(2017) 07 KAR CK 0033

In the Karnataka High Court

Case No : 6635 of 2010

BYRANAHALLI SHIVAMURTHY S/O HALAPPA, & ORS. — APPELLANT

Vs

SMT.BASAMMA W/O LATE RAJAPPA, & ORS. — RESPONDENT

Date of Decision : 07-07-2017

Acts Referred:

Indian Penal Code, 1860, Section 279, Section 304A, Section 338, Section 337 - Rash driving or riding on a public way - Causing death by negligence -

Citation : (2017) 07 KAR CK 0033

Hon'ble Judges : Rathnakala

Bench : DIVISION BENCH

Advocate : B.K.MANJUNATH, D.S.SHIVANANDA, S.BASAVARAJ POOJAR, M.R.MAMATHA, E.S.INDIRESH, R.SRISHAILA, MANJUNATHA PATTANASHETTY, M.U.POONACHA, MALLIKARJUN S. BASAREDDY, ASHOK KUMAR S.

Judgement

1. These appeals are the consequence of the vehicular accident dated 13.5.2005 involving Tractor-Trailor bearing No Reg.No.KA-14/T 539-540.

2. The common facts not in dispute in these appeals is, one Murugeppa is the owner of the Tractor- Trailor bearing Reg.No.KA-14/T 539-540. On 13.10.2005 at 7.30 p.m. the vehicle turtled at the Chennagiri town, Kagatur cross due to the rash and negligent driving by its driver. The loader Rajappa who was in the vehicle suffered fatal injuries and died on his way to the hospital. The legal heirs of Rajappa preferred claim petition before the Motor Accident Claim Tribunal (for brevity ''the Tribunal'') in MVC No.150/2006. On enquiry, the Tribunal allowed the petition, awarded compensation against the owner and driver of the vehicle and the petition against the insurer was dismissed.

3. Another person namely Hanumanthappa died at the spot and one Sri.Prabhakar Chari suffered permanent disability and the legal heirs of Hanumanthappa and injured Prabhakar Chari filed claim petitions before the

Commissioner for workmen''s compensation (for brevity ''the Commissioner'') which was numbered as CR No.195/2006 and CR No.50/2007 respectively. Both claim petitions were considered and disposed of vide common order dated 22.10.2008 and the petitions were allowed.

4. The award of the Tribunal is questioned by the driver of the Tractor-Trailor in MFA No.6635/2010 (MV) and the owner in MFA No.8471/2010(MV). The insurance company is challenging its liability against the award passed by the Commissioner in both claim petitions in MFA No.7412/2009 (WC) and 7413/2009 (WC) in KaaAaDa/K.N.P./CR.195/2006 and 50/2007 and the claimants are seeking enhancement of compensation awarded by the Commissioner in MFA 9021/2009 (WC) and MFA No.159/2009 (WC).

Regarding MFA No.8471/10(MV) and MFA

No.6635/10(MV):

Murigeppa (owner) and Byranahalli Shivamurthy

(driver) being roped with the liability to compensate the claimants have preferred the above appeals. During the pendency of the appeals, on the death of the owner, his legal heirs are prosecuting the appeal. The Tribunal by the impugned judgment and award has bailed out the insurance company on the ground that the deceased was a gratuitous passenger and not an employee of the owner of the vehicle. The Tribunal recorded its finding that the deceased was traveling in the Tractor from Channagiri to Kagatur village to the knowledge of the driver and held the driver and the owner responsible for the accident. Though one Mallikarjunappa was impleaded as 6th respondent claiming that he was the person on the wheels, considering the evidence of PW-1 that it was Shivamurthy who was driving the vehicle and the complaint was lodged against Byranahalli Shivamurthy @ Seenappa, the Trial Court held that it was Shivamurthy who was driving the vehicle and he did not have valid driving licence, thus brushed aside the contention of the owner that since the vehicle was insured and the coverage was in currency, insurance company is liable to indemnify him.

5. Learned counsel for the appellant in MFA No.6635/10 (Byranahalli Shivamurthy) has submitted that the appellant was not the driver of the vehicle, but it was 6th respondent Mallikarjunappa who was driving the Tractor-Trailor bearing Reg. No.KA 14/T-539-540. Byranahalli Shivamurthy was only travelling in the vehicle. A criminal case lodged against him ended in his acquittal. On appreciation of the said fact, the Commissioner held that Dummi Mallikarjunappa who had valid driving licence was driving the vehicle, thus compensation was awarded which was to be payable by the insurer. Mallikarjunappa, on impleading him as the 6th respondent, did not dispute the allegation that he was the driver of the vehicle and even the owner Murugeppa did not dispute employment of Mallikarjunappa under him as driver. In that view of the matter, the finding of the Tribunal that Byranahalli Shivamurthy was the driver is a perverse finding which requires to be reversed by absolving the liability of the accident.

6. The owner-appellant in MFA No.8471/10(MV) has challenged the impugned judgment and award on the ground that the compensation awarded at Rs.3,80,000/- is on a higher side and another fold of attack is, the insurance company was waived out from its liability to indemnify the legal heirs of the deceased solely on the ground that 4th respondent Byranahalli Shivamurthy had no driving licence, but the 6th respondent Mallikarjunappa was the driver and he had a valid driving licence which fact is accepted by the Commissioner. Since the insurance was duly covered by the insurance company for the concerned period, the liability shall be fixed on the insurance company, not on the owner.

7. Perused the records of MVC No.150/2006 on the file of the Civil Judge (Sr.Dn.) & AMACT at Bhadravathi.

8. The insurance policy was marked as Ex.R11. It was a Kissan Package Policy. Sum insured was for Rs.1,84,000/-. Rs.2,010/- towards basic premium and Rs.205/- towards service tax, totally 2,215 was collected towards the premium. Cover with exclusions: AGR & Forestry use only; Additional Perils: one driver; compulsory excess amount: Rs.3,500/-. The insurer had examined its official who had testified that the Tractor and Trailor can be used for agricultural purpose for the benefit of its owner and not for the commutation of the passengers. The claimants never stated that the deceased was an employee under the owner of the vehicle. It is borne from the evidence of the claimants that the deceased was travelling in the vehicle for his own work and thus was a gratuitous passenger. The nature of the policy did not cover the risk of such gratuitous passengers. In that view of the matter, the liability fastened against the owner of the vehicle cannot be shifted to the insurance company.

9. The Tribunal computed the income of the deceased in the absence of any documentary proof about the income of the deceased. His income was worked out at Rs.3,000/- per month, considering his age at 40 years, by deducting 1/3rd of the income towards personal expenses of the deceased and multiplying the residue with the multiplier of 15 appropriate to his age, the loss of dependency is worked out at Rs.3,60,000/- per annum; Rs.10,000/- is awarded towards the loss of consortium for the widow of the deceased and Rs.10,000/- is awarded towards funeral expenses and transportation of the dead body. Accordingly, Rs.3,80,000/- worked out by the Tribunal cannot be said to be exorbitant from any angle.

10. Regarding liability, the Tribunal on appreciation of the materials placed before it has observed that PW-1 the widow of the deceased had testified that Shivamurthy was driving the vehicle and the complaint to the police regarding the accident was lodged by one Malleshappa of Kagatur village naming Shivamurty @ Seenappa as the driver and the FIR was registered against Byranahalli Shivamurthy @ Seenappa, that prompted the Tribunal to brush aside the contention that G.P.Mallikarjunappa was the driver of the vehicle. The learned Judge has also observed from the deposition of the witnesses in the criminal case that the complainant had stated that Byranahalli Shekarappa was driving the

vehicle and there was no suggestion to him that Shivamurthy was not driving the vehicle. However, the witnesses examined two months thereafter came up with the statement that Mallikarjunappa was driving the vehicle and those witnesses were not examined before the Tribunal. Thus it was held that acquittal of Byranahalli Shivamurthy in the criminal case will not come in aid in the present case. In fact the widow of the deceased/PW-1 in her affidavit filed to the Court in lieu of her examination-in-chief had averred "............the 1st respondent drove the Tractor and Trailor in a very rash and negligent manner....." Shivamurthy was the 1st respondent arrayed in the claim petition. Apart from the above, it is to be noted that Shivamurthy had not challenged the charge sheet filed against him. It was never his case that he had valid driving licence to drive the Tractor in question. In all probability, it was the hand work of the interested in introducing the 6th respondent Mallikarjunappa G.P. as the driver of the vehicle since he had valid driving licence. The appreciation of evidence by the Trial Court is judicious and does not call for interference. Thus, both appeals are liable to be rejected. Regarding MFA Nos.7412/2009 (WC), 7413/2009(WC), 9021/2009 (WC) and 159/2009 (WC)

Coming to the award passed by the Commissioner, there were two claim petitions. MFA No. 159/2009 by the injured Prabhakara Chari and another in MFA No.9021/2009 by the legal heirs of the deceased Hanumanthappa pertaining to the accident on 13.5.2005. The contention was, on the fateful day, on the direction of the owner of the vehicle, the injured and the deceased being his employees had gone to Saw Mill to get wood logs cut. On the return journey, due to the rash and negligent driving of the vehicle by its driver, the vehicle toppled and Hanumanthappa died at the spot. The injured was treated at Channagiri Hospital and then at Manipal Hospital. The injured Prabhakara Chari suffered permanent disability and was disabled to walk. The injured was getting Rs.4,000/- wages per month with a daily allowance of Rs.25/-. The deceased was earning wages at the rate of Rs.4,500/- per month and he was aged 40 years as on the date of the accident. The vehicle is insured and the policy was in currency as on the date of the accident.

11. The owner of the vehicle admitted the accident, but claimed that he was disbursing daily wages at the rate of Rs.100/- and further claimed, one Dummi Mallikarjunappa was the driver of the Tractor and he had valid driving licence.

12. The insurer contested the petition; admitted that the policy was in currency and it was a farmer''s policy and the risk of the hamalis is not covered under the policy and the claim is subject to the fitness certificate, validity of the driving licence of the driver and also subject to Insurance Act 1964 (V)(B) and reserved right to defend itself under Sections 149(2), 149(4), 170 of the M.V. Act.

13. The injured examined himself as PW-1 and his Doctor as PW-2. On behalf of legal heirs of deceased, his widow Durgamma was examined. One witness was examined for the owner and the insurer examined its Administrative Officer. Documents were marked for either side.

14. The Commissioner on appreciation of the evidence on record held that the injured and the deceased were earning salary of Rs.3,000/- per month and they were aged 41 and 40 years respectively and assessed the permanent disability of the injured at 50%, thus worked out the compensation in accordance with the schedule to the Workmen''s Compensation Act as below: 1800x 181.37 x 50/100 = Rs.1,63,233/-

and in respect of the deceased, it was worked out as below:

1500 x 181.37 = 2,76,255/-

15. Though the insurance company contended that in fact one Byranahalli Shivamurthy was on the wheels at the time of the accident and he had no driving licence, drawing inference by the judgment of acquittal of the said Byranahalli Shivamurthy from the charges by the criminal court, it was observed that Dummi Mallikarjunappa was the driver and held that the vehicle met with the accident while under the use for agricultural purpose, thus allowed the claims.

16. Learned counsel for the insurer assailing the above award submits that the owner was examined through his GPA holder Rudresh and during the cross examination he had admitted that the vehicle did not possess the permit and he being an eye witness to the incident, had lodged the complaint to the police. The police Authorities filed FIR and on investigation filed charge sheet against Byranahalli Shivamurthy, the driver and the said Shivamurthy did not possess the driving licence on the date of the accident. 13 to 14 passengers were traveling in the vehicle. Out of them two sustained fatal injuries. The seating capacity of the Tractor is for one driver and there are no seats in the Trailor. Overlooking the above cross examination admission, the award passed is perverse and erroneous.

17. Learned counsel for the claimants submits that the owner had not disputed the employer and employee relationship. Several witnesses had testified before the criminal court that one Mallikarjunappa was the driver of the vehicle. The policy (Kissan Package Policy) was in force and compulsory excess amount premium was taken thus covering the coolies under the policy. No independent eye witness was examined by the insurance company to establish that the deceased Hanumanthappa and the injured were not the coolies.

18. Learned counsel for the insurer continues to submit that in view of the judgment of this court reported in 2011(1) KCCR 341 (DB) in MFA No.6794/2004, the risk of the workman/labour of the Tractor-Trailor has to be necessarily covered under Section 147 as an Act Policy. The appeal preferred by the insurance company lacks merit and the claimants are entitled for interest from the date of the petition till realization. There is evidence placed before the Tribunal that the insured and the deceased were earning Rs.4,500/- per month. In that view of the matter, the compensation has to be worked out on the basis of the monthly income of Rs.4,500/-. The accidental death of Hanumanthappa, injuries sustained by Prabhakara Chari at 50% physical disability not being in

question, the two points that fall for consideration in the appeals against the award of the Commissioner are:

1. Whether the compensation worked out by the Tribunal is proper and justified?

2. Whether the insurance company is not liable to indemnify the insured?

19. The owner of the Tractor and Trailor had admitted employer and employee relationship with the injured and the deceased. The claimants contended that the earning of the injured and the deceased was at Rs.4,500/- per month, but without corroborative documentary proof. The insurer disputed their identity as the employees of the owner of the vehicle apart from contending that the driver on the wheels was one Shivamurthy and had no driving licence to drive the vehicle. The insurer strongly relied on the prosecution of Shivamurthy in respect of the said accident, whereby he was charged for the offences under Sections 279, 337, 338, 304-A of IPC. However, the owner himself had stated in his objection statement, he used to pay wages at Rs.100/- per month. Wherefore, the Commissioner was justified in working out the compensation on the basis of the income of both at Rs.3,000/- per month.

20. Coming to the question of liability, it is a Kissan Package Policy covering the risk of the driver only. It is evident from the policy, the premium collected at Rs.2010/- was basic premium with service tax and no compulsory excess amount is collected towards the risk of the employees. Furthermore, the condition which is engraved on the face of the policy is, the vehicle shall be used for agricultural and forest use only.

21. The Division Bench of this Court in National Insurance Company Limited Vs. Maruthi & others reported in 2012 ACJ 1408 held that the combination of Tractor and Trailor is a goods carriage by virtue of Section 11(1) of fully worded policy (Miscellaneous & Special Type of Vehicles Policy ''B" package in the said case) and also provisions of section 147 of the M.V.Act, thus the claim of the coolies under the owner of the vehicle was held covered in the said case. The evidence was, claimants were carrying stones for constructing a bridge in the land belonging to the insured so as to store the water and the said work was held accepted as part and parcel of the agricultural operation.

22. But the accident in the present case has neither occurred in the agricultural farm nor in the forest, but in the town limits. The records reveal that there were two deaths and one causality. The owner though stated that he had sent the vehicle to the Saw Mill to get the wood logs cut, there was no corroboration to the said contention. The owner did not step into the witness box to subject himself for cross examination. To his knowledge, there was another claim before the Tribunal in which also he had admitted the liability in respect of the accident. The learned Commissioner has fastened the liability on the insurer in a casual manner, perhaps for the reason the employer-employee relationship was admitted by the owner. The Commissioner has not considered the objection of the insurer that the driver of the vehicle was one Shivamurthy who had no valid

driving licence and the vehicle at the time of accident was not used for agricultural purpose. The employer has not shown that the vehicle was not put in use against the terms of the policy. As observed, in the preceding para, G.P.Mallikarjunappa, a person having valid driving licence was introduced at a subsequent stage since Shivamurthy had no valid licence which was a clear violation of the condition of the insurance policy. In that view of the mater, the award of the Commissioner in fastening the liability against the insurance company is erroneous and cannot be sustained. Accordingly the following order is passed:

MFA No.6635/10 (MV) and MFA No.8471/2010 (MV) challenging the award passed by the MACT in MVC No.150/2006 are dismissed.

MFA No.9021/2009 (WC) and MFA No.159/2009 (WC) filed by the claimants seeking enhancement of the compensation awarded by the Commissioner in KaaAaDa/K.N.P./CR.195/2006 and 50/2007 are dismissed.

MFA Nos. 7412/2009 (WC) and MFA No.7413/2009 (WC) preferred by the insurance company challenging the award of the Commissioner in KaaAaDa/K.N.P./CR.195/2006 and 50/2007 are allowed. The award is modified to the extent that the injured Prabhakar Chari and the legal heirs of deceased Hanumanthappa are entitled for the compensation as ordered by the Commissioner from the owner/legal heirs of deceased owner Sri. Murugeppa and the insurance company is absolved of its liability to indemnify the owner.

Insurance company is permitted to withdraw the amount of deposit of Rs.1,63,233/- in MFA No.7412/2009 and Rs.2,76,255/- in MFA No.7413/2009, with accrued interest.

