

(2015) 03 KL CK 0013

In the High Court Of Kerala

Case No : M.A.C.A. Nos. 2526 of 2009 and 2507 of 2010

Augustine V.M.

APPELLANT

Vs

Ayyappankutty and Others

RESPONDENT

Date of Decision : 04-03-2015

Acts Referred:

Kerala High Court Act, 1958 — Section 4

Motor Vehicles Act, 1988 — Section 147, 149, 149(2)(a)(i)(c), 149(2)(a)(ii), 163A

Citation : (2015) 2 ACC 749 : (2015) ACJ 2142 : AIR 2015 Ker 131 : (2015) 2 ILR Ker 764 : (2015) 2 KHC 219 : (2015) 2 KLJ 392 : (2015) 2 KLT 139 : (2015) 3 RCR(Civil) 638

Hon'ble Judges : P.V. Asha, J.; A.V. Ramakrishna Pillai, J.; T.R. Ramachandran Nair, J.

Bench : Full Bench

Advocate : Baby Thomas and Latheesh Sebastian, for the Appellant; T.J. Michael and P. Jacob Mathew, Advocates for the Respondent

Final Decision : Disposed off

Judgement

A.V. Ramakrishna Pillai, J.—These appeals are before us as per two separate orders of reference by the Division Bench concerned before which, these appeals came up for consideration. MACA No. 2507 of 2010 is against the award passed by the Motor Accident Claims Tribunal, Perumbavoor in OP (MV) No. 73 of 2007. The appellant is the registered owner of the vehicle involved in a road traffic accident. Respondents 1 to 4 are the legal heirs of deceased Joseph, the victim. They preferred the claim petition before the Tribunal alleging that the deceased was knocked down by the vehicle owned by the appellant while the driver negligently backed up the vehicle. According to them, the accident occurred due to the negligence of the driver, the 5th respondent in the appeal. The offending vehicle involved in the accident was insured with the 6th respondent. The 6th respondent insurer raised a contention before the Tribunal that the insurer is entitled to take up the defence under Section 149(2)(a)(i)(c) of the Motor Vehicles Act as the validity of the certificate of fitness of the vehicle driven by the

5th respondent stood expired on the date of the accident. The said plea of the insurance company was accepted by the learned Tribunal and accordingly, though the insurance company was directed to pay the amount, its right to recover the same from the appellant, who is the insured was reserved. It is this finding, which is under challenge in this appeal.

2. MACA No. 2526 of 2009 arises out of the award of the Motor Accidents Claims Tribunal, Pala in OP (MV) No. 216 of 2006. This appeal is filed by the owner-cum-driver of the offending vehicle. The claim petition was preferred by the 1st respondent herein alleging that while he was walking along the side of Kollappally-Kadanadu road, a jeep owned and driven by the appellant knocked him down. The claimant alleged that the accident occurred due to the negligence of the appellant. The appellant remained ex parte before the Tribunal. The 2nd respondent, the insurer of the vehicle, while admitting the policy of the offending vehicle took up the contention that in the absence of permit and fitness certificate for the vehicle, there was violation of policy condition and, therefore, the insurance company is not liable to indemnify the owner of the compensation paid to the claimant. The insurer also filed an IA before the Tribunal for a direction to the appellant to produce the fitness certificate, and it was allowed. However, the appellant did not produce the same before the Tribunal. Drawing adverse inference against the appellant in view of his said default, the learned Tribunal directed the insurance company to pay compensation to the claimant reserving its right to recover the same from the appellant, the registered owner. It is this finding that the appellant is challenging in this appeal.

3. When MACA No. 2507 of 2010 came up for consideration before the Division Bench concerned, the Division Bench expressed the view that although absence of permit would attract Section 149(2)(a)(i)(c), it is not clear as to whether the absence of a valid fitness certificate would be sufficient to absolve the insurance company from its liability. The Division Bench also observed that a contrary view was taken by another Division Bench of this Court in Thara Vs. Syamala, wherein it was held that absence of a fitness certificate was a valid ground to absolve the insurance company from the liability to indemnify the owner under Section 149(2)(a)(i)(c). Therefore, the Division Bench felt that it would be appropriate to refer the matter for the decision of a Full Bench under Section 4 of the Kerala High Court Act. This is how, this appeal is now placed before us.

4. When MACA No. 2526 of 2009 came up for consideration before another Division Bench subsequently, the Division Bench noticed the conflict between the decisions in Thara's case (cited Supra) and Sethunath Vs. John Varghese and Others, which held that the insurer cannot claim exoneration from the liability to indemnify the owner of a transport vehicle in respect of injuries to third parties if the said vehicle gets involved in an accident after the expiry of the period of validity of the permit which indirectly would mean that absence of a valid permit is not a ground to absolve the insurance company from its liability. The Division Bench also noticed the reference order passed by the other Division

Bench in MACA No. 2507 of 2010 and thus MACA No. 2526 of 2009 was also referred to the Full Bench.

5. Arguments have been heard.

6. Admittedly, the policy issued by the insurance company contains a clause in the general conditions, which is in tune with Section 149(2)(a)(i)(c) of the Act. Section 149 of the Act reads as follows:

"149. Duty of insurers to satisfy judgments and awards against persons insured in respect of third party risks.--(1) If, after a certificate of insurance has been issued under sub-section (3) of Section 147 in favour of the person by whom a policy has been effected, judgment or award in respect of any such liability as is required to be covered by a policy under Clause (b) of sub-section (1) of Section 147 (being a liability covered by the terms of the policy) or under the provisions of Section 163A is obtained against any person insured by the policy, then, notwithstanding that the insurer may be entitled to avoid or cancel or may have avoided or cancelled the policy, the insurer shall, subject to the provisions of this section, pay to the person entitled to the benefit of the decree any sum not exceeding the sum assured payable thereunder, as if he were the judgment-debtor, in respect of the liability, together with any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments.

(2) No sum shall be payable by an insurer under sub-section (1) in respect of any judgment or award unless, before the commencement of the proceedings in which the judgment or award is given the insurer had notice through the Court or, as the case may be, the Claims Tribunal of the bringing of the proceedings, or in respect of such judgment or award so long as execution is stayed thereon pending an appeal; and an insurer to whom notice of the bringing of any such proceedings is so given shall be entitled to be made a party thereto and to defend the action on any of the following grounds, namely.--

a. that there has been a breach of a specified condition of the policy, being one of the following conditions, namely.--

i. a condition excluding the use of the vehicle--

(a) for hire or reward, where the vehicle is on the date of the contract of insurance a vehicle not covered by a permit to ply for hire or reward, or

(b) for organised racing and speed testing, or

(c) for a purpose not allowed by the permit under which the vehicle is used, where the vehicle is a Transport vehicle, or

(d) without side-car being attached where the vehicle is a motor cycle; or

ii. xxxx xxxx xxxx

iii. xxxx xxxx xxxx

(emphasis supplied)

7. Admittedly, the offending vehicles in both cases were transport vehicles which were not covered by valid certificate of fitness on the date of accident. In MACA No. 2526 of 2009, the insurer has raised another contention that the offending vehicle was not covered by a valid permit also at the time of the accident. As already pointed out, due to the failure on the part of the appellant to produce fitness certificate and permit, as directed, an adverse inference was drawn against the appellant by the learned Tribunal. There is no valid challenge against the said finding.

8. The short question to be answered by us is whether the insurer can claim exoneration from its liability to indemnify the owner of a transport vehicle in respect of injuries to third parties if the vehicle gets involved in the accident after the expiry of fitness certificate or permit.

9. In Thara's case (see Supra) the registered owner of the offending vehicle who preferred the appeal challenged the order of the claims Tribunal authorising the insurance company to recover compensation from the registered owner. In that case, the vehicle involved in the accident was a goods vehicle. The accident occurred on 05/06/2001. The vehicle was covered by a valid policy. However, the permit was valid only upto 15/02/2001. In other words, on the date of the accident, the vehicle ceased to have permit. The vehicle also did not have fitness certificate, a requirement for renewal of the permit. The Division Bench which considered this appeal made it clear that a goods carriage could be used on road for carrying goods only after obtaining the permit and the use of the vehicle without fitness certificate or permit would entitle the insurer to dishonour the liability under the policy.

10. In Sethunath's case (cited Supra) the question that came up for consideration before the Division Bench was whether the insurer can claim exoneration from its liability to indemnify the owner of a transport vehicle if the said vehicle gets involved in an accident after the expiry of the period of validity of the permit issued by the transport authorities in respect of the said vehicle. The Division Bench after considering the provisions of the Act observed that there is no provision in the Act or Rules which would indicate that the validity of the policy certificate is co-terminus with the validity of the permit under Rule 82 of the Central Motor Vehicles Rules. Therefore, the Division Bench observed that the Tribunal was not justified in mulcting the owner and driver with the liability of paying compensation. Thus, the award passed by the Tribunal to the extent it gave the right to the insurance company to recover the amount of compensation from the owner and driver of the vehicle was set aside, though in all other respects the award of the Tribunal was confirmed.

11. The Apex Court in National Insurance Co. Ltd. Vs. Swaran Singh and Others, while interpreting Section 149(2)(a)(ii) of the Act observed that whenever the insurer relies upon the violations of the provisions of law by the

insured, there must be a willful violation of law by the insured. It was observed that in some cases, violation of provisions of law may not necessarily hold good in avoiding the liability for payment to a third party.

12. The trend of pronouncements by the Apex Court in the realm would indicate that mere technical violations could not lead to a situation whereby the insurer can avoid the liability towards a third party. It is now settled that in the absence of any evidence to show that the breach was so fundamental as to cause the accident, there cannot be any automatic direction to allow the insurance company to recover the amount from the owner. Here, we would like to refer to the decision of the Apex Court in *S. Iyyappan Vs. United India Insurance Company Ltd. and Another*, . In that case, the question was whether the driver who had licence to drive "light motor vehicle" could drive "light motor vehicle" used as a commercial vehicle without obtaining endorsement to drive commercial vehicle. It was held that in such a case, the insurance company cannot disown its liability.

13. The aforesaid decision was followed by the Apex Court recently in *Kulwant Singh Vs. Oriental Insurance Company Ltd.*, . In that case, the claim petition was filed by the dependents of the victim who met with his death in a road traffic accident on 08/10/2005 while driving the vehicle which was hit by another vehicle. The Tribunal on facts found that the accident was due to the negligence of the other vehicle and, therefore, the claimants were entitled to compensation. The offending vehicle was covered by a valid policy and the driver was having a valid driving licence. However, the vehicle driven by the deceased was a light goods vehicle. The insurance company contended that it was entitled to recovery rights as the driving licence of the driver of the offending vehicle was for driving "light motor vehicle" and it could not be equated with "light goods vehicle". The High Court, on appeal, accepting the plea of the insurance company modified the award and granted recovery rights to the insurance company. The registered owner took up the matter before the Apex Court. The Apex Court, following the decision in *Iyyappan's* case (see *Supra*), found that there was no breach of any condition of insurance policy, allowed the appeal and set aside the direction of the High Court reserving the company's right of recovery.

14. This Full Bench while deciding *National Insurance Co. Ltd. Vs. Jisha*, followed the aforesaid decisions to hold that the recovery right of the insurer is not automatic in the absence of any evidence to show that there was a fundamental breach which led to the accident.

15. The learned Senior Counsel appearing for the insurance company would argue that absence of valid certificate of fitness affects the registration of the vehicle under Section 56 of the Motor Vehicles Act. Under Section 56 of the Act, the vehicle shall not be deemed to be validly registered under Section 39 unless it carries a certificate of fitness in the prescribed form. Undoubtedly, the same relates to the need of a fitness certificate on the date of registration. No doubt the lapse of certificate of fitness would constitute breach of the provisions of

Motor Vehicles Act or Rules. However, we cannot find anything under Section 56 which suggests that the registration or permit issued would stand cancelled or revoked on account of lapse of period of fitness certificate.

16. In order to enable the insurance company to take up the defence under Section 149(2)(a)(i)(c) it must be shown that the use of the transport vehicle was for a purpose not allowed by the permit under which the vehicle was used. Instances may occur where transport vehicles intended or permitted for a particular purpose are used for another purpose. For example, if a transport vehicle permitted only for carrying goods, carries passengers and capsizes en route causing injuries to the passengers, certainly, the insurer can take up the defence under Section 149(2)(a)(i)(c). However, if such a vehicle is used only for the permitted purpose, and the accident occurs when the permit or fitness certificate ceased to exist, it amounts to a technical violation only, which will not entitle the insurer to disown the liability to third parties. For avoiding the liability relying on Section 149(2)(a)(i)(c), the insurer should plead and prove that the offending vehicle was used for a purpose not authorised by the permit. It is true, that the vehicles in these cases ceased to have fitness certificate as well as permit on their expiry. We are unable to agree that the breach of condition in respect of non-renewal of certificate of fitness or permit would entitle the insurer to take up the defence under Section 149(2)(a)(i)(c) of the Act. We are of the definite view that *Thara v. Syamala* (cited Supra) does not lay down the correct law. In both these cases, there is no contention by the insurer that the vehicles were used for a purpose not allowed by the permit. There is nothing on evidence to show that the breaches alleged were fundamental breaches which have contributed to the cause of the accident. In the absence of any evidence to show that the breach was so fundamental as to lead to the accident, there cannot be an automatic direction to allow the insurance company to recover the amount from the owner. Therefore, on facts also the appellants are entitled to succeed.

In the result, the reference is answered and the appeals are disposed of as under:

(a) We hold that the insurer cannot claim exoneration from its liability to indemnify the owner of a vehicle in respect of injuries to third parties if the vehicle gets involved in the accident after the expiry of period of validity of fitness certificate or permit, merely on account of such technical violations.

(b) We also hold that *Thara Vs. Syamala*, does not lay down the correct proposition.

(c) We also hold that *Sethunath Vs. John Varghese and Others*, has laid down the correct law.

(d) The awards passed by the Tribunal to the extent they gave right to the insurance company concerned to recover the amount of compensation paid from the appellants is set aside. In all other respects, the awards passed by the Tribunal stand confirmed.