

(2000) 12 AP CK 0046
In the Andhra Pradesh High Court
Case No : CMA No. 715 of 1992 and Batch

Meka Chakra Rao

APPELLANT

Vs

Yelubandi Babu Rao @ Reddemma and others

RESPONDENT

Date of Decision : 19-12-2000

Acts Referred:

Motor Vehicles Act, 1988 — Section 149, 166, 168, 170, 173

Citation : (2002) ACJ 828 : (2001) 1 ALD 453 : (2001) 1 ALT 495 : (2001) 1 APLJ 122

Hon'ble Judges : V. Eswaraiah, J; Bilal Nazki, J

Bench : Division Bench

Advocate : M/s. B. Adinarayana Rao, I. Nagesh, K.L.N. Rao, P.B. Vijaya Kumar, L. Narasimha Reddy, S. Hanumaiah, P. Chandramouli, Ravi Sankar Jandhyala, J.R. Gopala Rao, K. Venkat Ram Reddy and N.P. Sangam, for the Appellant;

Judgement

V. ESWARAIAH

1. In view of the alleged two divergent decisions in CMA No.588 of 1992 dated 28-7-1999 and CMA No.448 of 1991 dated 7-6-2000, the following questions are referred by the learned single Judge for a decision from the Division Bench.

(1) What is the effect of the non-presence of the owner of a motor vehicle (insured at the appellate stage, if the appeal against the owner is dismissed for default for non-payment of "batta" or for non-compliance with the orders of the Court?

(2) If the lower Tribunal records a finding that the accident had taken place due to the rash or negligent driving of the motor vehicle by its driver, and if such a finding is not challenged by the Insurance Company in the appeal, whether there is any need for the presence of the owner of the motor vehicle?

(3) In an appeal filed by the Insurance Company, if the owner of the motor vehicle is not present (i.e., if the appeal against the owner is dismissed), what is the effect of the same on the said appeal?

(4) In an appeal filed by the claimant, if the Insurance Company has not filed any cross appeal, what is the need for the presence of the owner of the motor vehicle?

2. The CMA. No.588 of 1992 dated 28-7-1999 was dismissed by our learned brother E. Dharma Rao, J., on the ground that as the appeal was dismissed against the owner of the lorry which was involved in the accident and the claim against the insurer cannot be decided in the absence of the insured and as per the judgment of the Supreme Court in *Oriental Insurance Company Limited v. Sunitha Rathi* AIR 1998 SC 257, the liability of the insurer arises only when the liability of the insured is upheld for the purpose of indemnifying the insured under the contract of insurance.

3. The other CMA. No.448 of 1991 was allowed by our learned brother Ghulam Mohammed, J., on 7-6-2000 holding that as per the judgment of the Supreme Court in the case of *A. Robert Vs. The United Insurance Co. Ltd.*, , even if the appeal was dismissed against the owner of the motor vehicle (insured), the question of statutory liability of Insurance Company survives in the absence of service of notice on the insured.

4. In all these appeals, the Tribunals held that the accident was occurred due to the rash and negligent driving of the driver of the vehicles and the claimants were entitled for the compensation. Before the Tribunals, notices were served on the vehicle owners as well as on the Insurance Company and the owners of the vehicles contested the OPs., and on contest, the Tribunals held that the accident occurred due to the rash and negligent driving of the drivers of the vehicles. The said finding of the Tribunals has become final as neither the Insurance Company nor the owners of the vehicles have filed any appeals. All these appeals have been filed by the claimants alone with regard to the disputed quantum of compensation. Notices could not be served on the owners of the vehicles or on the legal representatives of the owners and the appeals stood dismissed against the owners of the motor vehicles (insured).

5. u/s 166 of the Motor Vehicles Act, 1988 ("the Act" of brevity), the claimants whether injured, owners of the property or legal heirs of the deceased, arising out of an accident shall have to file an application before the Motor Accident Claims Tribunal and on such application for compensation made u/s 166 of the Act, the Tribunal, after giving notice of the application to the insurer as well as the insured, shall make an award determining the amount of compensation u/s 168 of the Act specifying the amount which shall be paid by the insurer or owner or driver of the vehicle involved in the accident or by or any of them as the case may be.

6. As per Section 170 of the Act, where in the course of an enquiry, the claims Tribunal is satisfied that there is collusion between the person making the claim and the person against whom the claim is made or the person against whom the claim is made has failed to contest the claim, it may, for the reasons to be

recorded in writing, direct that the insurer who may be liable in respect of such claim shall be impleaded as a party to the proceedings and the insurer so impleaded shall thereupon have to contest the claim on all or any of the grounds that are available to the person against whom the claim has been made. It is the duty of the insurer to satisfy the judgments and awards against the insured in respect of third parties u/s 149 of the Act. The insurer shall indemnify the insured under the contract of insurance to the extent of its liability.

7. CMA No.588 of 1992 was dismissed solely on the ground that as the appeal was dismissed against the owners of the lorry (insured), the liability of the insurer cannot be decided who steps in to the shoe of the insured as held by the Supreme Court in Sunitha Rathi case (supra) that the liability of the insurer arises only when the liability of the insured has been upheld for the purpose of indemnifying the insured under the contract of insurance. The aforesaid observation was made by the Supreme Court in view of the clear finding based on undisputed facts that the accident occurred at 2-20 p.m. and the insurance cover note was obtained only thereafter at 2-55 p.m. in which it was expressly mentioned that the effective date and time of the commencement of the insurance for the purpose of the Act was 10-12-1991 at 2-55 p.m. In those circumstances it was held that the insurer cannot be held liable on the basis of the above policy and therefore the liability has to be of the owner of the vehicle alone, but not the insurer.

8. CMA No.448 of 1991 was allowed on 7-6-2000 relying on the latest judgment of the Supreme Court in A. Robert's case (supra) distinguishing the decision of the Supreme Court in Smith Rathi's case (supra). Our learned brother Ghulam Mohammed, J., while rightly distinguishing the case in Sunitha Rathi's case and relying upon the latest decision in Robert's case, considered the effect of the dismissal of the appeal for non-service of notice on the owner of the vehicle and held there is no bar to decide the statutory liability of the Insurance Company under the contract of insurance.

9. If the Claims Tribunal records a finding that the accident had taken place due to the rash or negligent driving of the driver of the motor vehicle and if such finding is not challenged either by the Insurance Company or by the owner of the motor vehicle, the question that arises in appeal filed against the orders of the Tribunal by the claimants is only with regard to the determination of just, fair and reasonable quantum of compensation and therefore there cannot be any bar to decide the quantum of compensation against the Insurance Company even in the absence of owner of the vehicle to the extent of the statutory liability of the insurance. But the quantum of compensation cannot be decided over and above the statutory liability of the Insurance Company in the absence of the owners, but the question of the statutory liability of the Insurance Company survives for consideration at the appellate stage.

10. Merely because the Insurance Company is respondent in the OP before the Claims Tribunal, it cannot file an appeal for the reduction of the quantum of

compensation. Notice as contemplated u/s 168 of the Act to the insurer is only for holding an enquiry with regard to the claim or for the purpose whether there is any valid contract of insurance and whether there is any collusion between the claimants and the insured and whether the insured has failed to contest the claim and if there is collusion between the parties, and if the insured has failed to contest the claim. then, only during the course of enquiry, if the Tribunal satisfies that there is collusion between the parties or the insured has failed to contest the claim, the Tribunal has to record the reasons in writing for impleading the insured to contest the claim on all or any of the grounds that are available to the insured. If there is no such order of the Tribunal u/s 170 of the Act, the Insurance Company cannot file an appeal either with regard to the quantum of the compensation or with regard to the occurrence of the accident, but it can only maintain an appeal with regard to the statutory liability under the contract of insurance. This question arose in the case of Shankarayya and Another Vs. United India Insurance Co. Ltd. and Another, and the Apex Court held in paragraph-4 as follows:

"It clearly shows that the Insurance Company when impleaded as a party by the Court can be permitted to contest the proceedings on merits only if the conditions precedent mentioned in the section are found to be satisfied and for the purpose the Insurance Company has to obtain order in writing from the Tribunal and which should be a reasoned order by the Tribunal. Unless that procedure is followed, the Insurance Company cannot have a wider defence on merits than what is available to it by way of statutory defence. It is true that the claimants themselves had joined respondent 1, Insurance Company in the claim petition but that was done with a view to thrust the statutory liability on the Insurance Company on account of the contract of the insurance. That was not an order of the Court itself permitting the Insurance Company which was impleaded to avail of a larger defence on merits on being satisfied on the aforesaid two conditions mentioned in Section 170. Consequently, it must be held that on the facts of the present case, respondent 1, Insurance Company was not entitled to file an appeal on merits of the claim which was awarded by the Tribunal"

11. Thus, an appeal lies by the Insurance Company on only limited grounds i.e., to the extent of determining its statutory liability or on the two conditions mentioned in Section 170 of the Act alone.

12. The statutory liability of the Insurance Company, in the absence of the owner of the vehicle, in the appeal filed by the claimants, can be decided and maintainable as held in the case of The Branch Manager, The New India Assurance Co. Ltd. Vs. Harijana Babakka and Others, , for fixing the statutory liability and the presence of the owner at the appellate stage is not necessary. We agree with this judgment.

13. Accordingly the questions 1 and 2 are answered holding that even if the appeal is dismissed against the owner of the vehicle, the question of statutory liability of the Insurance Company survives for consideration and there is no

need for the presence of the owner of the vehicle to decide the question of statutory liability of the Insurance Company at the appellate stage in the cases wherever the Tribunal recorded a finding that the accident has taken place due to the rash and/or negligent driving of the driver of the motor vehicle and if the said finding is not challenged either by the owner of the vehicle or by the Insurance Company.

14. With regard to the third question, the only limited scope for the Insurance Company to contest the claim on all or any of all the grounds that are available to the insured person is available only when there is collusion between the person making the claim and the person against whom the claim is made or the person against whom the claim is made has failed to contest the claim. If the owner of the vehicle fails to contest the claim before the Tribunal, the Insurance Company can contest the claim only before the Tribunal, if it gets itself impleaded by an order of the Tribunal to contest on the grounds mentioned u/s 170 of the Act and in the absence of such an order, the Insurance Company cannot maintain an appeal as mentioned in Section 170 of the Act. With regard to the determination to the extent of the statutory liability of the Insurance Company, in an appeal filed by the Insurance Company before the appellate authority, it can be decided even in the absence of the owner of the vehicle. The limited scope available for filing the appeal other than the grounds mentioned u/s 170(a) and (b) is only with regard to the excess quantum of the compensation payable by it over and above the statutory liability and that question can be decided at the appellate stage insofar as the statutory liability is concerned even in the absence of the owner.

15. In view of the answers on the questions 1 to 3, the 4th question is unnecessary. The question of filing any cross appeal by the Insurance Company in an appeal of the claimants does not arise and the cross appeal is not maintainable in an appeal filed by the claimants.

16. In view of the above answers on the points referred by the learned single Judge, the CMAs., may be posted before the learned single Judge for disposal