

(2009) 04 AP CK 0087

In the Andhra Pradesh High Court

Case No : C.M.A. No"s. 3303 of 2002 and 3086 of 2003

National Insurance Co. Ltd.

APPELLANT

Vs

Nakka Venkanna and others

RESPONDENT

Date of Decision : 02-04-2009

Acts Referred:

Insurance Act, 1938 — Section 64
Motor Vehicles Act, 1988 — Section 173

Citation : (2011) ACJ 1328

Hon'ble Judges : V.V.S. Rao, J

Bench : Single Bench

Advocate : Kota Subba Rao, for the Appellant; S. Laxma Reddy, B. Devanand and Mrs. N. Anjana Devi, for the Respondent

Final Decision : Allowed

Judgement

V.V.S. Rao, J

1. These two appeals u/s 173 of the Motor Vehicles Act, 1988 ("the Act", for brevity) are filed against two different awards in separate M.V.O.Ps. Impugned orders were passed by Motor Accidents Claims Tribunal-cum-I Additional District Judge, Visakhapatnam, on two different dates, but M.V.O.Ps. were filed in connection with the same accident involving the same vehicle. The point involved in these two appeals is the same and, therefore, they are being disposed of by this common order.

2. On 12.4.1999 one Yeluri Srinu and Nakka Rambabu and others were travelling in a jeep bearing No. OR 06-B 9111 belonging to Gayatri Project Limited. At a place called Peddapadu near Srikakulam lorry bearing No. AHH 2125 insured with National Insurance Co. Ltd., the appellant herein, dashed against the jeep. Srinu and Rambabu died in the accident. Alleging that both of them died due to rash and negligent driving by lorry driver, wife, minor son and parents of deceased Srinu filed O.P. No. 829 of 1999 claiming a sum of Rs. 5,00,000 and parents of deceased Rambabu filed O.P. No. 1926 of 1999 claiming a sum of Rs. 2,00,000

as compensation for death.

3. Driver and owner of lorry remained ex parte. Insurer filed counters denying negligence and also disputing the amount of compensation claimed. Additional counters were filed by the insurer alleging as follows:

Owner of lorry gave insurance proposal on 16.11.1998 and paid premium by way of cheque, Exh. B2. Accordingly policy was issued on 16.11.1998 but the cheque was presented for collection to bankers. The same was returned on 3.12.1998 with endorsement on Exh. B2. Therefore, on the same date insurer cancelled the insurance by separate endorsement and sent communication to the insured. Though it was sent to the correct address, it was returned unserved. Thus there is no valid insurance on the date of accident, i.e., 12.4.1999, as a result of which insurer cannot be made liable.

4. Separate enquiry/trial was conducted in both OPs. Oral and documentary evidence was let in. Learned Tribunal rejected the plea of insurer and held that accident occurred due to rash and negligent driving by driver of insured lorry. Considering the age and income of the deceased persons, the Tribunal awarded a sum of Rs. 4,67,000 to the dependants of deceased Srinu in O.P. No. 829 of 1999 and Rs. 2,00,000 to parents of deceased Rambabu in O.P. No. 1926 of 1999. Aggrieved by the awards, instant appeals are filed.

5. The only contention raised before this court is that as on the date of accident on 12.4.1999 offending lorry originally insured with appellant insurer was not having valid insurance policy and, therefore, impugned awards are erroneous.

6. Section 64-VB of the Insurance Act, 1938, prohibits an insurance company from assuming any risk in respect of any insurance business until premium payable is received or is guaranteed from the insured. It also provides that the insurer can assume risk for insurance business only when premium is paid in cash or by cheque to the insurer. In a case where premium amount is paid by cheque, but the cheque is dishonoured by the bankers, what would be its effect on the policy of insurance issued to the insured, and what would be the effect on legal right of third party whose risk is covered by policy of insurance. This question had come up before the Supreme Court in various judgments referred to hereinbelow. It is appropriate to consider these authorities in some detail.

7. In *New India Assurance Co. Ltd. Vs. Rula and Others*, , Supreme Court considered the position of rights of third party to get indemnified against the insurer of the vehicle when premium has not been paid and for that reason policy of insurance is cancelled. Placing reliance on *Oriental Insurance Co. Ltd. Vs. Inderjit Kaur and Others*, , Supreme Court answered the question in favour of third parties and held as under:

The subsequent cancellation of the insurance policy in the instant case on the ground that the cheque through which premium was paid was dishonoured, would not affect the rights of the third party which had accrued on the issuance

of the policy on the date on which the accident took place. If, on the date of accident, there was a policy of insurance in respect of the vehicle in question, the third party would have a claim against the insurance company and the owner of the vehicle would have to be indemnified in respect of the claim of that party. Subsequent cancellation of insurance policy on the ground of non-payment of premium would not affect the rights already accrued in favour of the third party.

(Emphasis supplied)

8. In *National Insurance Co. Ltd. Vs. Seema Malhotra and Others*, , Yashpal Malhotra insured his Maruti car under insurance contract on 21.12.1993 by paying premium amount by way of cheque. A cover note was issued as contemplated u/s 149 of the Act. In the accident occurred on 31.12.1993, the insured died and car was damaged. On 10.1.1994, bankers sent intimation about dishonour of cheque and, therefore, on 20.1.1994, the insurer informed business concern of the insured that insurance policy is cancelled. The widow and children of insured moved State Consumer Forum claiming for the loss of vehicle. The claim was rejected. A Division Bench of High Court of Jammu & Kashmir, however, allowed the appeal on the ground that there was no proper communication of cancellation of insurance policy. Before Supreme Court, the question was in a case where policy of insurance is cancelled for non-payment of premium amount, insurer would be liable or not. Supreme Court referred to *Oriental Insurance Co. Ltd. Vs. Inderjit Kaur and Others*, and *New India Assurance Co. Ltd. Vs. Rula and Others*, and held that when premium promised is not paid, insurer cannot be held liable. It is apt to quote the following paras:

(17) In a contract of insurance when an insured gives a cheque towards payment of premium or part of the premium, such a contract consists of reciprocal promise. The drawer of the cheque promises the insurer that the cheque, on presentation, would yield the amount in cash. It cannot be forgotten that a cheque is a Bill of Exchange drawn on a specified banker. A Bill of Exchange is an instrument in writing containing an unconditional order directing a certain person to pay a certain sum of money to a certain person. It involves a promise that such money would be paid.

(18) Thus, when the insured fails to pay the premium promised, or when the cheque issued by him towards the premium is returned dishonoured by the bank concerned, the insurer need not perform his part of the promise. The corollary is that insured cannot claim performance from the insurer in such a situation.

(Emphasis supplied)

9. In *Deddappa and Others Vs. The Branch Manager, National Insurance Co. Ltd.*, , referring to earlier decisions, Supreme Court held:

(26) We are not oblivious of the distinction between the statutory liability of the insurance company vis-a-vis a third party in the context of sections 147 and 149 of the Act and its liabilities in other cases. But the same liabilities arising under a

contract of insurance would have to be met if the contract is valid. If the contract of insurance has been cancelled and all concerned have been intimated thereabout, we are of the opinion, the insurance company would not be liable to satisfy the claim.

(Emphasis supplied)

10. In *National Insurance Co. Ltd. Vs. Abhaysing Pratapsing Waghela and Others*, , Supreme Court considered the effect of dishonour of cheque when subsequently amount of premium is paid in cash by the insured. Supreme Court, as summarized in head note B of SCC, held as under:

A bare perusal of the motor input advice-cum-receipt issued by the appellant insurer would show that not only the same contains a column relating to "class code" but also a "cover note number". Indisputably, the first respondent is a third party in relation to the contract of insurance, which had been entered into by and between the appellant and the owner of the vehicle in question. A document was produced before the Tribunal. Even according to the appellant insurer, although it was only a motor input advice-cum-receipt, it contained cover note No. 279106. It has to be concluded on facts that a cover note had, in fact, been issued. If a cover note had been issued which in terms of section 145 (1) (b) of the Act would come within the purview of definition of certificate of insurance; it would also come within the purview of the definition of insurance policy. If a cover note is issued, it will remain valid till it is cancelled. Indisputably, the insurance policy was cancelled only after the accident took place. A finding of fact, therefore, has been arrived at that prior to the deposit of the premium of insurance in cash by the owner of the vehicle, the cover note was not cancelled. Hence, the appellant insurer cannot avoid its liability.

11. The law, therefore, may be taken as well settled that when premium amount is not paid in cash or valid cheque, the insurance company can cancel the policy of insurance. It is also well settled that if as on the date of accident, the vehicle involved in the accident is not covered by valid policy, the insurer is not required to indemnify insured against third party risk. It is also well settled that if insured makes up the premium even after the cheque was dishonoured but before the date of accident, insurance company would be liable to pay the compensation. What would be the position if the cancellation or cancellation endorsement is not validly communicated to the insured? As observed by Supreme Court in *Deddappa and Others Vs. The Branch Manager, National Insurance Co. Ltd.*, , if the contract of insurance is cancelled but not communicated to all concerned including the insured, the insurance company would be still liable.

12. In this case memo of cancellation endorsement was communicated to insured by registered post and it was returned unserved. There is no evidence to show that registered post was sent to the last known address of insured. Therefore, as held by the Supreme Court in *C.C. Alavi Haji Vs. Palapetty Muhammed and Another*, , cancellation endorsement was deemed to have been

served. In addition to this it is brought to the notice of this court that the insured subsequently paid premium by cash and obtained insurance. This itself would show that as on the date of accident, i.e., 12.4.1999 accident vehicle was not insured with the appellant insurer in these appeals. As necessary corollary, it cannot be made liable to third party risks and, therefore, impugned awards suffer from error. However, amount paid to claimants in both OPs shall not be recovered. It shall be open to appellant insurer to recover said amount from insured.

The civil miscellaneous appeals are accordingly allowed. No costs.