(2014) 12 KAR CK 0141

In the Karnataka High Court

Case No : Miscellaneous First Appeal No. 9129 of 2011 (MV)

Bajaj Allianz General Insurance Co. Ltd. APPELLANT

Vs

Puttannacharai RESPONDENT

Date of Decision : 19-12-2014

Acts Referred:

Constitution of India, 1950 — Article 136, 142
Motor Vehicles Act, 1988 — Section 166, 173(1)

Citation : (2014) 12 KAR CK 0141

Hon'ble Judges : P.D. Waingankar, J

Bench : Single Bench

Advocate : O. Mahesh, Advocate for the Appellant; K.T. Gurudeva Prasad, Advocate for the Respondent

Judgement

P.D. Waingankar, J.—This appeal under section 173(1) of M.V. Act by the appellant-Insurance company is against the judgment and award dated 2.6.2011 in M.V.C. No. 8425/2008 on the file of Small Causes Court and MACT, Bangalore fastening the liability on the insurance company to pay award amount with liberty to recover the same from the owner of the vehicle.

2. The facts which gave rise to this appeal are as under:--

On 6.3.2008, at about 2.00 p.m., the claimant was travelling in tractor bearing No. KA-05-T-5263 as a coolie. On account of rash and negligent driving of the tractor, the driver lost control and thereby tractor turtled on the road, as a result, the claimant fell down and sustained grievous injuries, for which, he was treated in NIMHANS followed by Rajshekar hospital, Bangalore. He filed a claim petition under Section 166 of M.V. Act against the owner and insurer of the tractor.

3. The Insurance company opposed the claim petition. Though the Insurance company has admitted issuance of policy in favour of the owner of the tractor, which was valid as on the date of the accident, it has contended that the claimant was travelling in the tractor as gratuitous passenger in violation of the

policy conditions and therefore, the Insurance company is not liable to indemnify the owner of the tractor in the event an award is passed in favour of claimant.

4. The claim petition came up for consideration before the tribunal. The tribunal upon hearing the submissions made by learned counsel for the claimant and Insurance company and on appreciation of evidence, awarded a total compensation of Rs. 4,51,000/- to the claimant and directed that the owner and insurer of the tractor are jointly and severally liable to pay the compensation, giving liberty to the Insurance company to deposit and thereafter to recover the same from the owner of the tractor, though the Tribunal held that the claimant was travelling as gratuitous passenger in the tractor at the time of accident.

5. Aggrieved by the judgment and award directing Insurance company to deposit the award amount with liberty to recover the same from the owner of the tractor, this appeal is preferred.

6. I have heard learned counsel appearing for the Insurance company since learned counsel appearing on behalf of the owner of tractor remained absent.

7. Learned counsel for the appellant-Insurance company contended that the Tribunal is not justified in directing the Insurance company to deposit the compensation with liberty to recover the same from the owner of the tractor, when the Tribunal has recorded a finding that the claimant was travelling in the tractor as gratuitous passenger in violation of the policy conditions. He further submitted that the Supreme Court by exercising power under Article 136 r/w 142 of Constitution of India having regard to facts and circumstances of a particular case has directed the Insurance company to deposit and thereafter to recover the compensation from the owner of the vehicle, that power cannot be exercised either by the tribunal or by this Court and hence learned counsel would pray for dismissal of the claim petition as against the insurance company.

8. Having heard submissions made by learned counsel for Insurance company, upon perusal of the material on record and the judgment and award passed by the Tribunal, the point that arises for my determination is:--

"Whether the Tribunal is justified in directing the appellant-Insurance company to deposit the award amount with liberty to recover the same from the owner of the vehicle?."

9. It is not in dispute that claimant Puttannachari while travelling in tractor bearing No. KA-05-T-5263 insured by the appellant-Insurance company on 6.3.2008 at about 2.00 p.m. fell down from the tractor on account of rash and negligent driving of the driver of tractor and sustained injuries for which, he was treated in NIMHANS and thereafter Rajshekar hospital. He filed a claim petition against the owner of the tractor and the Insurance company. The claim petition was opposed by the Insurance company contending that the claimant was travelling in the tractor as gratuitous passenger, though he was not permitted to travel in terms of policy conditions and thereby owner of the tractor has

committed breach of policy conditions. The claim petition came up for consideration before the Tribunal. The Tribunal awarded a total compensation of Rs. 4,51,000/- to the claimant from respondent Nos. 1 and 2-owner and insurer of the tractor jointly and severally and directed the Insurance company to deposit to recover the same from the owner of the tractor.

Para 19 of the judgment reads as under:--

"Having considered the principles and ratio referred in the above referred ruling it is pertinent to note that petitioner has not disputed that he was travelling in the tractor on the date of the accident. Ex. R.2 is the ''B'' register extract of RC which reveal the seating capacity of tractor is only one. Ex. R.1 is the policy wherein there is no mention with regard to payment of additional premium. It is settled law that gratuitous passenger is not entitled for compensation unless the insured has paid additional premium. Under such circumstances the contention raised by the respondent that the petitioner is a gratuitous passenger is proved through oral and documentary evidence produced by the respondent. However in case of gratuitous passenger not covered by the insurance policy. Unless and until any extra premium is paid to cover the risk, the insurer is liable to satisfy the claim after gratuitous passenger and thereafter entitled to realize the amount from the owner of the vehicle without any separate proceedings. Hence, according to me even if the insurance company has proved the defence the insurance company has to pay the compensation at the first instance and he is at liberty to recover the same from the owner of the vehicle."

10. Thus upon going through para 19 of the judgment passed by the Tribunal, it is abundantly clear that the claimant was travelling as gratuitous passenger, he was not covered by the policy issued by Insurance company in favour of the owner of the tractor. While recording the said finding, the Tribunal held even if the Insurance company has proved the defence, the Insurance company has to pay compensation at the first instance and thereafter the Insurance company is at liberty to recover the same from the owner of the vehicle.

11. At this juncture, it has to be stated when there is breach of policy conditions, the Insurance company cannot be held liable to indemnify the owner. When such being the case, it was not proper on the part of the Tribunal to direct the Insurance company to pay compensation awarded to the claimant with liberty to recover the same from the owner of the tractor. Merely because the Supreme Court by exercising its power under Article 136 r/w 142 of the Constitution of India directed the Insurance company to deposit the compensation awarded with liberty to recover the same from the owner of the vehicle having regard to the facts and circumstances of a particular case, such a power cannot be exercised by the Tribunal. The Tribunal is not justified in directing the Insurance company to deposit the compensation amount with liberty to recover the same from the owner of the tractor. To that extent, the judgment and award passed by the Tribunal is liable to be set-aside.

12. Accordingly, I pass the following order:--

"Appeal is allowed. The judgment and award dated 2.6.2011 passed in MVC No. 8425/2008 on the file of Small Causes Court and MACT, Bangalore to the extent directing the appellant-Insurance company to pay compensation amount with liberty to recover the compensation from the owner of the tractor is hereby set-aside. The claim petition as against the appellant-Insurance company is hereby dismissed while confirming the judgment and award as against respondent No. 1-Owner of the tractor."

The amount in deposit shall be refunded to the appellant-Insurance company.