

(2008) 09 MAD CK 0038

In the Madras High Court

Case No : Civil Miscellaneous Appeal No. 2317 of 2007 and M.P. No. 1 of 2008

Iffco-Tokio General Insurance Co. Ltd.

APPELLANT

Vs

Smt. Sulochana and Others

RESPONDENT

Date of Decision : 30-09-2008

Acts Referred:

Motor Vehicles Act, 1988 — Section 146(1), 147, 147(1)

Penal Code, 1860 (IPC) — Section 279, 304A

Workmens Compensation Act, 1923 — Section 2

Citation : (2010) ACJ 1522 : (2009) 1 MLJ 453 : (2011) 1 TAC 953

Hon'ble Judges : S. Palanivelu, J

Bench : Single Bench

Advocate : K. Mohan, for the Appellant; Kannaiah Naidu, for R1 to R4, for the Respondent

Judgement

S. Palanivelu, J.—The allegations found in the Claim Petition are as follows:

The first and second applicants are parents of Jalander aged 20 who was working under the first opposite party in a tractor bearing Regn. No. TN

20 M 8535. On 10.06.2005 while in the course of employment at about 12.00 when the tractor was coming from Kanambakkam to Konda

Nellore, the vehicle going near Mugutha Chettiar land, the same was driven by the driver by name R. Vasu in a negligent manner and hence a jolt

occurred resulting in Jalander falling down from the mud guard seat of the tractor and was run over by the tractor tyre. He was immediately taken

to hospital where he was declared dead. He was earning a sum of Rs. 4,000/- as wages per month under the employment of first opposite party.

The case was registered in Crime No. 161/2005 u/s 279 and 304A I.P.C., and the charge sheet was laid against the driver of the tractor. The

vehicle was insured with the second opposite party which was valid from

08.07.2004 to 08.07.2005. The deceased was the only breadwinner of the family. Hence, a sum of Rs. 5,00,000/- is claimed as compensation. The third and fourth claimants are minor sister and brother of the deceased.

2. In the counter filed by the second opposite party it is stated that the allegations that the deceased was working under the first opposite party as a workman of the tractor and was getting wages of Rs. 4,000/- per month. the deceased was travelling in the tractor only in the capacity of a friend of the first opposite party and as such, there is no employer and workman relationship between the first opposite party and the deceased. The age and income of the deceased, place, date and time of the alleged accident are denied. The deceased did not sustain employment injury during the course and out of employment under the first opposite party. The tractor was not insured with the second opposite party. It is further submitted that the deceased was not a workman under the meaning of Section 2(n) of the Workmen's Compensation Act. The first opposite party has violated the terms and conditions of the policy. Hence, the petition has to be dismissed.

3. Before the Deputy Commissioner of Labour-II, Chennai, the first claimant, mother of the deceased Jalander alone was examined and nobody else came to the box on behalf of the second opposite party, namely, the appellant herein. The first opposite party, the owner of the vehicle remained exparte before the Deputy Commissioner of Labour. In the oral evidence, P.W.1 has stated that at the time of accident their son was sitting on the mudguard of the tractor and he fell down due to the rashness of the driver. In her cross-examination she would say that Jalander was employed in the first respondent's tractor as coolie, that he would be doing the agricultural work also by going in the tractor. The Commissioner has decided that the deceased was under the employment of the first opposite party and he died due to employment injury which happened out of and in the course of employment and consequently made the insurance Company liable to pay the compensation.

4. The appellant would contend that inasmuch as the trailer was not at all insured with the appellant and the deceased having gone in the trailer as a loadman, fell down from the trailer itself thereby met his death would not in any

way make the insurance company responsible for compensation. In the Memorandum of Appeal it is stated that the trailer annexed to the tractor was not at all insured. Worthwhile it is to note that this fact was not pleaded before the Commissioner. It is settled that if any thing which was not pleaded before the Commissioner could not be raised by the insured for the first time in the appeal. It is decided in Subramania Naicker and Another Vs. Kuppuswamy and Another, . However, in order to show that the deceased was travelling by the tractor, the Insurance Company has not moved its little finger to examine anybody before the Commissioner.

5. From the oral testimonies available among the records, which is from the mouth of P.W.1, it transpired that the deceased was going as a coolie under the first opposite party in the tractor, fell down and died. There is no doubt that the accident occurred due to the negligence on the part of the tractor driver.

6. As regards the liability for payment of compensation is concerned, the learned Counsel for the appellant would vehemently contend that as the insurance policy issued for the tractor does not cover any category of either employee or passenger, any compensation payable to the victim or his dependents is to be paid by the owner of the vehicle himself and the insurance company has to be absolved from its liability. A careful reading of the insurance policy would show that for legal liability to driver a premium of Rs. 25/- has been paid and next to it, a column available as `number of passengers'" against which nothing is there. Hence, even if the vehicle is under insurance, the insurer shall indemnify the vehicle owner as regards the liability to driver alone and no body else. In support of his contention, the learned Counsel for the appellant would draw attention to a decision of the Hon"ble Supreme Court reported in Ramashray Singh Vs. New India Assurance Co. Ltd. and Others, wherein Their Lordships have held that while insurance policy covers only driver of motor vehicle and no other person employed in motor vehicle is covered under policy, the persons carried in pursuance of the contract of employment was construed as passenger under old Act, the present Act does not contain such provision, that insurance policy covers persons or class of persons specified in the policy, in such cases the insurance company cannot be held liable. After extracting Section 147 of the Motor Vehicles Act, 1988, the Apex Court has

observed as under:

10. The appellant's first submission was that Shashi Bhushan Singh was a passenger. The appellant's submission that the phrases 'any person' and

'any passenger' in clauses (i) and (ii) of Sub-section (b) to Section 147(1) are of wide amplitude, is correct. (See: New India Assurance Company

Vs. Shri Satpal Singh and Others,). However, the proviso to the sub-section carves out an exception in respect of one class of persons and

passengers, namely, employees of the insured, in other words, if the "person" or "passenger" is an employee, then the insurer is required under the

statute to cover only certain employees. As stated earlier, this would still allow the insured to enter into an agreement to cover other employees,

but under the proviso to Section 147(1)(b), it is clear that for the purposes of Section 146(1), a policy shall not be required to cover liability in

respect of the death arising out of and in the course of any employment of the person insured unless, first: the liability of the insured arises under the

Workmen's Compensation Act, 1923 and second : if the employee is engaged in driving the vehicle and if it is a public service vehicle, is engaged

as conductor of the vehicle or in examining tickets on the vehicle. If the concerned employee is neither a driver nor conductor nor examiner of

tickets, the insured cannot claim that the employee would come under the description of "any person" or "passenger". If this were permissible, then

there would be no need to make special provisions for employees of the insured. The mere mention of the word "cleaner" while describing the

seating capacity of the vehicle does not mean that the cleaner was therefore a passenger. Besides the claim of the deceased employee was

adjudicated upon by the Workmen's Compensation Court which could have assumed jurisdiction and passed an order directing compensation

only on the basis that the deceased was an employee. This order cannot now be enforced on the basis that the deceased was a passenger.

Applying the principle laid down in the decision of the Supreme Court, as the first opposite party has not entered into any agreement with the

insurance company as to the liability available to any person or category of persons apart from the driver, it could not be concluded that the

Insurance Company is responsible. The appellant could not project a plea before this Court that the trailer was not under the insurance since it was

not pleaded before the Commissioner. Further, it is in evidence that the deceased was sitting on the tractor at the time of accident even though the tractor is under proper insurance at the time of accident because of the absence of any contract specifically covering any workman, load man or coolie of the first opposite party, the Insurance Company could not be mulcted with liability.

7. The learned Counsel for the appellant also garnered support from the Division Bench decision of the Karnataka High Court reported in The Oriental Insurance Co. Ltd. Vs. Sri D. Laxman and Others, wherein it is held that when the trailer was not insured, the insurance company was not liable to pay compensation to the workman who were going by the trailer.

8. As far as the facts of the present case are concerned, the principle laid down in the decision of the Supreme Court stated supra is applicable and the insurance company cannot be made liable for payment of compensation.

9. As regards the quantum of compensation, the Commissioner has adopted the minimum wages payable to a workman as per G.O. Ms. No.

(2)47, Labour and Employment Department, dated 1.8.2003 as Rs. 3,585/- including D.A. at Rs. 481/- applying factor 224.00 considering the

age of the deceased at 20 reached Rs. 4,01,520/- as compensation payable to the claimants. There is nothing wrong in the abovesaid calculation

and the quantum is also confirmed. In view of the decision made by this Court, the first opposite party is responsible to pay compensation and the

appellant is to be absolved from its liability.

10. In fine, the appeal is allowed modifying the award passed by the Commissioner making the first opposite party in the Claim Petition and the 5th

respondent in this appeal liable to pay the compensation as determined by the Commissioner of Workmen's Compensation by his award dated

26.7.2007.

11. Accordingly, the Civil Miscellaneous Appeal is partly allowed. No costs. Consequently connected pending M.P. is disposed of.

12. It is submitted that the appellant deposited entire award amount before the Deputy Commissioner of Labour and 25% of which has been

withdrawn by the claimant. The appellant is permitted to withdraw 75% and the amount withdrawn by the claimant need not be refunded.