

(2016) 08 KAR CK 0096
In the Karnataka High Court
Case No : M.F.A. No. 25604 of 2010(MV)

Bharma Kallappa Murashetti

APPELLANT

Vs

Karamjeet Kaur

RESPONDENT

Date of Decision : 30-08-2016

Acts Referred:

Motor Vehicles Act, 1988 — Section 168

Citation : (2017) AAC 810 : (2016) ILRKarnataka 5098

Hon'ble Judges : Mrs. S. Sujath, J.

Bench : Single Bench

Advocate : Sri. H.M. Dharigond, Advocate, for the Appellant; Sri. S.N. Rajendra, Advocate, for the Respondent No. 1; Sri. S.S. Joshi, Advocate, for the Respondent No. 2

Final Decision : Allowed

Judgement

Mrs. S. Sujath, J.—This appeal is directed against the judgment and award dated 11th January 2010, passed by the II Additional Civil Judge (Sr.Dn.) and Additional MACT, Belgaum ("the Tribunal" for short) in MVC No. 2293/2003.

2. Briefly stated the facts are that the appellants were the claimants before the Tribunal. The claimants instituted the claim petition seeking compensation for the death of Shashikant Bharmha Murashetti in the road traffic accident, which occurred on 14.06.2008 contending that the deceased met with road traffic accident while proceeding on the motorcycle bearing registration No. MH-03/AD-883 along with his friend as a pillion rider. It was alleged that the said accident occurred owing to the actionable negligence of the driver of the truck bearing registration No. HR-55/B-9905. The insurer contested the claim. The Tribunal after appreciating the evidence on record, fixed 50% of the contributory negligence on the part of the deceased and awarded total compensation of Rs. 2,28,500/-. Being aggrieved, the appellants are before this Court.

3. Heard Sri. H.M. Dharigond, learned counsel appearing for the appellants, Sri.

S.N. Rajendra, learned counsel appearing for the respondent No. 1-owner and Sri. S.S. Joshi, learned counsel appearing for the respondent No. 2/Insurance Company.

4. It is evident that the deceased was riding the motorcycle as a pillion on the fateful day of the accident. It is the case of the respondent No. 2/Insurance Company that the appeal papers clearly reveals that the accident occurred due to the contributory negligence of the deceased i.e., for the triple riding of motorcycle. The Tribunal accepting the plea of the insurer, fixed the contributory negligence to the extent of 50% on the part of the deceased and the rider of the motorcycle for the accident in question. It is an admitted fact that the charge sheet was filed against the driver of the truck bearing registration No. HR-55/B-9905. The plea taken by the insurer is that, three adult passengers were travelling on the motorcycle, much against the seating capacity of the vehicle, which resulted in violation of the terms and conditions of the policy.

5. This issue was the subject matter of appeal before the Hon'ble Apex Court in the case of B.V. Nagaraju v. Oriental Insurance Co. Ltd., Divisional Officer Hassan reported in (1996) 4 Supreme Court Cases 647, it is held thus:

It is plain from the terms of the Insurance Policy that the insured vehicle was entitled to carry 6 workmen, excluding the driver. If those 6 workmen when travelling in the vehicle, are assumed not to have increased any risk from the point of view of the Insurance Company on occurring of an accident, how could those added persons be said to have contribute to the causing of it is the poser, keeping apart the load it was carrying. Here, it is nobody's case that the driver of the insured vehicle was responsible for the accident. In fact, it was not disputed that the oncoming vehicle had collided head-on against the insured vehicle, which resulted in the damage. Merely by lifting a persons or two, or even three, by the driver or the cleaner of the vehicle, without the knowledge of owner, cannot be said to be such a fundamental breach that the owner should, in all events, be denied indemnification. The misuse of the vehicle was somewhat irregular though, but not so fundamental in nature so as to put an end to the contract, unless some factors existed which, by themselves, had gone to contribute to the causing of the accident. In the instant case, however, we find no such contributory factor. In Sikand's case this Court paved the way towards reading down the contractual Clause by observing as follows :

" When the option is between opting for a view which will relieve the distress and misery of the victims of accidents or their dependants on the one hand and the equally plausible view which will reduce the profitability of the insurer in regard to the occupational hazard undertaken by him by way of business activity, there is hardly any choice. The Court cannot but opt for the former view. Even if one were to make a strictly doctrinaire approach, the very same conclusion would emerge in obeisance to the doctrine of "reading down" the exclusion clause in the light of the "main purpose" of the provision so that the "exclusion clause" highlighted earlier. The effort must be to harmonize the two instead of allowing

the exclusion cause to snipe successfully at the main purpose.

The theory which needs no support is supported by Carter's "Breach of Contract" vide paragraph 251. To quote:

"Notwithstanding the general ability of contracting parties to agree to exclusion clauses which operate to define obligations there exists a rule, usually referred to as the "main purpose rule", which may limit the application of wise exclusion clauses defining a promisor's contractual obligations. For example, in *Glynn v. Margetson & Co.* [1893 AC 351, 357], Lord Halsbury, L.C. stated :

It seems to me that in construing this document, which is a contract of carriage between the parties, one must in the first instance look at the whole instrument and not at one part of it only. Looking at the whole instrument, and seeing what one must regard as its main purpose, one must reject words, indeed whole provisions, if they are inconsistent with what one assumes to be the main purpose of the contract."

6. The very same issue was considered by the Hon"ble Apex Court in the case of *Lakhmi Chand v. Reliance General Insurance* reported in (2016) 3 Supreme Court cases 100, wherein, the Hon"ble Apex Court after considering the judgment of the Apex Court in *B.V. Nagaraju* (supra) and the judgment of the Apex Court in the case of *National Insurance Co. Ltd., v. Swaran Singh* reported in (2004) 3 SCC 297, held thus;

"It becomes very clear from a perusal of the above mentioned case law of this Court that the insurance company, in order to avoid liability must not only establish the defence claimed in the proceeding concerned, but also establish breach on the part of the owner/insured of the vehicle for which the burden of proof would rest with the insurance company. In the instant case, the respondent-Company has not produced any evidence on record to prove that the accident occurred on account of the overloading of passengers in the goods carrying vehicle. Further, as has been held in the case of *B.V. Nagaraju* that for the insurer to avoid his liability, the breach of the policy must be so fundamental in nature that it brings the contract to an end. In the instant case, it is undisputed that the accident was in fact caused on account of the rash and negligent driving of the offending vehicle by its driver, against whom a criminal case vide FIR No. 66 of 2010 was registered for the offences referred to supra under the provisions of the IPC. These facts have not been taken into consideration by either the State Commission or National Commission while exercising their jurisdiction and setting aside the order of the District Forum. Therefore, the judgment and order of the National Commission dated 26.04.2013 passed in *Lakhmi Chand v. Reliance General Insurance* is liable to be set aside, as the said findings recorded in the judgment are erroneous in law."

7. The learned counsel for the insurer pointed out Section 128 of the Motor Vehicles Act, 1988 (the Act" for short) mandates the seating capacity of only two persons, as regards the motorcycle is concerned. Admittedly, it was the case of

triple riding resulting in violation of the statutory provision. This very point fell for consideration before the Division Bench of this Court in the case of Divisional Manager National Insurance Co. Ltd., v. Smt. Sunanda and Others in MFA No. 6360/2008 and connected appeals (disposed of on 24.06.2010), wherein, it is held thus:

"We have gone through the aforesaid two judgments. They are in the nature of observations. The aforesaid observations were made in the context and in the facts of that particular case and no law as such is laid down. If the violation of a statutory rule has resulted in the accident, certainly we can hold the person who violated the rule as also having contributed to the accident. But mere violation of a statutory provision cannot lead to an inference that the accident was on account of the negligence. Something more is to be done. Evidence has to be adduced in a particular case that the violation of a statutory rule resulted in negligence which in turn resulted in the accident, then proportionate contributory negligence could be attributed to the persons who violated the statutory provision. Ultimately it depends on the facts of each case. In the instant case, no doubt apart from the driver of the motorcycle, there were two pillion riders. It is in violation of Section 128. But there is nothing on record to suggest that just because three persons were on the motorcycle, that was the cause for the accident to any extent whatsoever. In the absence of any such evidence, mere contravention of a statutory provision cannot be held to have resulted in the accident. Therefore, on that score alone negligence cannot be attributed to the violators of the law. It is not possible to hold that merely because there were three persons in the vehicle, that by itself is a negligent act so as to foist the liability on the violators of the law. In that view of the matter, we do not find any substance in this contention."

8. A careful perusal of these judgments makes it clear that the very violation of a statutory provision would not lead to negligence causing the accident. A concrete evidence is necessary to establish the violation of the statutory provision, resulting in the negligence causing the accident. Only in such circumstances, proportionate contributory negligence could be attributable. No doubt three passengers were travelling in a motorcycle in violation of Section 128 of the Act, but no evidence is led by the insurer to establish that the said violation of the statutory provision itself was the cause for the accident to attribute contributory negligence on the part of the deceased. Mere taking a defence in the written statement would not suffice to establish the factum of contributory negligence, it has to be supported by direct and corroborative evidence, which is admittedly missing in the present case, since the insurer has not made any attempt to adduce evidence to establish the contributory negligence on the part of the deceased. It is well settled principle that, for the insurer to avoid its liability, the breach of the policy must be so fundamental in nature that it brings contract to an end. The burden of proving rests on the shoulder of the insurer to establish this breach of the policy, which was fundamental in nature. That having not been done by the insurer, no contributory negligence can be attributed on the

part or the deceased. On the other hand, the police records very well establish that the negligence on the part of the driver of the truck was the cause for the accident. This vital material evidence was lost sight of by the Tribunal while fixing contributory negligence to the extent of 50% on the deceased. Thus, this Court is of the considered opinion that the Tribunal fixing 50% contributory negligence on the part of the deceased is not fit to be sustained. Accordingly, the entire negligence is fixed on the driver of the truck (offending vehicle; and the insurer of the offending vehicle-respondent No. 2 shall be liable to satisfy the award.

9. As regards the quantum of compensation is concerned, it is apparent from the records that the deceased was aged about 32 years at the time of the accident. The Tribunal has determined the monthly income of the deceased at Rs. 2,250/- p.m., deducting ? of the income of the deceased towards personal expenses, employing the multiplier of "16", reckoned the loss of dependency at Rs. 4,32,000/-. The monthly income determined by the Tribunal is abysmally low compared to the date of accident, i.e., 14.06.2008 and the occupation of the deceased, i.e., agriculture and kirani business. Hence, the monthly income of the deceased is re-determined at Rs. 4,250/-. Thus, the loss of dependency works out to Rs. 6,12,000/- (Rs.4,250/- x 12 x 16 x ?).

10. The deceased has left the young aged (22 years) widow and three minor children aged about 4 years, 2? years and 1 year respectively, besides the aged parents. The untimely death of the deceased has caused irreparable loss to the family of the deceased, which is irrecoverable. Considering the unbeatable loss to the family, just, fair and equitable compensation is required to be awarded. In the given circumstances of the case and applying the principles of law laid down by the Hon''ble Apex Court in the case of Rajesh and others v. Rajbir Singh and others reported in (2013) 9 SCC 54 , it would be just and equitable to award a sum of Rs. 1,00,000/- towards loss of consortium, a sum of Rs. 1,00,000/- towards love and affection, a sum of Rs. 10,000/- towards loss of estate and a sum of Rs. 25,000/-towards funeral and other expenses. Thus, the compensation awarded by the Tribunal is modified as under:

i)

Loss of dependency

Rs. 6,12,000/-

ii)

Loss of consortium

Rs. 1,00,000/-

iii)

Loss of love and affection

Rs. 1,00,000/-

iv)

Loss of estate

Rs. 10,000/-

v)

Funeral expenses

Rs. 25,000/-

Total

Rs. 8,47,000/-

11. The appellants/claimants shall be entitled to total compensation of Rs. 8,47,000/- with interest @ 6% p.a. as against Rs. 2,28,500/- awarded by the Tribunal, deducting interest for the delayed period of 232 days in filing the appeal before this Court, as per order dated 13.08.2015. Respondent No. 2 shall satisfy the award.

12. The apportionment and disbursement of award amount shall be in terms of the order of the Tribunal.

13. Appeal is allowed to the extent indicated above.