for my determination. It is

a matter of record that earlier the present First Appeal came to be disposed off vide judgment dated 22.08.2013 and pay and recover order came to be passed. Subsequently, on the application made by the learned Counsel for the owner Shri Godinho, the said judgment is set aside and the said appeal was directed to be heard afresh. Accordingly, the present appeal is heard afresh after granting opportunities to all parties.

14. Admittedly, the Tribunal answered issue no.4 against driver and owner and issue no.5 in favour of insurance company. For the sake of convenience, issue nos.4 and 5 are re-produced herein below:

> "Issue no.4 – Whether the respondents nos.1 and 2 prove that the vehicle bearing registration no.GA-01/V-5686 was having valid insurance cover on the date of accident ?
>
> Issue no.5 – Whether the respondent no.3 proves that the bus bearing registration no.GA-01/V-5686 was not insured on the date of accident ?"

15. From the pleadings, it appears that the case of the original respondent no.2 is that the said vehicle was belonging to respondent no.2 and insured with the National Insurance Company, respondent no.3 for the last several years. Respondent no.2 deposited a cheque of an amount of Rs.11,555/- of his account in favour of respondent no.3 which is in possession of respondent no.3. After the vehicle met with an accident, the same was attached by the Mapusa Police. As insurance policy was directed to be produced, he went to the office of the respondent no.3 and asked for insurance policy where he came to know that the cheque has not been realised and insurance company demanded money from the respondent no.2 instead of giving policy certificate. Accordingly, he paid amount and asked to issue the certificate so as to produce before the police. Inspite of this, dishoured cheque was not returned to respondent no.2. As there was no intimation of cancellation of policy or of any dishonour of cheque, the insurance company is very much liable to pay the compensation to the claimant and respondent no.2 is not liable to pay.

16. In fact, after going through record, issue no.5 appears to have been deleted. Inspite of this fact, it is discussed and answered in the judgment. Respondent no.2-owner, to establish that there was insurance policy of the involved vehicle and to substantiate this claim he examined himself as Rw.2 as well as Rw.5 Erica Mesquita Benjamin. Rw.2 deposed that the vehicle was insured with insurance company and he had paid the premium vide cheque bearing no.472100. His vehicle is insured with insurance company for last several years till the date of his deposition (i.e. 18.06.2004). He was called by the respondent no.3 the next day to collect the policy. However, when he went to collect the same, company refused to issue a policy and also refused to return his cheque. As policy was required, he was forced to make cash payment. He placed on record R.C. Book, fitness certificate, other relevant certificates, counter foil of the cheque and bank passbook (Exhibit 49).

17. Rw.5, Erica, was examined by respondent no.2. She is in service of respondent-Company. She deposed that the cheque was received in the Margao Branch on behalf of one

Pravin Parsekar bearing no. 472100 dated 20.02.2003 for an amount of Rs.11,555/-. The said cheque was presented on the same day which was returned for insufficient funds. She produced on record cheque along with note of Bank She further deposed that since the cheque was returned dishonoured, the said Parsekar was notified about it by registered post acknowledgment due and similarly the office of the RTO Margao. She produced on record letter dated 04.03.2003 with the photocopy of the postal receipt (exhibit 70). The commencement of the said policy was from 24.02.2003 while the expiry was on 23.02.2004. The said Pravin Parsekar was duly notified that the cheque drawn by him favouring the respondent no.3 had been returned uncleared. She further deposed that fresh insurance policy had been provided to the vehicle in the name of Rajendra Naik on 15.03.2003. She deposed in cross by respondent no.3 that policy bearing no. 271201/31/02/6716700 was issued in favour of Pravin Madhukar Parsekar on 24.02.2003. The said policy was in effect from 24.02.2003 till 23.03.2004 since the cheque had bounced, policy was not in force on 10.03.2003. She on her own deposed that there is a clause in the policy of

insurance that in case a cheque is returned dishonoured on any ground, the policy stands cancelled *ab initio.* She was also shown the policy 271201/02/31/6717965. She deposed that it was subsequently issued in favour of Rajendra Naik covering the same vehicle from 15.03.2003 to 14.03.2004. She had not verified the account of the drawer of the cheque.

18. Considering the evidence of Rw. 2 and Rw.5 together, it is clear that Rw.2 had issued a cheque against insurance policy of his vehicle on 20.02.2003 in favour of insurance company. However, the said policy was not brought on record either by the respondent no.2 (allegedly it was not handed over to him) nor by respondent no.3 insurance company. I find substance in the contention of learned Counsel for respondent no.2-owner, Shri Godinho, that if notice could have been given to the respondent no.2 of the dishonour of his cheque, the respondent no.2 would have rectified the position and paid the insurance premium as to get the necessary insurance cover for his vehicle. It is very surprising that the said policy was neither asked by the respondent no.3 or claimant to produce on record nor

insurance company placed it on record. It is unclear how the name of Pravin Parsekar come into picture. It is the contention of appellant that company is not duty bound to give intimation and there is clause in the policy itself that if the cheque is dishonoured on any ground, the policy will be ineffective *ab initio*. However, there is no policy on record to show that such condition was notified in the policy and the same was communicated to respondent no.2. Learned Counsel Shri Afonso, has drawn my attention on the copy of cheque (exhibit 69-collectively), along with note. It is submitted that there is nothing on the cheque so as to infer that the said cheque was issued by Rajendra Naik. He has also drawn my attention to exhibit 70, which is letter dated 04.03.2003 addressed to Pravin Parsekar.

19. Both the Learned Counsel relied on ***Laxmamma*** (supra), wherein it is stated at paras 26 and 27 as under :

> *"26. In our view, the legal position is this : where the policy of insurance is issued by an authorized insurer on receipt of cheque towards payment of premium and such cheque is returned*

dishonoured, the liability of authorized insurer to indemnify third parties in respect of the liability which that policy covered subsists and it has to satisfy award of compensation by reason of the provisions of Sections 147(5) and 149(1)of the M.V. Act unless the policy of insurance is cancelled by the authorized insurer and intimation of such cancellation has reached the insured before the accident. In other words, where the policy of insurance is issued by an authorized insurer to cover a vehicle on receipt of the cheque paid towards premium and the cheque gets dishonored and before the accident of the vehicle occurs, such insurance company cancels the policy of insurance and sends intimation thereof to the owner, the insurance company's liability to indemnify the third parties which that policy covered ceases and the insurance company is not liable to satisfy awards of compensation in respect thereof.

27. Having regard to the above legal position, insofar as facts of the present case are concerned, the owner of the bus obtained policy of insurance from the insurer for the period April 16, 2004 to April 15, 2005for which premium was paid through cheque on April 14, 2004. The accident occurred on May 11, 2004. It was only thereafter that the insurer cancelled the insurance policy by

communication dated May 13, 2004 on the ground of dishonour of cheque which was received by the owner of the vehicle on May 21, 2004. The cancellation of policy having been done by the insurer after the accident, the insurer became liable to satisfy award of compensation passed in favour of the claimants."

20. Learned Counsel for the respondent-owner Shri Godinho also relied on ***Inderjit Kaur*** (supra) wherein similar view is expressed.

21. So far as ***Deddapa*** (supra) is concerned, in the said matter, it was held by Supreme Court that contract of insurance stood rescinded due to failure of consideration and intimation to this effect had been given to all person. In that matter also, the cheque was dishonoured on 21.10.1997 and intimation of dishonour was given on 06.11.1997 and, therefore, it was held by Apex Court that insurance company was not liable to compensate third party for the incident that occurred on 06.02.1998.

22. In the citation of ***Anilaben*** (supra), wherein the

question before the Gujarat High Court was whether Tribunal once exonerated Insurance Company from the liability of payment of compensation to the respective claimant, the Tribunal could have passed the directions against the insurance company to pay and recover. The Gujarat High Court held that the Tribunal erred in directing pay and recover to insurance company.

23. The citation ***Prakash*** (supra), relied on by learned Advocate Shri Afonso for appellant, is also on the same point that notice under Section 105 of Motor Vehicles Act, 1939. In the said matter also, intimation was given prior to the accident about cancellation of policy due to dishonour of cheque.

24. The learned Counsel for the Appellant, Shri Afonso, submitted that as cancellation of policy was duly informed to the RTO as well as the insurer, company is not liable to pay.

25. As against this, learned Counsel for the owner of the vehicle submitted that he has not received any intimation. He

has duly established that cheque was issued in favour of company against policy of his vehicle. He has also produced bank passbook and counter foil of the cheque book which clearly goes to show that cheque was of his account. By examining Erica, the employee of insurance company he has established that notice of dishonour of cheque was given to wrong person and, therefore, there is no intimation to the owner of the vehicle.

26. Having regard to the rival contentions and the principle laid down in the above referred citation of ***Laxmamma*** (supra), it will be the main issue whether the notice of cancellation or intimation of dishonour of cheque is duly given before accident to the insurer. Admittedly, Pravin Parsekar, in whose name it is alleged that earlier policy was issued, is not party to the Claim Petition. Learned Tribunal answered against these issues and findings are not in consonance with the reasoning. In my considered opinion, it is duly established that cheque no.472100 dated 20.02.2003 the policy bearing no.271201/31/02/6716700 was issued in favour of Pravin Madhukar Parsekar on 24.02.2003 and the said policy was in

effect from 24.02.2003 till 23.03.2004 covering the period of accident. However, due to dishonour of cheque, the said policy was not in force on 10.03.2003. The contention of the respondent-owner was that, inspite of his request, copy of policy or cheque was not handed over to him. There is discrepancy in his evidence when he approached to the company's office. Admittedly, the earlier policy which the insurance company is claiming to be issued in the name of Pravin Parsekar is not brought on record by the company. It is also a fact that notice of intimation was issued to Pravin Parsekar but as policy was not produced on record, the truth remained unfolded that whether actually the policy was issued in favour of Pravin Parsekar or whether by mistake, the intimation was issued to Pravin Parsekar. The respondent no.2-owner discharged his burden of proof of deposit of premium by issuing cheque in favour of company. When it is the contention of the company that the policy was not issued in his name but it was in the name of Pravin Parsekar, the company ought to have produced the copy of policy which is a part of the office record of the company. It has also come on record that original respondent no.2 is the registered owner

of the vehicle involved in the accident. There is no counter that till deposition of Rw.2, the said vehicle was insured with appellant-insurance company. As such, there was no reason not to bring on record the policy which was issued in the name of said Pravin Parsekar. In fact, it is not established at all that the said policy was issued in the name of Pravin Parsekar of the vehicle registered in the name of original respondent no.2-Rajendra Naik. To disown liability of payment, burden was on the insurance company to produce on record the earlier policy for which they had accepted the cheque which was dishonoured and also to prove that such policy was handed over to either Pravin Parsekar or any other person in his behalf. There was no intimation as such to the registered owner of cancellation of policy. The stand taken by the insurance company that as issue no.5 was deleted, there is no necessity for the insurance company to produce the earlier policy against the cheque amount to bring on record. I see no substance in this contention. It is beneficial legislation. If the policy in fact issued in the name of original respondent no.2, registered owner, in view of ***Laxmamma*** (supra) judgment, there is no intimation to owner and, as such,

company would have been liable to indemnify the owner.

27. As discussed earlier, respondent no.2 duly established by producing pass book and counter foil of cheque book that he issued cheque of premium in favour of Company which was dishonoured. It is also a matter of record that there is no dispute that the said cheque was received by the Company. As such, unless notice is duly served on the insured by the insurer of cancellation of policy, in view of the judgments referred above, there is liability of payment on the insurance company. When Insurance Company is disputing that on the date of accident there was policy covering the vehicle, it was incumbent on the part of the Insurance Company to produce the copy of insurance issued earlier in the name of one third person Pravin Parsekar. Thus, though learned Tribunal erred in answering the issue which was deleted but reasoning by the learned Tribunal is legal and justified and cannot be faulted with in the facts and circumstances of the matter.

28. Hence, I see no reason to interfere in the order passed

by Claims Tribunal. Accordingly, the appeal is liable to be dismissed.

29. Hence, I pass the following :

ORDER

The appeal is dismissed.

No order as to cost.

M. S. JAWALKAR, J.

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