
(2014) 11 AP CK 0078

In the Andhra Pradesh High Court

Case No : M.A.C.M.A. No. 1656 of 2010

Bajaj Allianz General Insurance Co. Ltd.

APPELLANT

Vs

M. Sreedevi

RESPONDENT

Date of Decision : 05-11-2014

Acts Referred:

Evidence Act, 1872 — Section 114(g)
Motor Vehicles Act, 1988 — Section 2(30)

Citation : (2016) ACJ 445 : (2015) 1 ALT 437

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

Bench : Single Bench

Advocate : T. Mahender Rao, Advocate for the Appellant; Yousuf and M. Achutha Reddy, Advocate for the Respondent

Judgement

U. Durga Prasad Rao, J.—Challenging the award dated 14.07.2010 in O.P. No. 542 of 2007 passed by the Chairman, M.A.C.T-cum-I Additional District Judge, at Mahabubnagar (for short the Tribunal), the 2nd respondent in the OP/Bajaj Allianz General Insurance Company Limited preferred the instant appeal.

2. The factual matrix of the case is thus:

a) The first claimant is the wife, claimants 2 to 4 are children and fifth claimant is the mother of the deceased M. Sudhakar. Their case is that on 28.06.2007, at about 7:00 p.m., when the deceased was proceeding on a motorcycle as pillion rider and when he reached near a factory, one motorcycle bearing No. AP 29 E 4956 came in opposite direction being driven by its driver at high speed and in a rash and negligent manner and dashed the motorcycle of the deceased. In the resultant accident, the deceased sustained head injury and other injuries all over the body and lost consciousness. Immediately, he was shifted to Government hospital, Shadnagar and from there to Yashoda Hospital at Hyderabad and while undergoing treatment he succumbed to injuries on 30.06.2007. It is averred that the accident was occurred due to the fault of the driver of offending motorcycle. On these pleas, the claimants filed O.P. No. 542 of 2007 against respondents 1

and 2, who are the owner and insurer of the offending motorcycle and claimed Rs. 10,00,000/- as compensation.

b) Respondents 1 and 2 filed separate counters. The 1st respondents contention is that it is a Milk Production Cooperative Union and it entered into an agreement with another Organisation, viz., BAIF Institute for Rural Development (BIRD-K) to extend technical support for artificial insemination programme for the benefit of farmers and for its use the 1st respondent purchased crime motorcycle bearing No. AP-29-E 4956 in the year 2004 and handed over to BIRD-K directly from Showroom since which time the employee of BIRD-K namely Sri M. Sagar Reddy was using the same and he committed the accident. The 1st respondent though is official owner but as per Section 2(30) of the MV Act, the BIRD-K is the real owner. Similarly, though the insurance policy stands in the name of 1st respondent, BIRD-K in fact paid the premium. Hence, BIRD-K is necessary party to the proceedings. It finally contended that the claim is excessive and untenable.

c) The 2nd respondent/Insurance Company denying the material averments inter alia contended that the drivers of both vehicles had no driving licence at the time of accident and the 1st respondent knowingly handed over the vehicle to its driver and thus committed breach of terms of the policy. On this plea, the 2nd respondent disowned its liability. Finally, it contended that the claim is excessive and arbitrary and prayed for dismissal of O.P.

d) During trial, P.Ws. 1 to 3 were examined and Exs. A. 1 to A. 9 were marked on behalf of claimants. R.Ws. 1 and 2 were examined and Exs. B. 1 to B. 15 were marked on behalf of respondents.

e) The Tribunal on appreciation of evidence, has awarded a sum of Rs. 4,67,000/- with costs and interest at 7.5% p.a. under different heads as follows:

Hence, the appeal by Insurance Company.

3. The parties in this appeal are referred as they stood before the Tribunal.

4. Heard arguments of Sri T. Mahender Rao, learned counsel for appellant/ Insurance Company, Sri Mohd. Yousuf, learned counsel for respondent Nos. 1 to 5/claimants and Sri M. Achutha Reddy, learned counsel for respondent No. 6.

5.a. While impugning the award, learned counsel for appellant Sri T. Mahender Rao firstly argued that as per contention of the 1st respondent, its organisation has handed over the vehicle after purchase to its technical supporter i.e., BIRD-K whose employee in due course of his employment committed the accident. Be that as it may, he argued, the enquiries caused by the appellant/Insurance Company revealed that M. Sagar Reddy the driver of the offending vehicle had no valid and effective driving licence by the date of accident and 1st respondent knowingly handed over the vehicle to him. The Insurance Company issued notices to 1st respondent and also M. Sagar Reddy to produce the driving licence but they failed to do so. As such, for the breach of terms of the policy instead of exonerating the 2nd respondent, the Tribunal erroneously placed burden on the

Insurance Company to prove that the driver of the vehicle had no driving licence and held as if the appellant/Insurance Company failed to establish the same. Learned counsel relied upon the following judgment and argued that there was no liability for Insurance Company to prove the lack of driving licence and consequential breach of policy committed by insured.

United India Insurance Company Limited v. Rakesh Kumar Arora Learned counsel vehemently argued that inspite of lack of burden on it, the same, the Insurance Company promptly issued notices to 1st respondent and driver to produce the driving licence but they failed and except that the Insurance Company could do nothing. So the Tribunal ought to have held that the Insurance Company discharged its burden and exonerated it. He relied upon a decision reported in Sardari and others v. Sushil Kumar and another and argued that in that case when the owner failed to discharge its statutory obligation of seeing that his driver had valid driving licence, the Apex Court exonerated the Insurance Company.

b. Secondly, challenging the quantum of compensation, learned counsel argued that the Tribunal awarded Rs. 1,06,000/- towards medical expenditure without there being proper proof of Ex. A-6 medical bills by the claimants. He relied on the decision in United India Insurance Company Limited v. Mohd. Khaja Rasool Sayyed and contended that medical documents like any other documents should be proved by the concerned party and no genuinity can be attached to them without proper proof. He thus prayed to allow the appeal.

6. Per contra, learned counsel for owner of the vehicle/1st respondent in O.P. while supporting the award, argued that though the Tribunal disagreed with the contention of the 1st respondent that 1st respondent is only a nominal owner and BIRD-K is real owner, still, as the policy was in force and Insurance Company failed to prove driver lacking driving licence, the Tribunal rightly held it should indemnify the liability of the 1st respondent. He thus contended that the appeal at the instance of the Insurance Company is bereft of merits and liable to be dismissed. He argued that the decision in Sardari and Others Vs. Sushil Kumar and Others, relied upon by the Insurance Company/appellant is not applicable to the present case as in that case the concerned driver, who was examined in the court admitted that he had no driving licence, whereas in the instant case, the Insurance Company failed to produce any reliable evidence to hold that he had no driving licence.

7. Whereas the learned counsel for the claimants in the O.P./respondent Nos. 1 to 5 in the appeal supported the award.

8. In the light of the above rival arguments, the points for determination in this appeal are:

1) Whether the Tribunal was right in fixing the liability on the Insurance Company and if so whether the Insurance Company discharged its burden?

2) Whether the compensation awarded is just and reasonable or needs interference?

3) To what relief?

9. POINT No. 1 Accident, involvement of crime motorcycle bearing No. AP-29-E-4956 and death of deceased are not in dispute. Regarding ownership of the vehicle, the contention of the 1st respondent is that though the 1st respondent-Cooperative Union is the registered owner of the vehicle, but it handed over the vehicle to its technical supporter i.e., BIRD-K and their employee M. Sagar Reddy while using the vehicle, caused the accident and, therefore, under Section 2(30) of the Motor Vehicles Act, 1988, BIRD-K has to be treated as the owner of the vehicle. The award shows that the Tribunal having regard to the admission of Rw. 1 that as on the date of accident crime vehicle was in the name of the 1st respondent in the RTAs records, held that 1st respondent is the owner of the crime vehicle and it is liable to pay compensation to the claimants. The Tribunal further held that Exs. B-1 to B-9 record purportedly showing the handing over of the vehicle to BIRD-K organisation will not help 1st respondent to substantiate its contention that BIRD-K organisation is the owner of the said crime motorcycle. In my view Tribunal rightly held so. First respondent did not examine any authorised officer from BIRD-K to prove the alleged agreement between them.

10. Then the liability of the appellant/Insurance Company is concerned, the Tribunal following the dictum laid down by the Supreme Court in National Insurance Co. Ltd. vs. Swaran Singh and others to the effect that the Insurance Company in order to avoid its liability must not only establish the available defences raised in the proceedings but must also establish breach on the part of the owner of the vehicle and the burden of proof where-for would be on them, has observed that in the instant case the appellant/Insurance Company failed to discharge its burden since it failed to examine the RTA officials to establish that M. Sagar Reddy-driver of the crime vehicle did not possess the driving licence and further it did not take steps to summon and examine the said M. Sagar Reddy to prove that he did not possess valid driving licence. The Tribunal also observed that in the charge-sheet the police have not charged M. Sagar Reddy for not possessing valid driving licence. On the aforesaid observations, the Tribunal held that the Insurance Company failed to discharge its burden that the driver had no driving license and the insured was guilty of negligence in fulfilling conditions of the policy regarding driving licence of the driver. Accordingly, the Tribunal directed respondent Nos. 1 and 2 to pay compensation.

11.a. As against, first contention of learned counsel for appellant is that there is no burden on the Insurance Company to prove that the driver had no valid driving license and Tribunal erroneously placed burden on it to establish that fact contrary to the principle laid down in United India Insurance Co. Ltd. Vs. Rakesh Kumar Arora and Others, . Next, he argued that proving the lack of driving licence is nothing but establishing a negative fact and even then the Insurance Company discharged the said onerous task by issuing notices to owner and

driver vide Exs. B12 and B13 but they failed to respond. Learned counsel would argue that the Insurance Company could do nothing more. Under those circumstances the Tribunal ought to have drawn adverse inference against the insured that he knowingly allowed the unauthorised driver to drive the vehicle and thereby caused breach of terms of policy and accordingly exempted the Insurance Company from the liability. He would submit that as per Swaran Singh's case 2004 ACJ 1 (SC) the burden is on the owner to see that the driver to whom he entrusted the vehicle is having valid driving licence.

b. In the light of his arguments, I perused the award. Relying upon the Full Bench decision of the Apex Court in Swaran Singh's case 2004 ACJ 1 (SC) the Tribunal held that burden is on the Insurance Company to establish the breach on the part of insured. The Apex Court in that case was dealing with vide spectrum of defence pleas of Insurance Companies basing on the deficiencies in driving licences. Such deficiencies are:

- a) Fake driving licenses 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 learners licence.

c. The Supreme Court after discussing various issues involved in this regard, summarised its findings which were excerpted in para-38 of the award and hence I am not reproducing here. The gist of the findings is that the Insurance Company in order to succeed its defence pleas touching the driving licence issues must:

- a) Firstly, establish that there is a breach of policy condition in respect of driving licence issue.
- b) Secondly, 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 drive at the relevant time.
- c) Thirdly, the breach which was committed by the insured was so fundamental as is found to have contributed to the cause of the accident.

d) So, by applying the above principles, the Tribunal rightly fixed the burden of establishing the breach of terms of policy on the Insurance Company. The appellant/Insurance Company relied upon Rakesh Kumar Arora's case 2008 ACJ 2855 to buttress his argument that burden of proving the lack of driving licence was not on the Insurance Company and Tribunal was at fault. However, in view of Full Bench decision in Swaran Singh's case 2004 ACJ 1 (SC) fixing responsibility

on the Insurance company, I am unable to follow United India Insurance Co. Ltd. Vs. Rakesh Kumar Arora and Others, . So, the first argument raised by the appellant/Insurance Company is negatived.

12. Then coming to next argument, a perusal of Ex. B12 and B13 would no doubt show that appellant/Insurance Company issued notices to owner and driver to produce the copy of driving licence for perusal and they have not responded. Hence, point is whether by that count an adverse inference can be drawn against the insurer and driver and consequently can it be held that the insurer discharged its burden.

13. It is imperative to peruse case law in this regard.

(i) In the case of *Narcinva V. Kamat and another vs. Alfredo Antonio Doe Martins and others* appellant No. 2 who was the partner of the firm owning the crime vehicle while driving the van committed accident. The Insurance Company repudiated its liability on the ground that he was not having valid driving licence. The Tribunal and High Court absolved the Insurance Company. In that context, firstly with regard to point whether the burden lies with the Insurance Company to prove the breach of the policy the Apex Court observed thus:

If a breach of a term of contract permits a party to the contract to not to perform the contract, the burden is squarely on that party which complains of breach to prove that the breach has been committed by the other party to the contract. The test in such a situation would be who would fail if no evidence is led. The language and the format in which issues Nos. 7 and 8 have been cast by the Tribunal clearly casts the burden of proof on the insurance company.

Then, while appreciating the argument of Insurance Company that in the cross-examination of second appellant he agreed to produce his driving licence but failed to produce the same and hence an adverse inference must be drawn against him that he did not have a valid driving licence, the Apex Court while disagreeing held thus:

The submission fails to carry conviction with us. The burden to prove that there was breach of the contract of insurance was squarely placed on the shoulders of the insurance company. It could not be said to have been discharged by it by a mere question in cross-examination. The second appellant was under no obligation to furnish evidence so as to enable the insurance company to wriggle out its liability under the contract of insurance. Further the R.T.A. which issues the driving licence keeps a record of the licences issued and renewed by it. The insurance company could have got the evidence produced to substantiate his allegation. Applying the test who would fail if no evidence is led, the obvious answer the insurance company.

(Emphasis supplied)

Thus, the Apex Court did not agree that mere admission by the driver in his cross-examination to produce driving licence and his failure will discharge the

burden of Insurance Company.

(ii) A learned single Judge of this High Court in *United India Insurance Company Limited, Kurnool vs. Madiga Thappeta Ramakka and others* while relying upon the above Supreme Court judgment in *Narcinva V. Kamat*'s case 1985 ACJ 1 397 (SC) and other High Court decisions has observed thus:

As seen from the above pronouncements of the Supreme Court and other High Courts, the best method is to summon the driver to produce the driving licence, and also to take appropriate steps to examine him. If the driver and the owner of the offending vehicle remain ex parte, a duty is cast upon the court on the application of the insurance company to take appropriate steps to summon the driver and examine him. If the driver is summoned and if he has produced the driving licence it is sufficient. If he did not respond to the summons and did not appear nor did he produce the driving licence, an adverse inference can be drawn that he was not holding a valid driving licence. It is also the duty of the Insurance Company to summon the R.T.A. officials to produce the driving licence as the R.T.A. who issues the driving licence keeps record of the licence issue and renewed by it and the insurance company could have got the evidence produced to substantiate its defence. Either of the above two steps has not been taken by the insurance company. As already stated, if the driver, in spite of receipt of summons, has not been present and subjected himself for examination, the court is entitled to draw adverse inference.

From the tenor of above observation the Court is entitled to draw adverse inference it appears, drawing adverse inference in the circumstances narrated supra is the discretion of the concerned court but not mandatory because it was held in the above decision that apart from summoning the driver and owner to produce the licence, it was also the duty of the Insurance Company to summon the RTA officials to produce the driving licence.

(iii) In a subsequent decision reported in *The National Insurance Company Limited rep. by its Divisional Manager vs. Parital Venkateswarlu* and another learned single Judge of this High Court happened to discuss about the liability of Insurance Company to prove non-possession of driving licence by the driver. He also happened to discuss whether issuing notice to the owner and driver by the Insurance Company would discharge its liability. Regarding the first aspect, learned Judge held that though it amounts to adducing negative evidence which is difficult in the ordinary circumstances, still the obligation is cast upon the insurer to prove such negative evidence so as to eventually absolve itself from the liability. Such burden is cast upon the insurer, obviously, in view of the fact that innocent claimant may not be knowing about existence or non-existence of the licence of the driver of the offending vehicle. Then, regarding the sufficiency of issuing notice to discharge the burden, learned Judge held thus:

Para-19. It is no doubt true that the second respondent - owner did not respond to the notice got issued by the appellant-insurer for causing production of the

licence. That will not absolve the insurer from discharging its obligation to show before the Court that the owner has breached the condition of policy of possessing valid driving licence by the driver.

14. When the above decisions of the Supreme Court and our High Court are summed up, we can understand that mere eliciting from the owner/driver to produce licence and their consequential failure or mere issuing notice to the owner/driver to produce licence and their non-response by themselves are not sufficient to absolve the liability of Insurance Company to pay compensation and at best from the above circumstances the Court in its discretion may draw adverse presumption under Section 114(g) of Evidence Act against the owner and driver to the effect that driver had no valid driving licence. In view of the principles in Swaran Singh's case 2004 ACJ 1 (SC), the Court cannot exonerate the Insurance Company from its liability to pay compensation to third party merely by drawing such an adverse inference. The further burden lies on Insurance Company to establish that the owner has willfully committed the breach of the policy by entrusting the vehicle to an unauthorised driver and the breach was so fundamental that resulted in the accident.

15. In the instant case, as rightly observed by the Tribunal, the appellant/Insurance Company has not summoned the RTA officials to establish that driver did not possess any driving licence. Moreover, the police have not charge sheeted the driver for not possessing valid driving licence. Considering all these, it must be held that the appellant/Insurance Company failed to establish the breach of the policy committed by the insured.

16. The cited decision in Sardari and Others Vs. Sushil Kumar and Others, also will not help the appellant. In that case the driver of the crime vehicle was examined before the Tribunal and he admitted that he had not possessed valid driving licence. In that context, it was held that owner of the vehicle had statutory obligation to see that driver of the vehicle whom he authorised to drive the same holds a valid licence. Accordingly, the Supreme Court exonerated the Insurance Company in that case. However, the facts in the instant case are different. As observed supra, there is no cogent material in this case to conclude that driver had no valid driving licence. Therefore, the question of holding the 1st respondent guilty of negligence does not arise.

This point is answered accordingly.

17.a. POINT No. 2: This point is concerned, the grievance of the appellant is that the Tribunal awarded Rs. 1,06,150/- towards medical bills without proof of Ex. A6 medical bills by the claimants. Ex. A6 medical bill was issued by Yashoda Hospital for Rs. 1,06,150/- towards treatment charges of the deceased.

b. In the cited decision in United India Insurance Company Limited Vs. Mohd. Khaj Rasool Sayyed @ Mohd. Khaja Main Shaik and Another, it was held in the absence of any evidence in proof of documents through proper witnesses they cannot be accepted nor can be relied upon by the court and there can be no

exception to medical documents.

c. In the instant case, relying upon the evidence of P.Ws. 1 and 3 the Tribunal allowed the aforesaid medical expenditure. PW 1 who is the wife of deceased deposed that after critically injured in the accident on 27.06.2007 her husband underwent inpatient treatment till 30.06.2007 in Yashoda Super Speciality Hospital and succumbed to injuries and they incurred medical expenditure about 1.50 lakhs to 2 lakhs. She thus produced Ex. A6 medical bill. PW 3 is the consultant Neurosurgeon in Yashoda Hospital who performed brain operation to the deceased. He deposed that deceased suffered brain injury and abdomen injury and there was a large acute subdural haematoma and subarachnoid haemorrhage in all basal cisterns. He deposed that Ex. A6 medical bill was issued by Yashoda Hospital.

d. Having regard to proof offered by claimants relating to the critical nature of injuries, treatment and more particularly, the expenditure the Tribunal rightly approved Ex. A6 medical bill. Hence, I find no conviction in the argument of the appellant.

This point is answered accordingly.

18. In the result, this MACMA is dismissed by confirming the award passed by the Tribunal in O.P. No. 542 of 2007. No order as to costs.

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