

(2013) 12 AP CK 0161

In the Andhra Pradesh High Court

Case No : Motor Vehicle Act (C.M.A.) No. 23 of 2012

Bajaj Allianz Insurance Co. Ltd.

APPELLANT

Vs

Botu Janardhana Rao, Botu Naveen Kumar, Botu Maduri and
R.K. Pandu

RESPONDENT

Date of Decision : 18-12-2013

Acts Referred:

Citation : (2013) 12 AP CK 0161

Hon'ble Judges : B. Siva Sankara Rao, J

Bench : Single Bench

Advocate : A. Ramakrishna Reddy, for the Appellant; S. Kasi Viswanatham for Respondents 1 to 3, for the Respondent

Final Decision : Partly Allowed

Judgement

Dr. B. Siva Sankara Rao, J.—The 2nd respondent-insurance company filed this appeal, having been aggrieved by the Order/Award of the learned Chairman of the Motor Accidents Claims Tribunal-cum-II Additional District Judge, Visakhapatnam, (for short, "Tribunal") in M.V.O.P. No. 16 of 2008, dated 29.07.2011, awarding compensation of Rs. 4,39,000/- (Rupees Four lakhs Thirty Nine thousand only) with interest at 7.5% per annum as prayed for in the claim petition u/s 166 of the Motor Vehicle Act, 1988 (for short, "the Act"). Heard Sri A. Rama Krishna Reddy, the learned counsel for the appellant-2nd respondent and Sri S. Kasi Viswanatham, learned counsel for respondents 1 to 3-claimants 1 to 3. Against the appeal 4th respondent (owner of the auto) notice served, but not appeared, thus taken up the appeal to decide on merits. Perused the material on record. The parties hereinafter are referred to as arrayed before the Tribunal for the sake of convenience in the appeal.

2. The contentions of the insurer in the grounds of appeal as well as in course of hearing in nutshell are that the appellant insurance company has no liability to pay compensation to the claimants as the appellant never issued any policy to the crime auto bearing No. AP 09 Y 7574 and the policy produced by the

claimants is a fake or fabricated policy and in proof of the fact that they placed reliance on Exs. B-1 to B-3 bunch of policies of the impugned date 07.03.2007 and also to subsequent dates which nowhere given the series mentioned in the impugned policy and that even in notice issued covered by Exs. B-4 to B-10, same returned, to the 1st respondent to produce relevant documents including driving licence and policy, he did not respond and thereby set aside the award of the Tribunal and exonerate the insurer and also contended that the driver was not having transport light motor vehicle driving licence for driving the transport light motor vehicle auto, for non-transport light motor vehicle driving licence, the insurer is not liable and award of the Tribunal is contrary to law, weight of evidence and probabilities of the case, that the Tribunal was erred in arriving a wrong conclusion and compensation awarded to the claimants is highly excessive, that the award in granting compensation is against to the principles of law and prayed to dismiss the claim of the claimants by allowing the appeal. Whereas it is the contention of the claimants as respondents 1 to 3 of the appeal that the award of the Tribunal is reasoned and well considered one and just and for this Court while sitting in the appeal, there is nothing to interfere either in the finding of liability of insurer in issuing the policy even impugned as not genuine and for joint liability from the contention of not possessing valid licence is not a fundamental breach and prayed to dismiss the appeal with costs.

3. Now the points that arise for consideration in the appeal are:

1. Whether the award of the Tribunal in fixing joint liability on the insurer and insured by holding that the insurer bound to indemnify the owner of the auto from the disputed policy held issued by the agent to bind is not sustainable and requires interference by this Court while sitting in the appeal so also on the contention of the driver of the auto said to have been not possessed effective licence and with what observations and conclusions?

2. To what result?

POINT No. 1:

4. The factual matrix that were proved before the Tribunal is that the 1st claimant who is husband of the deceased took the deceased for medical check up to NIMS on 20.07.2007 and after completing the same, the 1st claimant along with the deceased Smt. Rajakumari while crossing the road in front of said hospital, one auto rickshaw bearing No. AP 09 Y 7574 in a rash and negligent manner dashed her (deceased) who sustained bleeding head injury and succumbed to the injuries of the accident dated 25.07.2007. Subsequently, the claimants 1 to 3 husband, son and daughter of the deceased filed the claim petition. The fact that the accident was the result of rash and negligent driving of the driver of the crime auto of 1st respondent is not in dispute in the appeal. It is also not in dispute apart from proved from the evidence of R.Ws 1 to 3 in their cross examination by claimants that R.W.-1 admitted that Ex. A-4 policy was issued through their agent Anand Raj who is their employee and the particulars

mentioned in the disputed policy Ex. A-4 are tallied with the agent particulars with the insurer and it is also admitted that he issued similar policies more than 47 in number and no action even taken in this regard. When admittedly he was the agent and it is he that issued the policy representing the principal i.e., insurer herein 2nd respondent to the claim petition (appellant herein) they have no right to rebut and dispute the liability thereunder in the absence of notice issued by canceling the policy before the accident. Thus, the claim of the claimants against the insurer to indemnify pursuant to said policy more particularly under the contract of agency covered by chapter 10 of the Indian Contract Act, 1872, the general law apart from the special provisions under the Insurance Act is sustainable. The Tribunal there from well considered the evidence on record and assigned reasons to said conclusion and for this Court while sitting in appeal so far as that finding concerned, there is practically nothing to interfere muchless to disturb in any manner.

5. Coming to the factum of the driver was not having transport light motor vehicle driving licence is concerned, no doubt as can be seen from para-4 of the award of the Tribunal, extracting of the relevant portion of the counter of the insurer, specific plea taken by the insurer that the driver was not having transport light motor vehicle driving licence, but for non-transport light motor vehicle driving licence to the driver by name R. Nandya. The said factum is not in dispute and Ex. A-5 photostat copy of driving licence shows that he possessed only non-transport light motor vehicle driving licence. No doubt, it is the contention of the claimants as respondents to the appeal that the transport and non-transport vehicle only regarding the nature of the use and not in change in the size of the vehicle. However, the fact remains once the rules are prescribed for possessing a valid driving licence and within the expression of three Judge bench of the Apex Court National Insurance Co. Ltd. Vs. Swaran Singh and Others, categorically held at paras 45, 89 and 102 that it is the duty of the driver to have valid driving licence and also owner to verify and entries, but for to say for totally avoiding the liability by the insurer, there must be proof of conscious knowledge of the fact to the owner-1st respondent to the claim petition in entrusting the vehicle; in the absence of which even the driver was not having valid driving licence, the insurer has to pay to satisfy the claim of the claimants under Sections 149 r/w 166 & 168 of the Act and to recover the same from the owner. The Tribunal in this regard at page 10 and 11, para 12 observed that the evidence of R.W.-2 with reference to Ex. X-2 speaks the driver was having a valid driving licence to drive non-transport light motor vehicle and the badge and the transport endorsement required is additionally to give first aid after accident and from which it is not a breach more particularly from the admission of R.W.-2 to exonerate the insurer. Once the fact that the driver supposed to possess transport driving licence not possessed but for non-transport driving licence of light motor vehicle is proved from the record, once it is a breach by violation of the statutory requirement, the insured cannot say that it is not a fundamental breach. However, by taking consideration of the same, the insurer cannot avoid

liability, but for indemnify the insured to the 3rd party claimants and recover from the insured.

6. Having regard to the above, the insurer is liable to satisfy the claimants indemnifying the insurer and recover. No doubt in *National Insurance Co. Ltd. Vs. Vidhyadhar Mahariwala and Others*, , the two judge bench of the Apex Court in this decision by referring to *Swaran Singh (supra)* apart from other expressions in *National Insurance Co. Ltd. Vs. Kusum Rai and Others*, and *Oriental Insurance Co. Ltd. Vs. Shri Nanjappan and Others*, and *Ishwar Chandra and Others Vs. The Oriental Insurance Co. Ltd. and Others*, held that the insurer is not liable to indemnify the owner, when the driver has no license to drive the crime vehicle.

7. In *Sardari and Others Vs. Sushil Kumar and Others*, it was observed in para 6 of the judgment by the Supreme Court that, time and again made distinction between cases where 3rd party is involved vis-?-vis owner of the vehicle was involved. The object of Sections 147 & 149 of the MV Act enacted was social justice doctrine envisaged in the preamble of the constitution, however, the Act itself provides where the insurance company can avoid its liability. The avoidance of such liability by insurer largely depends upon violation of conditions of the Insurance Contract. Where the breach is ex-facie apparent from the record, court need not fasten liability on the insurer. In certain situations, however, the court while fastening liability on insured, may direct the insurer to pay to the claimants and recover the same from the insured. Even in the latest expression of the Apex Court in *S. Iyyapan Vs. United India Insurance Company Ltd. and Another*, a two judge bench of the Apex Court held that even though the insurer has taken the defence that there is a breach of conditions of the policy excluding from liability, from the driver is not duly licenced in during the crime vehicle when met with accident, third party has a statutory right to recover compensation from insurer and it was for the insurer to proceed against the insured for recovery of amount paid to third party in case there was any breach of condition of Insurance policy. By applying the ratio in *Swaran Singh (supra)* at para-21 of the judgment, the High Court held that some amount that was already deposited by the insurance company, which holds good to withdraw, and for the rest, insurance company is not liable. Accordingly to that extent point No. 1 is answered.

POINT No. 2:

8. In the result, the appeal is partly allowed while upholding the liability of the insurer to indemnify the insured from Ex. X-1 policy since issued on their behalf by their agent to bind, however the driver not possessed transport light motor vehicle, but for non-transport driving licence, to satisfy the claimants the claim awarded and recover the therefrom. The respondents shall deposit said amount within one month, failing which the claimants can execute and recover. It is made clear from the settled expressions of the Apex Court in *United India Insurance Co. Ltd. v. Lehu (supra)* & *Nanjappan (supra)* that the insurer is entitled, while depositing the amount payable, if not deposited or paid any amount so far to deposit in bank to approach the Tribunal to direct the RTA

concerned not to register any transfer of the crime vehicle and to seek for attachment of the crime vehicle or other property of the insured as an assurance for execution and recover in the same proceedings or under revenue recovery as per the MV Act, 1988 and also ask the Tribunal not to disburse the deposited amount to claimants (but for to invest in a bank) till such attachment order is made and made absolute from appearance and hearing. However, after the same, the Tribunal shall not withhold the amount of the claimants, if there is any necessity to permit for any withdrawal but for to invest the balance in fixed deposit in a nationalized bank. Rest of the terms of the award of the Tribunal holds good with proportionate increase of the enhanced compensation. There shall be no order as to costs in the appeal. Miscellaneous petitions, if any, in this appeal shall stand closed.