(2007) 10 MP CK 0071

In the Madhya Pradesh High Court

Case No : Miscellaneous Appeal No''s. 1027 and 1132 of 2006

Kusum Thagele and Others APPELLANT

Vs

National insurance Co. Ltd. and Another RESPONDENT

Date of Decision : 30-10-2007

Acts Referred:

Motor Vehicles Act, 1988 — Section 166, 2(34)

Citation : (2008) 1 MPLJ 134

Hon'ble Judges : P.K. Jaiswal, J

Bench : Single Bench

Advocate : C.P. Singh in Misc. Appeal No. 1027 and B.N. Malhotra in Misc. Appeal No. 1132 of 2006, for the Appellant; B.N. Malhotra and Narendra Singh in Misc. Appeal No. 1027 and C.P. Singh, Narendra Singh in Misc. Appeal No. 1132 of 2006, for the Respondent

Judgement

P.K. Jaiswal, J.

Both these appeals are arising out of award dated 24-7-2006 passed by First Additional Motor Accidents Claims Tribunal, Gwalior in Claim Case No. 18/06 and, therefore, both these appeals are disposed of by this common order. Miscellaneous Appeal No. 1027/06 is filed by the claimants. Miscellaneous Appeal No. 1132/06 is filed by the Insurance Company.

For sake of convenience, I state the facts occurring in Miscellaneous Appeal No. 1132 of 2006, National Insurance Company Limited v. Smt. Kusum Thagele and others.

Brief facts of the case are that on 23-8-2005, Respondent No. 4 Vivek Thagele, son of Balmukund was cleaning his Scorpio vehicle bearing Registration No. MP 07-HA-8030, owned by the deceased Balmukund. The vehicle was parked at the courtyard of the house. While cleaning, the vehicle suddenly started and moved towards reverse side and dashed against Balmukund. Deceased Balmukund who received severe injuries on his head and on the way to District Hospital, he died.

The vehicle was insured by the Appellant.

The Respondents No. 1 to 3-claimants preferred a claim petition u/s 166 of the Motor Vehicles Act 1988 (for short ''the Act'') on the ground that deceased Balmukund was owner of the vehicle and vehicle was duly insured by the Respondent No. 1 and extra premium for the liability of the owner of the vehicle has been paid. It is also averred that Insurance Company received Rs. 700/- for third party risk and Rs. 100/- as a compulsory personal accident of owner-driver risk and, therefore, Insurance Company is liable to pay the amount of compensation. In respect of compensation, it is averred that at the time of death, deceased Balmukund was 46 years of age, working as a Constable in M. P. Transport Department and his salary was Rs. 6,026/- per month.

The Respondent No. 4 Vivek Thagele filed his written statement and admitted the claim of the claimants. The Appellant in its written statement denied the allegations made in the claim petition and averred that incident occurred inside the house of the deceased-vehicle owner Balmukund and that was not a public place as defined u/s 2(34) of the Act and, therefore, Insurance Company was not liable to indemnify the insured. It is also averred that deceased-vehicle owner was not mounting or dismounting of the alleged vehicle and, therefore, no liability can be fastened on the Insurance Company. It is further averred that as per personal accident clause coverage, the maximum liability of the Insurance Company was upto Rs. 2,00,000/- only.

The Claims Tribunal after considering the oral and documentary evidence has come to the conclusion that accident occurred on the street which is outside the house of the deceased-vehicle owner and deceased was standing on the street when he was dashed by his own Scorpio vehicle which is a public place. It is also held that at the time of the accident, deceased was not driving the vehicle and he met with an accident at public place and, therefore, the deceased was third party. In respect of income, the Tribunal has held that as per Ex.P/1, the salary of the deceased was Rs. 6,026/- per month and after deduction, he was getting Rs. 5,200/- cash in hand and looking to the future prospect, the Tribunal has held that deceased was earning Rs. 6,000/- per month and after deducting 1/3rd towards his personal expenses, the dependency of the Appellants comes to Rs. 4,500/- per month i.e. Rs. 54,000/- per annum. As per driving licence (Ex.P/11), the date of birth of the deceased was 12th September, 1954 and, therefore, at the time of death, he was 51 years of age and as per the Second Schedule, multiplier of 11 will be applicable and on applying the multiplier of 11, the total compensation comes to Rs. 5,94,000/-. To this amount, Rs. 2,000/-towards funeral expenses, Rs. 2,500/- towards estate and Rs. 5,000/- towards loss of consortium was added by the Tribunal. The tribunal assessed the compensation amounting to Rs. 6,03,500/- with interest at the rate of 6% per annum from the date of filing of the claim petition till its realisation.

The Claims Tribunal after considering the evidence of Pushpak Joshi (NAW-1) has held that Clause 15 of IMT will be applicable and this fact is admitted by the

NAW-1 in para-5 of his Court statement. Rs. 100/- was paid to its compulsory personal accident to owner-driver risk and, therefore, the Insurance Company is liable to pay the amount of Rs. 2,00,000/- only to the claimants and directed the Insurance Company to pay the said amount out of the total amount of compensation and further directed the Respondent No. 4 to pay the rest of the amount of compensation.

Learned Counsel for Insurance Company is partly aggrieved by the award dated 24-7-2006, by which Tribunal has held that the accident occurred on the public place and the deceased, who was owner of the vehicle was a third party and extra premium was paid and, therefore, Insurance Company was liable to pay the amount of compensation to the extent of Rs. 2,00,000/-.

On the other hand, learned Counsel for Respondents No. 1 to 3/claimants has submitted that as per Clause 15 of the IMT, liability is limited upto Rs. 7.50 lakhs and learned Tribunal committed error in fixing the limited liability of the Insurance Company to the extent of Rs. 2,00,000/- only.

Shri B. N. Malhotra, learned Counsel for Insurance Company drew my attention to Section 2(34) of the Act and has submitted that as per FIR dated 24-8-2005 (Ex.P/2) and averments made in the claim petition, the incident occurred inside the house which was not a public place as defined u/s 2(34) of the Act and, therefore, the claim petition was not maintainable against the Insurance Company AW-1 Rachna, daughter of the deceased Balmukund in para-3 and para-15 of her statement has deposed that offending vehicle was parked outside the house and Respondent No. 4 was cleaning the vehicle, her father who was at that time standing on the street which is outside the Courtyard of his house and was talking to his neighbour Balram Kushwaha suddenly Respondent No. 4 started the vehicle and it started running towards reverse side and dashed to his father who sustained injuries and died due to the said accident. AW-2 Balram Kushwaha supported the said fact and in para-8 of his cross-examination has deposed that at the time of accident, deceased Balmukund was standing on the street and talking with him and while talking, offending vehicle came and dashed him.

In the case of Oriental Insurance Company Limited Vs. Jamnabai and Others, , the Division Bench of M. P. High Court, Indore Bench has held "that the definition of ''public place'' has to be construed liberally, broadly and pragmatically and not in a pedantic and narrow sense with a view to advance the cause of justice and not to defeat the same. Assuming, the vehicle may have crossed the ''public place'' to some extent, and was getting to the field of Shivgiri Maharaj, it cannot be construed that the field of Shivgiri Maharaj was private place in the strict sense of the term. Generally, fields in villages may be owned and possessed by a particular landowner but that does not mean that no one can pass through the same unless there is a specific prohibition from doing so. We do not feel any difficulty in holding that the place where the accident took place was a ''public place'' and the contention to the contrary is liable to be rejected."

Here, in the present case, AW-1 Ku. Rachna and AW-2 Balram Kushwaha in their evidence very specifically stated that at the time of accident, deceased Balmukund was standing on the street and, therefore, it cannot be said that accident did not occur at a public place. The street is a public place as defined u/s 2(34) of the Act.

The contention of the learned Counsel for the Insurance Company is that as per FIR, Ex.P/2 dated 24-8-2005 and spot map (Ex.P/5), it cannot be said that the accident had occurred at public place. In the FIR, it is mentioned that Respondent No. 4 was cleaning his Scorpio vehicle and while cleaning the Scorpio vehicle, he started the same due to which accident had occurred. Ex.P/5 is the spot map and the Insurance Company failed to examine the persons who have prepared the spot map and, therefore, on the basis of the said document, it cannot be said that incident had occurred inside the house which was not a public place. It is well settled that FIR is not a substantive piece of evidence nor any of the witnesses admitted the facts mentioned in the FIR. Learned Counsel appearing on behalf of the claimants contended that FIR was brought on record for the purpose of proving the accident and not for the fixing of liability on the part of the driver of the vehicle involved therein. The Apex Court in the case of Narbada Devi Gupta Vs. Birendra Kumar Jaiswal and Another, has held that mere production and marking of a document as exhibit by the Court cannot be held to be a due proof of its contents. Its execution has to be proved by admissible evidence, that is, by the evidence of those persons who can vouchsafe for the truth of the facts in the issue. Similar is the position in the present case and, therefore, on the basis of Ex.P/2 and P/5, it cannot be said that accident had occurred inside the house of the deceased which was not a public place. I do not feel any difficulty in holding that the place where the accident took place was a ''public place'' and the contention of the Appellant is liable to be rejected.

Learned Counsel for Insurance Company further submitted that the deceased was owner of the insured vehicle and Insurance Company is not liable for the death of owner and liability of the Insurance Company is to the extent of indemnification of the insured or injured person, a third person or in respect of damages of property. In respect of the said contention, he placed reliance on the two decisions of the Apex Court in the case of Dhanraj v. New India Assurance Co. Ltd. and Anr. 2005 ACJ 1 (SC) and Oriental Insurance Co. Ltd. Vs. Smt. Jhuma Saha and Others, .

In Dhanraj (supra), it is stated as follows:-

(8) Thus, an insurance policy 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 authorised 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. Section 147 does not require an insurance company to assume risk for death or bodily injury to the owner of the vehicle. (10) In this case, it has not been shown that the policy covered any risk for injury to the owner himself. We are unable to

accept the contention that the premium of Rs. 4,989 paid under the heading ''own damage'' is for covering liability towards personal injury. Under the heading ''own damage'', the words ''premium on vehicle and non-electrical accessories'' appear. It is thus clear that this premium is towards damage to the vehicle and not for injury to the person of the owner. An owner of a vehicle can only claim provided a personal accident insurance has been taken out. In this case, there is no such insurance.

In the case of Jhuma Saha (supra), the Apex Court has held that Section 147 of the Act does not require for an insurance company to assume risk to the owner of vehicle and additional premium was not paid in respect of the entire risk of death or bodily injury of the owner of the vehicle and, therefore, Insurance Company is not liable for the death of the owner of the insured.

The contract between the insured and insurer is that if any accident occurred out of the use of motor vehicle then only third party is entitled to get compensation. The insurer and insured is the first and second party and other than them, all are third parties.

In the present case, the deceased-vehicle owner was not driving the vehicle whereas he was standing on the street when he was hit by the offending vehicle driven by the Respondent No. 4. In the case of Jamna Bai (supra), the deceased was owner of the vehicle along with Apa and it was being driven by driver appointed by Apa and apart from the payment of normal premium towards damage of the vehicle, the deceased has paid Rs. 150 against ''own damages''. The Division Bench has held that the deceased falls within the definition of ''third party'' and Insurance Company is liable to pay the compensation. This question again cropped up for consideration in the case of National Insurance Co. Ltd v. Kishore Kumar Lalwani and others, 2007(1) TAC 418. In the case of Kishore Kumar Lalwani (supra), owner was travelling in offending vehicle as a passenger being a member of marriage party and not as an owner to supervise and control the bus. Since the owner was a passenger in a public service vehicle, may owned by him, which met with an accident at public place, therefore, the Respondent No. 1 ought to have been treated as a third party as laid down by the Division Bench of this Court in the case of Jamna Bai (supra) and his claim petition cannot be dismissed on the ground that he was owner of the vehicle.

It is submitted by the learned Counsel for the claimants that the Insurance Company has received Rs. 700/- for third party risk cover and Rs. 100/- as compulsory personal accident of owner-driver risk and the learned Tribunal committed an error in not holding that the policy of the present case covers both kinds of risk, owner-driver and also risk of insured and that the liability of the Insurance Company was a limited liability and the policy covers the compulsory personal accident to personal accident owner-driver of Rs. 2 lakhs. He submitted that policy (Ex.P/2) did not limit the liability of the Insurance Company. As per IMT-15, the limit of liability of Insurance Company is Rs. 7,50,000/- and in view of law laid down by the Division Bench of this Court in the case of Jamna Bai and

Ors. (supra) and Kishore Kumar Lalwani and Ors. (supra), the deceased-owner comes within the ambit of third party and the Insurance Company is liable to indemnify the whole award. As per Ex.D/1, limits of liability reads as under:-

Under Section 11(i) in respect of any one accident: As per Motor Vehicles Act, 1988.

Under Section 11(ii) in respect of any one claim or series of claims arising out of one event: Rs. 7,50,000/-

Schedule of Premium (in Rs.)

B:T.P.- BASIC 700.00

PA to unnamed Passengers Number 7, 350.00

Amount 100000 Per Person Compulsory PA to Owner- Driver Amount 200000 100.00

WC to employee 1 25.00

GROSS (B) 1,175

Gross OD and TP 21,437

Stamp Duty 1.00

Net Premium 21,437

Service Tax 10.2% 2,187

Net Amount Payable (Rounded) 23,624

Section III-Personal Accident Cover For Owner-DRIVER attached along with the policy reads as under:

The Company undertakes to pay compensation as per the following scale for bodily injury/death sustained by the owner-driver of the vehicle, in direct connection with the vehicle insured or whilst driving or mounting into/ dismounting from the vehicle insured or whilst travelling in it as a co-driver, caused by violent accidental external and visible means which independent of any other cause shall within six calendar months of such injury result in:

Nature of injury Scale of compensation

(i) Death 100%

(ii) Loss of two limbs or sight of two eyes or one limb and sight of one eye. 100%

(iii) Loss of one limb or sight of one eye 50%

(iv) Permanent 100%

Provided always that

A) compensation shall be payable under only one of the items (i) to (iv) able in respect of the owner-driver arising out of any one occurrence and the total liability of the insurer shall not in the aggregate exceed the sum of Rs. 2 lakhs during any one period of insurance.

B) no compensation shall be payable in respect of death or bodily injury directly or indirectly wholly or in part arising or resulting from or traceable to (1) intentional self injury suicide or attempted suicide physical defect or infirmity or (2) an accident happening whilst such person is under the influence of intoxicating liquor or drugs.

C) such compensation shall be payable directly to the insured or to his/her legal representatives whose receipt shall be the full discharge in respect of the injury to the insured.

2) This cover is subject to

(a) the owner-driver is the registered owner of the vehicle insured herein;

(b) the owner-driver is the insured named in this policy;

(c) the owner-driver holds an affective driving license, in accordance with the provisions of Rule 3 of the Central Motor Vehicles Rules, 1989, at the time of the accident.

IMT-15 personal accident cover to the insured or any named person other than paid driver or cleaner reads as under:

Applicable to private cars including three wheelers rated as private cars and motorized two wheelers with or without side car (not for hire or reward)

In consideration of the payment of an additional premium it is hereby agreed and understood that the Company undertakes to pay compensation on the scale provided below for bodily injury as hereinafter defined sustained by the insured person in direct connection with the vehicle insured or whilst mounting and dismounting from or travelling in vehicle insured and caused by violent accidental external and visible means which independently of any other cause shall within six calendar months of the occurrence of such injury result in:

Details of Injury Scale of Compensation

i) Death 100%

ii) Loss 100%

iii) Loss of one limb or sight of one eye 50%

iv) Permanent Total Disablement from injuries other than named above 100%

Provided always that

(1) compensation shall be payable under only one of the items (i) to

(iv) above in respect of any such person arising out of any one occurrence and total liability of the insurer shall not in the aggregate exceed the sum of Rs. ....* during any one period of insurance in respect of any such person.

(2) no compensation shall be payable in respect of death or injury directly or indirectly wholly or in part arising or resulting from or traceable to (a) intentional self injury/suicide or attempted suicide physical defect or infirmity or (b) an accident happening whilst such person is under the influence of intoxicating liquor or drugs.

(3) such compensation shall be payable only with the approval of the insured named in the policy and directly to the injured person or his/her legal representative (s) whose receipt shall be a full discharge in respect of the injury of such person.

Subject otherwise to the terms exceptions conditions and limitations of this policy.

* The Capital Sum Insured (CSI) per passenger is to be inserted.

As per IMT-15, the Insurance Company had taken an additional premium of Rs. 700/- for third party risk cover and maximum liability of the company is in respect of anyone claim or are series of claim arising out of one event is Rs. 7,50,000/-.

That DW-1 Pushpak Joshi, who is administrative officer in the insurance company had admitted that as per policy (Ex.D/1), a premium of Rs. 700/- has been taken for the third party and the amount of limits of liability has been stated as Rs. 7,50,000/-. It is also admitted that as per Ex.D/2 Policy, personnel accident is also covered. In view of the clear admission made by him and as the deceased falls within the category of third party as held above, as per IMT 15, the limits of liability of Insurance Company is Rs. 7,50,000/- and, therefore, the Appellant is liable to indemnify the whole award awarded by the Claims Tribunal. Accordingly, the appeal filed by the Appellant-insurance Company has no merit and is liable to be dismissed and the appeal of the Respondents No. 1 to 3 is liable to be allowed. The Appellant is directed to pay the rest of the compensation amounting to Rs. 4,03,500/- with interest at the rate of 6% per annum from the date of filing of the claim petition till its realisation.

In that view of the matter, I accordingly allow the miscellaneous appeal No. 1027/06 of the Respondents No. 1 to 3, partly modified the judgment and order passed by the Claims Tribunal and dismiss the Miscellaneous Appeal No. 432/06 filed by the Insurance Company. No order as to costs.

Appeal allowed.

