

(2013) 12 KL CK 0016
In the High Court Of Kerala
Case No : M.A.C. A. No. 1724 of 2009

Mary and Others

APPELLANT

Vs

United India Insurance Co. Ltd. and Another

RESPONDENT

Date of Decision : 20-12-2013

Acts Referred:

Citation : (2014) 1 KLJ 805

Hon'ble Judges : S. Siri Jagan, J;K. Ramakrishnan, J

Bench : Division Bench

Final Decision : Disposed Off

Judgement

K. Ramakrishnan, J.—MACA. No. 1724/2009 is filed by the claimants in OP (MV). No. 2044/2004 on the files of the Motor Accidents Claims Tribunal, Perumbavoor, while MACA. No. 638/2009 is filed by the first respondent-owner cum driver of the vehicle involved in the accident of the same case.

2. The claimants, who are the wife, children and parents of deceased Varghese, filed the O.P.(MV) for compensation for the death of Varghese, who died in a motor vehicle accident caused on account of the rash and negligent driving of a vehicle, owned and driven by the first respondent and insured with the second respondent, before the Tribunal.

3. After considering the evidence on record, the Tribunal found that the accident occurred due to the negligent driving of the vehicle by the first respondent and awarded a total compensation of Rs. 3,43,350/- under various heads as follows:

4. The Tribunal also found that the deceased was travelling in a goods vehicle as a gratuitous passenger and as such, the insurance company is not liable to indemnify the insured-owner of the vehicle, and directed the first respondent - owner of the vehicle to pay the amount to the claimants.

5. Dissatisfied with the quantum of compensation awarded by the Tribunal and also the finding exonerating the insurance company from paying the

compensation, the claimants filed MACA. No. 1724/2009 and against the finding of the Tribunal exonerating the insurance company and also questioning the quantum of compensation, the owner of the vehicle has filed MACA. No. 638/2009.

6. Earlier, MACA. No. 638/2009 alone was heard and this Court by judgment dated 2.8.2013 dismissed the appeal filed by the owner of the vehicle confirming the finding of the Tribunal exonerating the insurance company from paying the amount and quantum of compensation awarded. Thereafter, the owner of the vehicle filed R.P. No. 788/2013 and respondents 1 to 4 in that case, who are the claimants in the Tribunal and the appellants in MACA. No. 1724/2009 filed R.P. No. 846/2013 to review and recall the judgment on the ground that this appeal ought to have been heard along with the appeal filed by the claimants, namely MACA. No. 1724/2009 and disposing of the case separately has caused prejudice to them. Since we are satisfied that the matter should be reconsidered on the grounds stated, we review and recall the judgment in MACA 638/2009 dated 2.8.2013. The appeals are again heard and disposed of by this common judgment.

7. For the purpose of convenience, we are referring to the rank of the parties as obtaining in the O.P.(MV). The counsel for the claimants submitted that, in fact the deceased was travelling in the goods vehicle as the authorised representative of the owner of the goods and, accompanying the goods of his employer, who is the owner of the goods. Further, the accident occurred at the time when he was unloading the goods when the vehicle was stationary and at that time, due to negligent moving of the vehicle by the first respondent, the accident had taken place. So, the claimant can only be treated as a third party, who suffered death on account of the user of the vehicle in a public place and as such, he is covered by the policy. Further, according to the claimants, even otherwise, since the insured had paid Rs. 75/- as a premium for a non-fare-paying passenger, the deceased is entitled to be covered as a non-fare-paying passenger. So, according to him, the Tribunal was not justified in exonerating the insurance company in the absence of any evidence adduced on the side of the insurance company to prove the nature of persons liable to be covered on account of collection of the additional premium while issuing the policy. Further, according to him, the income taken by the Tribunal is on the lower side. The amount awarded under the head loss of consortium and other heads are also low and, according to the counsel for the appellants, the appellants are entitled to get enhancement under all other heads as well.

8. On the other hand, the learned counsel for the first respondent - owner supports the submissions of the counsel for the claimants against the finding of the Tribunal exonerating the insurance company from the liability. As regards the quantum of compensation is concerned, according to him, the Tribunal has awarded just compensation. He further submits that the deceased accompanied the goods as his authorised agent. So, the insurance company is liable to

indemnify the owner for the compensation payable to the claimant. The counsel for the insurance company submitted that the amount of Rs. 75/- collected is not to cover any non-fare paying passenger, but only to cover the owner of the goods or authorised representative of the owner of the goods carried in the vehicle as per the tariff conditions. This is clear from the policy itself. Further, the claimants have no consistent case regarding his status in which he travelled in the vehicle. According to them, while the deceased was travelling in the vehicle as the authorised representative of the owner of the goods, the accident occurred. But, now they have got a different case that he was unloading the goods from a stationary vehicle, and the accident occurred when the vehicle was negligently moved by the first respondent resulting in the accident. Being a gratuitous passenger, the liability of such person is not covered under the policy, which is issued only to satisfy the provisions of Section 147 of the Act. According to him, the Tribunal was perfectly justified in exonerating the insurance company from liability. He supports the amount awarded as just and proper also.

9. The interesting question that arise for consideration is as to whether a gratuitous passenger carried in a goods vehicle is covered by an "Act only policy" issued u/s 147 of the Act or whether any person other than the owner of the goods or authorized representative of the owner of the goods accompanying the goods carried in the goods vehicle also will be covered under such policy.

10. The case of the claimants was that the deceased was working under one Johny, who is a plumbing contractor, as a plumbing worker and he was travelling in the goods vehicle bearing Reg. No. No.KL-7/Q-2232 owned and driven by the first respondent along with the water tap kutties as an authorized representative of the owner of the goods and during the process of unloading the same, the first respondent negligently moved the vehicle causing injuries to the deceased to which he succumbed. No oral evidence was adduced on either side. The claimants have produced only Exts. A1 to A5 to prove the incident. Ext. A1 is the certified copy of the First Information Report and the First Information Statement in Crime No. 594/2004 of Perumbavoor police station. The crime was registered on the basis of the statement given by the Contractor. It was alleged in the First Information Statement that he along with his plumbers, Varghese, Babu and Santhosh were travelling in the goods vehicle along with the goods and when the vehicle stopped at the place of occurrence. Himself, Babu and Santhosh were standing on the side of the road, Varghese (the deceased) was unloading the kutties and they were stocking the same on the side of the road. At that time, the first respondent suddenly took the vehicle in a negligent manner and due to that, it capsized, the deceased Varghese fell down and sustained injuries. So, it is clear that the deceased was travelling in the vehicle at that time. Further, he was not the owner of the goods and he was not an authorized employee of the owner of the goods accompanying the goods because even as per the statement in the First Information Statement of the informant namely the owner of the goods, he was also travelling in the vehicle along with the goods. Further, there is no cabin in the goods vehicle. So, the persons, who were accompanying the goods

including the owner of the goods were travelling on the platform of the vehicle. Moreover, the deceased cannot be said to be an employee of the owner of the vehicle so as to be covered under the provisions of the Workmen's Compensation Act as well. So he can only be deemed to be a gratuitous passenger carried in the vehicle. No evidence was adduced on the side of the claimants or the owner of the vehicle to prove the capacity in which the deceased was travelling in the vehicle. If the owner of the goods was also travelling along with the goods in the vehicle, then others accompanying the goods along with the owner will not be covered by the policy u/s 147 of the Motor Vehicles Act as the Section only covers the owner of the goods or an authorized representative of the owner of the goods accompanying the goods and not any other person unless additional premium is collected to cover such persons as well.

11. Section 147 of the Motor Vehicles Act reads as follows:

147. Requirements of policies and limits of liability:- (1) In order to comply with the requirements of this Chapter, a policy of insurance must be a policy which-

(a) is issued by a person who is an authorised insurer, and

(b) insures the person or classes of persons specified in the policy to the extent specified in sub-section (2)-

(i) against any liability which may be incurred by him in respect of the death of or bodily [injury to any person, including 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 in a public place;

(ii) against the death of or bodily injury to any passenger of a public service vehicle caused by or arising out of the use of the vehicle in a public place:...

Provided that a policy shall not be required-

(i) to cover liability in respect of the death, arising out of and in the course of his employment of the employee of a person insured by the policy or in respect of bodily injury sustained by such an employee arising out of and in the course of his employment other than a liability arising under the Workmen's Compensation Act 1923 (8 of 1923) in respect of the death of, or bodily injury to, any such employee-

(a) engaged in driving the vehicle, or

(b) if it is a public service vehicle engaged as a conductor of the vehicle or in examining tickets on the vehicle, or

(c) if it is a goods carriage, being carried in the vehicle, or

(ii) to cover any contractual liability.

12. In the decision reported in *New India Assurance Co. Ltd. Vs. Asha Rani and Others*, , it has been held that the expression "any person" occurring in Section

147(1) of the Act does not cover a gratuitous passenger carried in a goods vehicle. It only covers the owner of the goods or his authorized representative being carried in the goods vehicle accompanying the goods and not other persons. The same view has been reiterated in the decisions reported in *Oriental Insurance Company Ltd. Vs. Devireddy Konda Reddy and Others etc. etc.* and *Jogi Subbamma and Others etc. etc.*, , Manager, National Insurance Company Ltd. Vs. Saju P. Paul and Another, , and National Insurance Co. Ltd. Vs. Cholleti Bharatamma and Others, . So it is clear from the above decisions that only those persons mentioned in Section 147(1) of the Act namely owner of the goods or authorized representative of the owner of the goods accompanying the goods carried in the vehicle alone will be covered by the policy. Further, in the decision reported in *Cholleti Bharatamma* (cited supra), the Supreme Court has held that the owner must travel only in the cabin of the vehicle and not in the platform of the vehicle along with the goods. In *Saju P. Paul's* case (cited supra), the Supreme Court has held that the employee of the owner of the vehicle means only one driver and a cleaner, who only is covered under the policy and not even a spare driver carried in the vehicle who will be held only to be gratuitous passenger carried in the vehicle. So, from this, it is clear that only the owner of the goods or his authorized representative of the owner of the goods travelling in the vehicle, that too, if he is travelling in the cabin, alone are liable to be covered by the policy issued only for satisfying the provisions of in Section 147 of the Act alone.

13. The counsel for the claimants and the counsel for the first respondent submitted that, it is seen from the policy that, an amount of Rs. 75/- was collected to cover the liability of non-fare paying passenger. There is nothing mentioned in the policy regarding the nature of the person covered by such collection of premium. So, under the circumstances, even assuming that he was a gratuitous passenger carried in the vehicle, he will be covered by the policy as the burden is on the insurance company to prove the terms and conditions of the policy to show that it will not cover the persons like the deceased, which has not been done in this case.

14. On the other hand, the counsel for the insurance company submitted that, as per the tariff regulations, the premium collected is to cover the risk of the owner or authorised representative of the owner of the goods, who are travelling in the vehicle as non-fare paying passengers. So, according to him, that will not cover the liability of the person like the deceased.

15. The copy of the policy has been produced and marked as Ext. B1. The policy contains a heading "liability only" and it is also shown that the vehicle is a goods carrier. In the policy, the schedule of premium consists of Rs. 75/- for covering the liability of a non-fare paying passenger. There is nothing mentioned in the policy produced regarding the terms and conditions of the policy or the nature of person, who was intended to be covered by the collection of such additional premium.

16. In the decision reported in *New India Assurance Co. Ltd. Vs. C.M. Jaya and Others*, , it has been held that even though statutory liability cannot be more than what is required in the statute itself, there are no provisions in the Act prohibiting the parties from creating a higher liability to cover wider risk. In such cases, the insurer will be bound by the terms of the contract. Therefore, the terms of the contract of insurance will govern the field. The same view has been reiterated in the decision reported in *Dr. T.V. Jose Vs. Chacko P.M. alias Thankachan and Others*, . It is also settled law that, the burden is on the insurance company to clear the ambiguity, if any, in the terms of the policy and, if there is ambiguity in the terms of the insurance policy, one that is beneficial to the insured should be accepted consistent with the purpose for which the policy is taken and the premium is paid. When the document is ambiguous, it will go against the party, who prepared the document. See *The General Assurance Society Ltd. Vs. Chandmull Jain and Another* and *United India Insurance Co. Ltd. Vs. Pushpalaya Printers*, followed in *Sameer and Others Vs. Madhya Pradesh State Road Transport Corporation and Others*, .

17. In this case, the policy was issued by the insurance company and it is for them to prove the terms and conditions of the policy. They have not produced the full terms and conditions of the policy in this case. Further, even regarding the endorsements, there are two endorsements relating to non-fare paying passengers. One endorsement viz. IMT-44 covers legal liability for accidents to non-fare paying passengers who are employees of the insured but not "workmen" under the Workmen Compensation Act and any other non-fare paying passengers. There is another IMT endorsement as IMT-37, covering the legal liability for accidents to non-fare paying passengers, owner of goods, who are not employees of the insured, carried in the goods carrying vehicle. Rs. 75/- per passenger. It is not clear from this, whether this relates to endorsement IMT 37 or 44. The policy produced does not contain any mention as to which are the endorsements attached to the policy as well. When the policy is stated to cover a non-fare passenger, then it will be deemed to cover any non-fare paying passenger, not merely the persons mentioned in Section 147 of the Act. So, under such circumstances, in the absence of any evidence adduced on the side of the insurance company regarding the nature of persons covered by the policy, it can only be presumed that it will cover any non-fare paying passenger carried in the vehicle. So, there is some force in the submission made by the learned counsel for the claimants and the counsel for the insured that the liability of persons like the deceased is also covered by the policy. So, the Tribunal was not justified in coming to the conclusion that the liability of persons like the deceased carried in the vehicle is not covered by the policy and erred in exonerating the insurance company from the liability.

18. Then the question will be whether there was any violation of the conditions of policy and if so, whether they can get exoneration from the liability with reservation to recover the amount from the insured. Even in cases where there is liability" on the part of the insurance company to indemnify the insured, as per

the policy, they will get a right of recovery, if they are able to establish that the insured had violated the conditions of the policy. In this case it is clear from the evidence that there was no cabin in the vehicle and all the persons were travelling on the platform of the vehicle. So, even if there is any liability for the insurance company to satisfy the award in respect of the third party, then they can recover the amount from the insured, if they can establish that there is violation of the policy conditions. In this case, the owner of the vehicle is not expected to carry any person on the platform. Even if there was a coverage for covering liability of persons carried in the vehicle, he can only carry a person, if there is provision in the vehicle for carrying such person. In this case, apart from the deceased, three other persons were carried in the vehicle and all of them were traveling on the platform of the vehicle along with the goods. So, the insured had willfully violated the conditions of the policy by carrying the persons on the platform of the vehicle, thereby committing willful violation of the conditions of the policy and, as such, the insurance company is entitled to recover the amount paid by them to satisfy the award payable to a third party from the insured - the owner of the vehicle. So, the finding of the Tribunal wholly exonerating the insurance company has to be set aside and it has to be modified as follows:

The insurance company is liable to satisfy the award in respect of the deceased and they are entitled to recover the amount from the insured-owner of the vehicle, first respondent in the lower court.

19. As regards the quantum of compensation the case of the claimants was that the deceased was working-as a plumber and getting a monthly income of Rs. 7,500/- per month. He was aged 44 years at the time of his death. They have only produced Ext. A7 certificate to show that he is a NCTVT certificate holder in plumbing. They have not produced documents to prove his income. The contractor under whom he was working was not examined to prove the income of the deceased. But, the evidence will go to show that he was working as a plumber under a contractor. That alone is not sufficient to come to the conclusion that he was earning Rs. 7,500/- per month as claimed by the claimants. It has to be proved by them. In this case, the accident occurred in the year 2004. So, considering the qualification of the deceased and the cost of living and future prospects, the amount of Rs. 2,500/- fixed by the Tribunal appears to be on the lower side. So, we are inclined to refix the monthly income of the deceased as Rs. 3,000/-.

20. The deceased was aged 44 years and the proper multiplier applicable to such age group as per Smt. Sarla Verma and Others Vs. Delhi Transport Corporation and Another, . There are five dependants. As per Sarla Verma (cited supra), if the number of dependants are between 4 and 6, then only one fourth has to be deducted for personal expenses of the deceased instead of one third as done by the Tribunal. If a recalculation is made on the basis of the above inputs, the appellants will be entitled to get an amount of Rs. 3,76,800/- (3000 x 12 x 14 x

3/4) instead of Rs. 3,00,600/- awarded by the Tribunal under the head loss of dependency and we award this amount under this head.

21. The deceased was aged 44 years and the first appellant, his wife was aged only 33 years at the time of death of her husband. She had two minor children aged 13 and 9 years respectively to be looked after. So considering the circumstances, there is no possibility of a remarriage of the first appellant. She will have to live without support of her husband for the remaining period of her life. She had lost consortium of her husband for the remaining period of her life. It is true that in the decision reported in *Rajesh and Others Vs. Rajbir Singh and Others*, it has been held that in appropriate cases, a minimum of Rs. 1,00,000/- has to be awarded under the head "loss of consortium". In that case, the deceased was aged only 33 years and his wife was still young. Even in that case, the Apex Court had awarded only Rs. 1,00,000/- under the head "loss of consortium". So, the age of the deceased, age of the wife, period for which the consortium is lost, period of marital life etc. are all relevant factors to be considered while fixing the compensation payable under the head "loss of consortium". So, considering these aspects, we feel that the amount of Rs. 15,000/- awarded by the Tribunal under the head "loss of consortium" is on the lower side and we enhance the same to Rs. 60,000/-. Similarly, the children were aged only 13 and 9 years respectively at the time of death of their father. They have lost the support and guidance of their father at their young age. Further, his parents were aged 74 and 71 years respectively at that time. They have also lost the love and affection of their son at their old age. Considering these aspects, the amount of Rs. 15,000/- awarded by the Tribunal under the head "loss of love and affection" appears to be on the lower side and we enhance the same to Rs. 30,000/-. Similarly the amount awarded under the head funeral expenses of Rs. 3,000/- is also on the lower side and we enhance the same to Rs. 10,000/-. We are also inclined to enhance the amount awarded under the head "pain and suffering" to Rs. 10,000/- from Rs. 5,000/-. The Tribunal has awarded only Rs. 2,500/- under the head "loss of estate", which appears to be on the lower side and we enhance the same to Rs. 10,000/-. Though persuasive arguments were made by the counsel for the claimants to get enhancement under other heads, we are not impressed by the same, as we are of the opinion that the amounts awarded by the Tribunal under other heads are just and proper. So, the claimants are entitled to get an additional compensation of Rs. 1,25,700/- over and above what has been awarded by the Tribunal together with 9% interest from the date of petition till the date of payment. The second respondent insurance company is directed to pay this amount also along with the amount awarded by the Tribunal with the interest at the rate fixed by the Tribunal. But they are entitled to recover the entire amount paid from the first respondent, who is the owner of the vehicle, u/s 149(4) of the Motor Vehicles Act. Two months' time is granted to the insurance company to deposit the amounts. Both the appeals are allowed in part. The award of the Tribunal is modified as follows:

The finding of the Tribunal exonerating the insurance company completely is set

aside. The insurance company is directed to pay the amount to the claimants with liberty to recover the amount from the first respondent-owner of the vehicle. The claimants are entitled to get additional compensation of Rs. 1,25,700/- over and above what has been awarded by the Tribunal, which they are entitled to recover from the insurance company together with 9% interest from the date of petition till the date of payment. The insurance company is liable to pay the amount awarded by the Tribunal with interest at the rate as fixed by the Tribunal. But the insurance company is entitled to recover the entire amount so paid from the first respondent - owner of the vehicle u/s 149(4) of the Act.

M.A.C.A. Nos. 638 & 1724 of 2009 23I, 07;

With the above modification of the impugned award of the Tribunal, these appeals are disposed of.