

(2014) 06 AP CK 0169

In the Andhra Pradesh High Court

Case No : M.A.C.M.A. No. 1031 of 2009

Bajaj Allianz General Insurance co. Ltd.

APPELLANT

Vs

Kalaguri Naganna

RESPONDENT

Date of Decision : 06-06-2014

Acts Referred:

Citation : (2015) 4 ACC 304 : (2015) ACJ 2131 : (2014) 4 ALD 685 : (2014) 5 ALT 751 : (2014) 2 AnWR 882

Hon'ble Judges : U. Durga Prasad Rao, J

Bench : Single Bench

Advocate : K.S.N. Murthy, Advocate for the Appellant; Kranthi K. Vaka, Advocate for the Respondent

Final Decision : Dismissed

Judgement

U. Durga Prasad Rao, J.—Aggrieved by the Award dated 02.01.2009 in O.P. No. 489 of 2007 passed by the Chairman, M.A.C.T-cum-V Additional District Judge (FTC), Anantapur (for short "the Tribunal), the 2nd respondent in the OP/ Insurance Company preferred the instant appeal.

2. The factual matrix of the case is thus:

a) The first claimant is the father, 2nd claimant is the mother and 3rd respondent is the wife of the deceased--K. Narappa. Their case is that on 17.06.2007, the deceased along with others was proceeding in a auto bearing No. AP 02 W 1301 towards Gantapuram Village and when the auto reached near Malyavantham village, the driver of the auto drove in a rash and negligent manner with high speed and lost control over the vehicle, due to which the auto turned turtle. In the resultant accident, the deceased received grievous injuries and immediately he was shifted to Government General Hospital, Anantapur and from there he was shifted to St. John Medical College Hospital, Bangalore, where he succumbed to injuries on 22.06.2007. It is averred that the accident was occurred due to the rash and negligent driving by the driver of the offending auto. It is pleaded that

the wife of the deceased, who is added as R.3 is also entitled for compensation. On these pleas, the claimants filed OP No. 489 of 2007 against respondents 1 and 2, who are the owner and insurer of the offending vehicle and respondent No. 3 wife of the deceased and claimed Rs. 5,00,000/- as compensation under different heads mentioned in the OP.

b) Respondent No. 1 remained ex parte.

c) Respondent No. 2/Insurance Company opposed the claim mainly on the ground that the driver of crime vehicle had no valid driving license and the owner thus violated terms of policy.

d) Respondent No. 3 filed counter and contended that the deceased is her husband and she being the Class-I legal heir of the deceased, is entitled to compensation claimed by the claimants. R.3 further contended that the claim of the claimants is against law and utter disregard to the agreement or understanding entered into by her and the claimants. She thus prayed to dismiss the OP and grant entire compensation to her.

e) During trial P.Ws.1 and 2 are examined and Exs. A1 to A5 were marked on behalf of the claimants. R.Ws.1 and 2 were examined and Exs. B.1 to B.5 were marked on behalf of respondents..

f) A perusal of the award would show that the Tribunal basing on the evidence of PW.2--eye witness coupled with Ex. A1-FIR, Ex. A.2--Inquest report, Ex. A.3--Postmortem certificate and Ex. A4-charge sheet, has held that the accident was occurred due to the rash and negligent driving by the driver of the offending auto.

g) Issue No. 2 which relates to quantum of compensation is concerned, the Tribunal granted compensation of Rs. 3,32,000/- with proportionate costs and interest at 7.5% p.a from the date of OP till the date of realization under different heads as follows:

h) Then liability is concerned, the Tribunal fastened liability on the first respondent being owner of the crime vehicle. The 2nd respondent/Insurance Company repudiated its liability on the plea that the driver had driving licence to drive only non-transport vehicle and crime vehicle was a transport vehicle and thus the owner committed breach of terms of the policy. However, the Tribunal relying upon the Apex Court's decision in National Insurance Co. Ltd. Vs. Swaran Singh and Others, directed the 2nd respondent to pay compensation and recover the same from 1st respondent.

Hence, the appeal by the 2nd respondent/Insurance Company.

3. Heard arguments of Sri K.S.N. Murthy, learned counsel for appellant/Insurance Company and Sri Kranthik Vaka, learned counsel for respondents 1, 2 and 4. Though notice to the 3rd respondent but he did not choose to appear.

4. Learned counsel for appellant/Insurance Company impugned the award insofar as Tribunal directing the appellant to pay compensation and recover from the

insured. He argued that when the appellant by cogent and convincing evidence able to establish that the driver of the crime auto had only non-transport driving licence and thereby the owner committed breach of the terms of the policy, the Tribunal instead of exonerating the Insurance Company totally from the liability, ordered to pay compensation and then recover from the owner which is illegal. He argued that the Insurance Company deserves total exoneration from the liability. He relied upon the following unreported judgments:

1) IFFCO-TOKIO General Insurance Co. Ltd. v. V. Narasimhulu and another MACMA Nos. 1757/2011 & 1195/2012 Dt. 22.01.2014 (AP High Court)

2) United India Insurance Company v. Narayana Kutty MFA No. 4124 of 2009 Dt. 25.11.2013 (Karnataka High Court)

3) Bajaj Alliance General Insurance Co. Ltd. v. S. Ravikumar and another MFA No. 1911 of 1010 dt. 07.09.2011 (Karnataka High Court)

4) M/s. IFFCO TOKIO General Insurance Co. Ltd. v. Omprakash and another MFA No. 8960 of 2009 Dt. 27.11.2013 (Karnataka High Court)

He thus prayed to allow the appeal.

5. Per contra, supporting the award learned counsel for respondents 1, 2 and 4 argued that the Tribunal rightly directed the Insurance Company to pay and recover compensation amount from the insured and there is no need to interfere with the award. He also relied upon the decision of the Apex Court in Oriental Insurance Co. Ltd. Vs. Shri Nanjappa and Others, .

6. In view of the above rival arguments, the point for determination in this appeal is:

"Whether the award passed by the Tribunal directing the appellant/Insurance Company to pay compensation and recover from the insured is legally sustainable?

7. POINT: The accident, involvement of auto bearing No. AP 02 W 1301 and death of deceased are admitted facts. Exs. B4 and B5 coupled with the evidence of RW2 would show that the driver of the crime vehicle i.e. autorikshaw possessed non-transporting driving licence but not transport driving licence by the date of accident. Hence, the point is, whether the owner can be held to have committed breach of the policy to exempt insurance company. In Swaran Singh's (1 supra) Honourable Apex Court was dealing with wide spectrum defence pleas of Insurance Companies basing on the deficiencies in driving licences. Such deficiencies are:

- a) Fake driving license of the driver.
- b) Driver not having licence whatsoever.
- c) No renewal of driving licence as on the date of accident.

d) License granted for one class or description of vehicle but vehicle involved in accident was of different class or description.

e) Driver holding only a learner's licence.

The Apex Court after discussing various issues involved in this regard, summarized its findings thus:

i) Mere absence, fake or invalid driving licence or disqualification of the driver for driving at the relevant time, are not in themselves defences available to the insurer against either the insured or the third parties. To avoid its liability towards insured, the insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by duly licensed driver or one who was not disqualified to drive at the relevant time.

ii) The insurance companies are, however, with a view to avoid their liability must not only establish the available defence(s) raised in the said proceedings but must also establish "breach" on the part of the owner of the vehicle; the burden of proof wherefore would be on them.

iii) Even where the insurer is able to prove breach on the part of the insured concerning the policy condition regarding holding of a valid license by the driver or his qualification to drive during the relevant period, the insurer would not be allowed to avoid its liability towards insured unless the said breach or breaches on the condition of driving licence is/are so fundamental as are found to have contributed to the cause of the accident. The Tribunals in interpreting the policy conditions would apply "the rule of main purpose" and the concept of "fundamental breach" to allow defences available to the insured u/s 149(2) of the Act.

iv) The question as to whether the owner has taken reasonable care to find out as to whether the driving licence produced by the driver, (a fake one or otherwise), does not fulfill the requirements of law or not will have to be determined in each case.

v) Where on adjudication of the claim under the Act the tribunal arrives at a conclusion that the insurer has satisfactorily proved its defence in accordance with the provisions of section 149(2) read with sub-section (7), as interpreted by this Court above, the Tribunal can direct that the insurer is liable to be reimbursed by the insured for the compensation and other amounts which it has been compelled to pay to the third party under the award of the tribunal.

From the above summarization, it is clear that an Insurance Company in order to succeed in its defence pleas touching the driving licence issues must:

a) Firstly establish that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicle by a duly licensed driver or one who was not disqualified to driving

at the relevant time.

b) Secondly, the breach which was committed by the insured was so fundamental as is found to have contributed to the cause of the accident.

Even upon establishing the above conditions by the Insurance Company, the Tribunal can direct that the insurer is liable to be reimbursed by the insured for the compensation and other amounts which it has been compelled to pay to the third party under the award of the Tribunal.

8. When the above principles are applied to the instant case, except establishing that driver drove one type of vehicle holding different type of licence, the Insurance Company has not established the other vital ingredients i.e. owner has deliberately committed the breach by knowingly allowing the driver to drive the vehicle and the said breach was so fundamental that it contributed for the accident.

9. In this case, it is not the plea of Insurance Company that the driver does not know the driving at all and thereby the accident was occurred. So mere holding a different type of licence cannot be regarded as a "fundamental breach. So, the Tribunal rightly applied the ratio of Swaran Singh's case (1 supra) and directed the Insurance Company to pay compensation at first and recover the same from the insured. I do not find any illegality or irregularity in it.

10. In a recent judgment reported in S. Iyyapan Vs. United India Insurance Company Ltd. and Another, the Apex Court decided a similar issue. The question that arose for consideration was can an Insurance Company disown its liability on the ground that the driver of the vehicle although duly licensed to drive light motor vehicle but there was no endorsement in the licence to drive light motor vehicle used as commercial vehicle. In that context, discussing several its judgments including Swaran Singh's (1 supra) the Apex Court observed as follows:

"Hence, in our considered opinion, the insurer cannot disown its liability on the ground that although the driver was holding a licence to drive a light motor vehicle but before driving light motor vehicle used as commercial vehicle, no endorsement to drive commercial vehicle was obtained in the driving licence. In any case, it is the statutory right of a third party to recover the amount of compensation so awarded from the insurer. It is for the insurer to proceed against the insured for recovery of the amount in the event there has been violation of any condition of the insurance policy."

The Apex Court in that case ordered pay and recover.

11. So, in the light of the above law, the appellant's argument cannot be acceded. Consequently, the citations filed by it are of no use to it.

12. In the result, this MACMA is dismissed by confirming the award passed by the Tribunal in O.P. No. 489 of 2007. No costs in the appeal.

As a sequel, miscellaneous applications pending, if any, shall stand closed.