A NATIONAL INSURANCE CO. LTD.

v.

YELLAMMA & ANR.

(Civil Appeal No. 3317 of 2008)

MAY 6, 2008

B

[S.B. SINHA AND LOKESHWAR SINGH PANTA, JJ.]

Contract of insurance – Insurance policy in respect of bus – Issue of third party cheque by purported insured towards payment of insurance premium – Cheque not encashed by C *insurer as it was third party cheque and allegedly returned – Accident of bus – Claim petition – MACT allowed claim but held insurer not liable to pay compensation on ground that there was no valid insurance policy – Appeal by victim – No appeal by purported insured – High Court held that there was* D *no provision that consideration for policy should flow from insured and not from third party – On appeal, Held: Contract of insurance like any other contract is a contract between insured and insurer – Amount of premium is required to be paid as consideration for arriving at concluded contract – If* E *insurer insists that cheque should be issued only by insured and not by third party no exception thereto can be taken – No privity of contract came into being between insured and insurer and as such question of enforcing purported contract of insurance while taking recourse to s.147 of Motor Vehicles* F *Act did not arise – Accident took place in Karnataka and insured was resident of Ludhiana and transaction was purported to have been entered in Ludhiana – Victim, therefore, may not be in a position to enforce award against insurer – In peculiar facts and circumstances of case, interest* G *of justice would be served if in exercise of jurisdiction under Article 142, it is directed that award be paid by insurer with liberty to it to recover same from purported insured – Motor Vehicles Act, 1988 – ss.147 and 166 – Constitution of India, 1950 – Article 142.*

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Respondent no. 2 sought to take insurance policy in respect of mini bus owned by him and issued a third party cheque towards payment of insurance premium. A

The Development Officer of the appellant-insurer issued a cover note. However, when he noticed that it was a third party cheque, he contacted respondent no.2 to pay the premium amount. It was not tendered and instead the respondent no.2 allegedly returned the original cover note and took back the cheque. The original cover note as also all the duplicate copies thereof were cancelled. B

C

The said insurance cover was issued for the period 3.9.1991 to 2.9.1992. On or about 12.9.1991, the said vehicle met with an accident. First respondent who suffered an injury filed a claim petition in terms of the provisions contained in s.166 of the Motor Vehicles Act, 1988. An award for a sum of Rs.43,000/- was made. The Tribunal however held that there was no valid insurance policy as on the date of accident and as such insurer was not liable to pay any compensation to the victim. Second Respondent did not prefer any appeal thereagainst. First Respondent only preferred an appeal questioning the quantum of compensation. D E

High Court while enhancing the amount of compensation to Rs.1.50 lacs held that there is no provision in law that the consideration for policy should flow only from the insured and not from the third party and since the accident has occurred within 15 days from the date of issue of cover note, the insurer was liable to pay the compensation. Hence, the present appeal. F

Partly allowing the appeal, the Court G

HELD: 1. It is neither in doubt nor in dispute that all the copies including the insurance cover had been produced before the Tribunal to show that original insurance cover had been taken back by the Development H

A Officer concerned for one reason or the other. The Administrative Officer of the appellant not only examined himself before the Tribunal but also proved the note prepared by the Divisional Manager. The Tribunal, on appreciation of the evidence produced before it, held that B the vehicle was not legally insured. The High Court, however, wrongly proceeded on the premise that the cheque could be issued by a third party. A contract of insurance like any other contract, is a contract between the insured and the insurer. The amount of premium is C required to be paid as a consideration for arriving at a concluded contract. If the insurer insists that a cheque should be issued only by the insured and not by a third party, no exception thereto can be taken. The fact remains that the cheque was not encashed. Concedely, the insurer D did not make any payment. [Paras 5, 6] [866-A-E]

Deddaooa & Ors. v. Branch Manager, National Insurance Co. Ltd. (2008) 2 SCC 595 – referred to.

2. In today's world payment by cheque is ordinarily accepted as valid tender but the same would be subject E to its encashment. A distinction, however, exists between the statutory liability of the insurance company vis-à-vis the third party in terms of ss. 147 and 149 of the Motor Vehicles Act and its liability in other cases but it is clear that if the contract of insurance had been cancelled and F all concerned had been intimated thereabout, the insurance company would not be liable to satisfy the claim. [Para 8] [869-C, D]

3. In this case, there cannot be any doubt or dispute G whatsoever that no privity of contract came into being between the appellant and the second respondent and as such the question of enforcing the purported contract of insurance while taking recourse to s.147 of the Motor Vehicles Act did not arise. Second respondent did not contest the case at any stage. It did not adduce any H

evidence before the Tribunal. It did not appeal from the judgments of the High Court. No argument in the appeal was advanced in his behalf. No appearance has been made on behalf of the respondent no.2 despite service of notice before this Court also. [Para 9] [869-E, F, G]

4. The accident took place in the State of Karnataka. Respondent no.2 is a resident of Ludhiana. The transaction in question was purported to have been entered in Ludhiana. First respondent, therefore, may not be in a position to enforce the award as against the respondent no.2. In the peculiar facts and circumstances of the case, therefore, the interest of justice would be subserved if in exercise of jurisdiction under Article 142 of the Constitution of India, it is directed that the awarded amount be paid by the appellant to the first respondent with liberty to it to recover the same from the second respondent by initiating an appropriate proceeding in this behalf. [Paras 10,11] [869-G, A, B, C]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3317 of 2008

From the Order dated 23.3.2005 of the High Court of Karnataka, Bangalore in M.F.A. No. 1110/2000

M.K. Dua, Kishore Rawat and Dhiraj for the Appellant.

Uday Umesh Lalit, (A.C.) for the Respondents.

The judgment of the Court was delivered by

S.B. SINHA, J. 1. Leave granted.

2. Respondent No.2 was the owner of a Mini Bus. An insurance policy in respect of the said vehicle was sought to be taken by him. For the said purpose, the second respondent issued a third party cheque towards payment of insurance premium.

The Development Officer of the appellant by inadvertence

A issued a cover note. However, when the said mistake came to his notice, the respondent No.2 was contacted by the Development Officer. He was asked to pay the amount of premium. It was not tendered and in stead the respondent No.2 is said to have returned the original cover note and took back
B the cheque. The original cover note as also all the duplicate copies thereof was cancelled

The said insurance cover was issued for the period 3.9.1991 to 2.9.1992. On or about 12.9.1991, the said vehicle met with an accident. First respondent who suffered an injury
C therein filed a claim petition in terms of the provisions contained in Section 166 of the Motor Vehicles Act, 1988 (the Act). An award for a sum of Rs.43,000/- was made. The Tribunal, in its award, categorically held

D "The petitioners have produced Ex.P.7 the Xerox copy of the cover note Ex.R.1. There is all the chances of the owner of the vehicle having taken Xerox copy of the cover note Ex.R.1 and returning the original cover note Ex.R.1 to the insurance company as deposed by RW.1. If really the
E cover note was not cancelled, the original cover note should have been with the insured and respondent No.3 could not have produced the original cover note Ex.R.1. Hence, the case of 3rd respondent that the owner of the vehicle had given third party cheque and that later he had taken back the cheque and returned the original cover note
F Ex.R.1 to the insurance company and that the insurance company has cancelled cover note is more probable. As Ex.P.7 is the Xerox copy of the original cover note Ex.R.1 and as the original cover note Ex.R.1 and its copies Exs.R.2 to R.4 have been produced by the insurance
G company, the argument of the learned counsel for the petitioners that respondent No.3 is liable to pay the compensation cannot be accepted. Hence, from the above discussion, I hold that there was no valid insurance policy as on the date of the accident and as such the respondent
H No.3 is not liable to pay any compensation to the

petitioners."

3 Second Respondent did not prefer any appeal thereagainst. First Respondent only preferred an appeal questioning the quantum of compensation.

The High Court, by reason of the impugned judgment, while enhancing the amount of compensation to a sum of Rs.1,50,000/-, held :

> "The above provision disclose that a policy can be issued against the issuance of cheque and the liability commences from the date of issuance of cheque and not from the date of its encashment. There is no provision in law that the consideration for policy should flow only from the insured and not from the third party. The development officer has acted in a hasty manner. No attempt was made to present the cheque for encashment. If the cheque was encashed it was well and good for the insurer otherwise steps could have been taken for cancellation of the policy Ex.R.1. The reason that the cheque is not issued by the insured is not a ground for valid cancellation. The endorsement of cancellation is vague, it does not bear the date. The officer who has made endorsement of cancellation is not examined. The endorsement of the insured is not taken on the policy to substantiate that the cancellation was with due notice and knowledge by the insured. Therefore, under the above circumstances, the very cancellation of the policy for untenable reason is bad in law. The accident has occurred within 15 days from the date of issue of cover note. Hence, the insurer is liable to pay the compensation."

4 Mr. Dua, learned counsel appearing on behalf of the appellant, would submit that keeping in view the provisions contained in Section 65(v)(b) of the Insurance Act, 1938 and furthermore in view of the finding of fact arrived at by learned Motor Vehicles Accidents Claims Tribunal which was not questioned by the insured, the impugned judgment cannot be sustained.

A As nobody had appeared despite service of notice on behalf of the respondent, we requested Mr. U.U. Lalit, senior counsel to assist us.

5. It is neither in doubt nor in dispute that all the copies including the insurance cover which were marked as Ex.R.1 to B R.4 had been produced before the Tribunal to show that original insurance cover had been taken back by the Development Officer concerned for one reason or the other.

The Administrative Officer of the appellant not only C examined himself before the Tribunal but also proved the note prepared by the Divisional Manager of Ludhiana which was marked as Ex.R.5. The Tribunal, as noticed hereinbefore, on appreciation of the evidence produced before it, held that the vehicle was not legally insured.

D 6. The High Court, however, wrongly proceeded on the premise that a cheque could be issued by a third party.

A contract of insurance like any other contract, is a contract between the insured and the insurer. The amount of premium is required to be paid as a consideration for arriving at a concluded E contract. If the insurer insists that a cheque should be issued only by the insured and not by a third party, no exception thereto can be taken. The fact remains that the cheque was not encashed. Concededly, the insured did not make any payment.

F Section 64VB of the Insurance Act mandates that before a contract of insurance comes into being, the premium should be received by the insurer in advance, stating :

> "**Section 64VB - No risk to be assumed unless premium is received in advance**— (1) No insurer shall G 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 H or unless and until deposit of such amount as may be

prescribed, is made in advance in the prescribed manner. A

(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. B

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."

7. The question came up for consideration recently before C this Court in *Deddaooa & Ors. v. Branch Manager, National Insurance Co. Ltd.* [(2008) 2 SCC 595], wherein upon noticing the precedents which were operating in the field, it was clearly held :

D

"18. The ratio of the said decision was, however, noticed by this Court in *New India Assurance Co. Ltd. v. Rula and Ors.* [(2003) 3 SCC 195]. It was held that ordinarily a liability under the contract of insurance would arise only on payment of premium, if such payment was made a condition precedent for taking effect of the insurance policy E but such a condition which is intended for the benefit of the insurer can be waived by it. It was opined:

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

The dicta laid down therein clarifies that if on the date of accident the policy subsists, then only the third party would be entitled to avail the benefit therof. H

19. Almost an identical question again came up for consideration before this Court in *National Insurance Co. Ltd. v. Seema Malhotra and Ors.* [(2001) 3 SCC 151], a Division Bench noticed both the aforementioned decisions and analysed the same in the light of Section 64-VB of the 1938 Act. It was held:

> '17. In a contract of insurance when the insured 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.
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> 18. 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.
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> 19. 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.

20. 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.'

20. A contract is based on reciprocal promise. Reciprocal promises by the parties are condition precedents for a valid contract. A contract furthermore must be for consideration."

8. In today's world payment by cheque is ordinarily accepted as valid tender but the same would be subject to its encashment. A distinction, however, exists between the statutory liability of the insurance company vis-à-vis the third party in terms of Sections 147 and 149 of the Motor Vehicles Act and its liability in other cases but it is clear that if the contract of insurance had been cancelled and all concerned had been intimated thereabout, the insurance company would not be liable to satisfy the claim.

9. In this case, there cannot be any doubt or dispute whatsoever that no privity of contract came into being between the appellant and the second respondent and as such the question of enforcing the purported contract of insurance while taking recourse to Section 147 of the Motor Vehicles Act did not arise.

Second respondent did not contest the case at any stage. It did not adduce any evidence before the Tribunal. It does not appeal from the judgments of the High Court. No argument in the appeal was advanced in his behalf. Before us also, no appearance has been made on behalf of the respondent No.2 despite service of notice.

10. The accident took place in the State of Karnataka.

A Respondent No.2 is a resident of Ludhiana. The transaction in question was purported to have been entered in Ludhiana. First respondent, therefore, in our opinion, may not be in a position to enforce the award as against the respondent No.2.

11. In the peculiar facts and circumstances of this case, B we are, therefore, of the opinion that the interest of justice would be subserved if we, in exercise of our jurisdiction under Article 142 of the Constitution of India, direct that the awarded amount be paid by the appellant to the first respondent with liberty to it to recover the same from the second respondent by initiating C an appropriate proceeding in this behalf.

12. This appeal is allowed to the aforementioned extent and with the aforementioned directions. As the respondents have not appeared before us, there shall be no order as to costs.

D D.G. Appeal partly allowed.