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In the Andhra Pradesh High Court

Case No : CMA. No. 3149 of 2000

Jayavarapu Ramesh Babu and Jayavarapu Prasada Rao — APPELLANT

Vs

Jayavarapu Laxminaraya, The United India Insurance Co., Ltd. and The New India Assurance Co., Ltd. — RESPONDENT

Date of Decision : 08-10-2008

Acts Referred:

Motor Vehicles Act, 1939 — Section 95(1)
Motor Vehicles Act, 1988 — Section 147, 147(1), 163A, 2(17), 2(24)
Penal Code, 1860 (IPC) — Section 304A, 337

Citation : (2009) 3 ALT 180

Hon'ble Judges : G. Bhavani Prasad, J

Bench : Single Bench

Advocate : K. Ananda Rao, for the Appellant; A. Rajendra Babu and T. Mahender Rao and Kota Subba Rao, in CMA. No. 3149 of 2000 and A. Malathi and B. Devanand, Adv, for the Respondent No. 3 in CMA. No. 3209 of 2001, for the Respondent

Final Decision : Dismissed

Judgement

G. Bhavani Prasad, J.—The claimants in O.P. No. 140 of 1995 and O.P. No. 387 of 1995 on the file of the Motor Accidents Claims Tribunal-cum-Additional District Judge, Ongole filed the appeals respectively against the awards, dated 08-09-2000 and 03-08-2001 dismissing their claim petitions.

2. The appellants'' case is that Jayavarapu Subrahmanyam and Jayavarapu Narayanamma are the parents of petitioners 2 and 3 in O.P. No. 387 of 1995/ petitioners in O.P. No. 140 of 1995, while the 1st petitioner in O.P. No. 387 of 1995 is the mother of Jayavarapu Subrahmanyam. Jayavarapu Laxminarayana, another son of Subrahmanyam and Narayanamma, is the owner of the car AP27 4622 insured with the United India Insurance Company Limited. On 16-03-1995 Jayavarapu Laxminarayana along with his parents and others was going in his car towards Nellore and near Singarayakonda, lorry No. AEE 4477 owned by the 3rd respondent and insured with the 4th respondent in both the petitions allegedly

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stopped suddenly due to application of brakes by the driver and the car dashed the back side of the lorry. Narayanamma and another died on the spot, while others received injuries and Subrahmanyam treated at Government hospital and then at Vijaya hospital, Madras, died after about 13 days of treatment with an expenditure of Rs. 1,00,000/-. Narayanamma aged 44 years was earning Rs. 8,000/- per month from finance business and was an income tax assessee. Subrahmanyam, working in Telecom Department, was on a monthly salary of Rs. 4,500/- and allowances. Hence, the claim petitions for compensation of Rs. 2,00,000/- and Rs. 5,00,000/- respectively.

3. The owners of the car and the lorry remained ex parte before the Tribunal, while the insurers contested the claims.

4. The insurer of the car contended that the owner of the car being the son of the deceased, the insurance policy does not cover the risk of the deceased, who are not third parties. The driver of the car was not careful in driving and there was negligence on the part of the lorry driver. The compensation and interest claimed are excessive.

5. The insurer of the lorry contended that the rash and negligent driving of the car led to hitting the lorry in its rear, damaging the lorry and hence, the owner and insurer of the lorry are not necessary parties.

6. The Tribunal framed issues on the responsibility for the accident and the entitlement of the claimants to compensation in both the petitions. While P.W.1 was examined and Exs.A.1 to A.5 and B.1 were marked in O.P. No. 387 of 1995, P.Ws.1 to 3 and R.W.1 were examined and Exs.A.1 to A.6, B.1 and B.2 were marked in O.P. No. 140 of 1995 during the enquiry.

7. The Tribunal rendered the impugned award in O.P. No. 140 of 1995, dated 08-09-2000 noting the evidence of P.Ws.1 and 2 and R.W.1 and Ex.A.6 first information report and Ex.A.5 charge-sheet to be disclosing the admitted fact that the car driver drove the car rashly and negligently and dashed against the stationary lorry from behind. It also noted that the crime was registered on the report of the lorry driver and the car driver was prosecuted under Sections 337 and 304A of Indian Penal Code. It further noted that the United India Insurance Company Limited agreed before the Lok Adalat in O.P. No. 139 of 1995 to pay compensation of Rs. 80,000/- for the death of one Neelisetty Subbarao travelling in the car in the same accident. After concluding that the accident was due to the rash and negligent driving of the car driver, the Tribunal, relying on The Oriental Fire and General Insurance Co. Ltd. Vs. Smt. Shakuntala Devi, and finding the claimants themselves to be the owners of the insured vehicle, held that the joint family members including the claimants, the 1st respondent and the mother of the deceased cannot lay any claim for compensation against the insurer and consequently, dismissed the petition with costs of respondents 2 to 4.

8. The Tribunal rendered the impugned award in O.P. No. 387 of 1995, dated 03-08-2001 referring to similar evidence of P.W.1 and also to Ex.A.1 first

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information report and Ex.A.2 charge-sheet as probablising the accident to be due to the rash and negligent driving of the car, while it also referred to the settlement of O.P. No. 139 of 1995 before Lok Adalat in respect of the death of a third party but not the owner and also relied on its earlier decision in O.P. No. 140 of 1995. Distinguishing the decision reported in 1998 (2) ALD SC 27 and relying on Oriental Fire and General Insurance Company Limited v. Shakunthala Devi (supra), the Tribunal found that the insurance policy taken by the 1st respondent cannot make his parents third parties, more so, when they were living under the same roof and were travelling in their own vehicle. Consequently, the Tribunal dismissed the petition without costs.

9. The claimants in O.P. No. 140 of 1995 filed C.M.A. No. 3149 of 2000 and the claimants in O.P. No. 387 of 1995 filed C.M.A. No. 3209 of 2001 contending that there was no evidence to prove the rash and negligent driving of the car by its driver and the claim could not have been negatived due to the relationship of the deceased with the owner. The legal heirs of any person travelling in the insured car have to be indemnified by the insurer. Hence, they sought for grant of their claim for compensation.

10. C.M.A. No. 3209 of 2001 was referred to a Division Bench for determining the question about the liability of the insurer for compensation in respect of the claims made by the owner or legal representatives of the deceased as third party claims, in the facts and circumstances.

11. The Reference was answered by the Division Bench, to which I was a party, by the order dated 21-06-2007 [reported in Jayavarapu Rajamma and Others Vs. Jayavarapu Laxminarayana and Others,], concluding as follows:

1. A statutory insurance policy in terms of Section 147 of the Act covers the liability incurred by the insured in respect of death of or bodily injury to any person (including an owner of the goods or his authorized representative) carried in the vehicle or damage to any property of a third party caused by or arising out of the use of the vehicle.

2. Section 147 of the Act does not require an insurance company to assume risk for death or bodily injury to the owner of the vehicle.

3. An insurer can enter into a contract of insurance with the insured covering a risk wider than the minimum requirement of the statute whereby the risk to the owner of the vehicle/insured or gratuitous passengers or such other risks not covered by the statute can also be covered, for which premium is paid.

4. The owner of the vehicle/insured driving or travelling in the vehicle in case of injuries or his legal representatives in case of his death in the accident can make a claim only if the policy by its terms covers such risk.

5. The kith and kin of the insured for injuries and their legal representatives in the event of their death in the accident can sustain claims for compensation as third party claims, provided the relevant policy of insurance covers such a risk.

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6. The terms of the insurance policy determine the liability of the insurer in each case.

7. Mere nomenclature of the policy as a comprehensive policy or otherwise is not the guide, but the specific terms and conditions of the policy govern the existence and extent of the liability of the insurer.

12. Both these appeals have to be, hence, decided in the light of the said answer to the Reference.

13. Sri K. Ananda Rao, learned Counsel for the appellants in both the appeals and Smt. A. Malathi and Sri T. Mahender Rao, learned standing counsel for the 2nd respondent/insurer of the car respectively in the appeals attacked and defended the impugned awards respectively, reiterating their contentions and citing some more precedents than already referred to in the Reference Order, while Sri B. Devanand and Sri Kota Subba Rao, learned standing counsel for the 4th respondent, insurer of the lorry, maintained a stance of neutrality, as the finding of the Tribunal in both the claim petitions about the rash and negligent driving of the car alone being responsible for the accident, is not seriously challenged in these appeals. Though such a feeble attempt was made in the grounds of appeal, apart from the accident, in which the speeding car hit a stationary lorry from behind, speaking for itself, the learned Counsel for the appellants and the 2nd respondent made no attempt to justify any such plea. Hence, the determination of these appeals has to be proceeded on the basis that the owner and insurer of the lorry are not liable for any compensation, in any view.

14. The point for consideration, therefore, is the liability of the 2nd respondent to compensate the appellants.

Point:

15. In M. Akkavva v. New India Assurance Co., Poona AIR 1988 KAR 238, a Division Bench held that if the owner of the vehicle, who has the benefit of indemnity is himself not covered by the policy, his representative, unless he be an employee covered by the first proviso to Section 95(1)(b) of the Motor Vehicles Act, 1939, is in no better position in relation to the insurer''s obligation or the absence of it.

16. In Oriental Insurance Co. Ltd. v. Rajni Devi and Ors. 2008 (4) ALD 34 , the Apex Court held that where compensation is claimed for the death of the owner or another passenger of the vehicle, the contract of insurance being governed by the contract qua contract, the claim of the insurance company would depend upon the terms thereof. The Apex Court also pointed out following the earlier precedents that the liability u/s 163A of the Motor Vehicles Act, 1988 on the owner of the vehicle as a person cannot be both, a claimant as also a recipient, and for the said purpose, only the terms of the contract of insurance could be taken recourse to.

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17. In Oriental Insurance Company Limited v. Sudhakaran K.V. (2008) 2 ACC 849 , the Apex Court held that indisputably, a distinction has to be made between a contract of insurance in regard to a third party and the owner or the driver of the vehicle and in terms of Section 147 of the Motor Vehicles Act, 1988 only in regard to reimbursement of the claim to a third party, a contract of insurance must be imperatively taken by the owner of the vehicle. When, however, an owner of a vehicle intends to cover himself from other risks, it is permissible to enter into a contract of insurance, in which event the insurer would be bound to reimburse the owner of the vehicle strictly in terms thereof. Pointing out that the liability of the insurer to reimburse the owner in respect of a claim made by the third party is statutory, whereas other claims are not, the Supreme Court pointed out that the provisions of the Motor Vehicles Act, 1988 and, in particular, Section 147 must be kept confined to a third party risk and a contract of insurance, which is not statutory in nature, should be construed like any other contract.

18. In Usha Baghel v. United India Insurance Company Limited 2008 ACJ 1697, a Full Bench of Madhya Pradesh High Court concluded that merely by a clause in the policy enabling the owner of vehicle to drive the vehicle, the risk of the owner-insured Was not covered by the policy of insurance, unless additional premium was paid so as to cover the risk of the owner-insured driving the vehicle.

19. The above precedents cited in addition to those already referred to in the Order of Reference strengthen the conclusions arrived at in the Reference Order already extracted above and therefore, the question in both the petitions herein is whether any risk to the owner of the vehicle/insured or passengers in the vehicle, was covered by the insurance of the car of the 1st respondent with the 2nd respondent and whether the legal representatives of the parents of the 1st respondent (other than the 1st respondent) can sustain any claim for compensation under the specific terms and conditions of the said insurance policy.

20. The insurance policy in question is a private car ''B'' policy mentioning the seating capacity as 5 + 1, while the 1st respondent was the insured. Due observance and fulfillment of the terms and conditions and the Endorsements of the insurance policy in so far as they relate to something to be done or complied with by the insured including regarding the person driving the vehicle or limitations as to use, are not disputed even by the insurer. Under the Schedule to the policy, premium was collected under two heads-A. Own damage and B. Liability. The first head covers the vehicle and the second head covers the individuals. Under the second head i.e. B. Liability, Rs. 1607- towards basic liability and Rs. 15/- towards legal liability to paid-driver as per Endorsement IMT 19 were paid, making a total of Rs. 175/- and the net premium is as though it was subject to IMT Endorsement numbers. Against P.A. benefits as per i) ''Endorsement IMT 5'', ''No. of Passengers ...'', ''Capital benefits per person Rs. ...'', no amount was entered to have been paid as premium. u/s II-LIABILITY

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TO THIRD PARTIES, 1., the undertaking by the insurer to indemnify the insured in respect (a) death of or bodily injury to any person including occupants carried in the motor car (provided such occupants are not carried for hire or reward) is "subject to the limits of liability as laid down in the Schedule hereto". But such restriction on the limits of liability was specified to be excepting the necessity to meet the requirements of the Motor Vehicles Act, 1988 in respect of death or injury arising out of and in the course of employment of such person by the insured. The deceased parents of the 1st respondent were, of course, not stated to be carried in the car for hire or reward nor were they claimed, in any manner, to be in the employment of the insured while travelling in the car at the time of the accident. The insurance policy specifies the Schedule to be the basis of the contract and the right of any other person other than the insured to recover the amount under or by virtue of the provisions of the Motor Vehicles Act, 1988 shall remain unaffected by anything in the policy or any Endorsement therein.

21. A similar policy was the subject of interpretation in Oriental Insurance Company Limited v. Nakirikanti Narendra Babu 2006 (5) ALT 442. That policy was also issued for a private car having a seating capacity of five persons and the policy does hot cover the use of the vehicle for hire or reward, etc. Noting that IMT No. 5 relates to payment of compensation to unnamed passengers other than the insured and his paid driver or cleaner, who sustains bodily injury in the motor accident of a passenger vehicle, the learned Judge held the same to be inapplicable to the policy issued for a private car. The learned Judge also noted that what are the liabilities that are covered under ''basic'', is not shown anywhere in the policy and the other amount of Rs. 15/- paid under "TPPD" under the column of liability in the Schedule of premium in the insurance policy, remained unexplained. The learned Judge also observed that the seating capacity was not violated and it was mandatory for the owner to take insurance covering the risk of a third party. The learned Judge also referred to Section-II 1. (a) as showing clearly that the insurance company is liable to third parties in case of their death or bodily injuries including occupants carried in the motor car provided that such occupants are not carried for hire or reward. The learned Judge relied on National Insurance Co. Ltd. Vs. Smt. Rasheeda and Another, , wherein the word ''any person'' used in Section 147 of the Motor Vehicles Act, 1988 was construed as including a traveller in a private vehicle. The learned Judge also referred to Skandia Insurance Company Limited v. Kokilaben Chandravadan 1987 ACJ 411 relied on by Karnataka High Court and distinguished New India Assurance Company Ltd. Vs. S. Vijayalakshmi and Others, and Andhavarapu Kamaraju Vs. Thammineni Seetharam and others, .

22. Section-II 1. of the insurance policy extracted in the decision did not or at least was not stated to contain the words "subject to the limits of liability as laid down in the Schedule hereto", as the policy herein and such unconditional undertaking of the liability to indemnify by the insurer under that policy and the conditional undertaking of liability to indemnify herein are clearly distinct and different. Section 147(1)(b)(i) of the Motor Vehicles Act, 1988 requiring

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insurance against any liability in respect of death of or bodily injury to any person, includes only the owner of the goods or his authorized representative carried in the vehicle in the word ''any person'' and no others specifically. Section 147(1)(b)(ii) requires insurance against the death of or bodily injury to any passenger of a public service vehicle and if it was the intendment of the Act to make it compulsory for the statutory policy of insurance to cover passengers of every motor vehicle, Section 147(1)(b) would not have been what it is. ''Public service vehicle'' was specifically defined by Section 2(35) as meaning any motor vehicle used or adapted to be used for the carriage of passengers for hire or reward including a maxicab, a motorcab, contract carriage and stage carriage. A ''private service vehicle'' was distinctly defined in Section 2(33) and a ''heavy passenger motor vehicle'' and a ''medium passenger motor vehicle'' were defined in Section 2(17) and Section 2(24) respectively including both public service vehicle and private service vehicle within their ambit.

23. The very Chapter XI of the Motor Vehicles Act, 1988 is for insurance of motor vehicles against third party risks and the requirements of policies and limits of liability prescribed by Section 147, more particularly Sub-section (1) (b) thereof, appear to mandate the statutory insurance policy to cover the death of or bodily injury to the owner of goods or his authorized representative carried in the vehicle along with the goods in a goods carriage or any passenger of a public service vehicle also, while insuring against any liability in respect of the death of or bodily injury to any person. IMT No. 5 relating to payment of compensation to passengers other than the insured and his paid driver or cleaner literally applies both to public and private vehicles and there is nothing in IMT No. 5 restricting its applicability to public passenger vehicles only and not to private passenger vehicles. The use of the word ''basic'' in the Schedule to the policy is obviously and specifically to cover the liability prescribed by Section 147, while the other liabilities specified in the Schedule as covered by different IMT Endorsements are those which are optional for the insured and the insurer to be covered by payment of specific premia. Whether the expression ''any person'' used in Section 147(1)(b) includes the occupant carried in a private motor car not for hire or reward, is not as ambiguous as sought to be construed and when no premium was admittedly paid in respect of the personal accident benefits as per Endorsement IMT 5 in respect of the passengers of a private motor car, it is unclear as to whether the insurer can be considered liable to indemnify the insured in respect of the death of or bodily injury to such passengers. In any view, as the insurance policy in question in the present case is subject to the limits of liability as laid down in the Schedule therein and as no premium was paid in respect of personal accident benefits of the passengers in the private car, the insurer does not appear to be liable, like the insurer in Oriental Insurance Company Limited v. Nakirikanti Narendra Babu (supra).

24. That apart, in the judgment of a Division Bench of this Court in Branch Manager, United India Insurance Company Limited v. Kondakotla Saroja and Ors. Judgment in C.M.A. No. 2770 of 2003, dated 17-06-2008, the decisions reported

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in Oriental Insurance Company Limited v. Nakirikanti Narendra Babu (supra), New India Assurance Co. Ltd. Vs. R. Anantha Reddy and Others, and United India Insurance Company Limited Vs. Shaik Husain and Another, were relied on by the claimants. That was a case where an unauthorized fare-paying passenger was travelling in a private jeep insured under an Act policy and the insurer contended the occupants and the inmates of the vehicle to be not third parties who can make the insurer liable for compensation. The insurer relied on Yallwwa v. National Insurance Co. Ltd. 2007 ACJ 1934, United India Insurance Co. Ltd. Vs. N. Rukkamma and Others, and United India Insurance Co. Ltd. Vs. Muppala Anasuryanvathi and Others, . The Division Bench found that no extra premium was paid to cover the passengers who travelled in the jeep and noted that in Yallwwa v. National Insurance Co. Ltd. (supra), the Supreme Court held that the recent decisions of the Apex Court were authorities for the proposition that the insurance company would not be liable in cases where passengers of vehicles are not third parties. The Division Bench also relied on United India Insurance Co. Ltd. V. N. Rukkamma and Ors. (supra), Oriental Insurance Co. Ltd. Vs. Smt. Jhuma Saha and Others, , Dhanraj Vs. New India Assurance Co. Ltd. and Another, , United India Insurance Co. Ltd., Eluru v. Muppala Anasuryanvathi (supra), United India Insurance Co. Ltd., Shimla Vs. Tilak Singh and Others, and T.V. Jose (Dr.) v. Chacko P.M. (2001)8 SCC 748, to note that even the owner is not covered by a comprehensive policy or an Act policy unless separate premium is paid covering such risk and the principle laid down in New India Assurance Company Limited v. Asha Rani (2003) 2 SCC 223 applies with equal force to gratuitous passengers in any other vehicle also. The Division Bench also noted that a ''third party'' in the insurance parlance is a person who is not travelling in or on the vehicle, which is insured, and referred to The Oriental Insurance Company Limited Vs. Meena Variyal and Others, and Pushpabai Purshottam Udeshi and Others Vs. Ranjit Ginning and Pressing Co. (P) Ltd. and Another, for the proposition that the policy of insurance is not required to cover the risk to the passengers who are not carried for hire or reward. The Division Bench, therefore, held that the decisions in Oriental Insurance Company Limited v. Nakirikanti Narendra Babu (supra), New India Assurance Co. Ltd., Nizamabad v. R. Anantha Reddy (supra) and United India Insurance Company Limited v. Shaik Husain (supra) are contrary to the ratio laid down by the Supreme Court and cannot be taken into consideration to fix the liability on the insurance company and concluded that the insurance company, which did not undertake any liability by collecting extra premium for the passengers who travelled in the insured vehicle, cannot be held liable to pay the compensation, while the owner of the vehicle is liable for such compensation. Thus, the disagreement of the Division Bench with Oriental Insurance Company Limited v. Nakirikanti Narendra Babu (supra) as being contrary to the ratio laid down by the Supreme Court, makes the said decision unavailable for consideration to fix the liability on the insurer. Even otherwise, the insurance policies in question therein and herein are distinguishable in construing any liability of the insurer.

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25. Thus, the legal representatives of the parents of the insured can sustain a claim for compensation in the event of their death in the accident as third party claims, only provided the relevant policy of insurance covers such a risk, as a statutory insurance policy in terms of Section 147 does not cover gratuitous passengers, unless specific premium/additional premium is paid. The existence and extent of liability of the insurer are governed by the specific terms and conditions of the insurance policy in each case whatever be the nomenclature of the policy. The Act policy in the present case being similar to the policy under consideration of the Division Bench in Branch Manager, United India Insurance Company Limited v. Kondakotla Saroja and Ors. (supra), under which no extra premium was paid for the occupants/passengers travelling in the insured vehicle, the insurer cannot be held liable to pay the compensation.

26. The award of the Lok Adalat in O.P. No. 139 of 1995 awarding compensation for the death of Neelisetty Subbarao, another occupant of the car in the same accident against the 2nd respondent/insurer of the car on its agreement is neither res judicata nor estoppel herein. It was a compromise or settlement in respect of that particular claim in respect of a person who is not either kith and kin or a member of the family of the owner/insured, which cannot be even remotely construed as an admission of liability in respect of any other occupant of the car. Both the appeals have to, therefore, fail. 27. Though the 1st respondent who is also the son of the deceased-Subrahmanyam and Narayanamma, could have been made liable for compensation as the owner of the car, the emphasis in the two appeals during hearing was only to fix the liability of the insurer, and under the peculiar facts and circumstances, there also appears no need or justification for remitting the matters back to the Tribunal for consideration of any liability of the 1st respondent for compensation to the other legal representatives of his parents at this distance of time.

28. In the result, both the appeals are dismissed. No costs.

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