

(1997) 09 KAR CK 0037

In the Karnataka High Court

Case No : M.F.A. 1867/99, c/w 1868/89 and 1869 of 1989

National Insurance Co., Ltd.

APPELLANT

Vs

Smt. Shantabai and Others

RESPONDENT

Date of Decision : 04-09-1997

Acts Referred:

Evidence Act, 1872 — Section 114

Motor Vehicles Act, 1939 — Section 95, 96

Citation : (1999) ACJ 391 : (1998) ILR (Kar) 3707

Hon'ble Judges : M.F. Saldanha, J

Bench : Single Bench

Advocate : H.G. Ramesh, for the Appellant; P.S. Malimath, for R.1 and R.2, B. Sharath Kumar, for R3 and R4, P.S. Mali Patil, for R1 to R4, B. Sharath Kumar, for R5 and R6 and B. Sharath Kumar, for R2 and R3, for the Respondent

Judgement

M.F. Saldanha, J.

1.The three claims that are the subject matter of these appeals relate to an incident that occurred on 1.10.1986 at 2.30 A.M. when a truck No. CAA 330 which was carrying stones capsized. Of the three coolies who were travelling in the vehicle, 2 died and 1 was injured giving raise to three claims being filed before the M.A.C.T., Gulbarga. The case of the claimants was that respondent 1 who was the son of respondent 2 (owner of the truck) was driving the vehicle and that because of his rashness and negligence the accident occurred. It was also contended that respondent No. 3 namely National Insurance Co. was liable because the vehicle was insured by respondent No. 3. The respondents 1 and 2 filed a written statement in which they contended that respondent 1 was not driving the vehicle and that one Murugesh was in fact driving it. It is relevant to point out that respondents 1 and 2 though represented by a lawyer did not participate in the proceedings in so far as neither of them gave any evidence. I have recounted these details because they are of some consequences. As far as Respondent 3 is concerned, the usual plea was taken that the vehicle was not insured by the Company. The learned Counsel who represents the Insurance Co.

informs me that the reason for this was because no particulars of the policy were set out as a result of which it was extremely difficult for the Company to even trace out the policy in question. More importantly, the respondent 3 took up the defence that it was not liable because Respondent 1 did not possess the requisite driving licence. What is most important is that a notice was served on Respondents 1 and 2 calling upon them to produce the insurance policy and more particularly the driving licence of respondent 1 but they did not comply with either of the requirements. The Tribunal however after hearing the parties quantified the amounts of compensation payable at Rs. 90,100/-, Rs. 27,000/- and Rs. 5600/- respectively with interest at 12% per annum and costs. The Insurance Co, i.e. original respondent No. 3 has challenged the correctness of this award through the present set of appeals.

2. I do not propose to go into the question of quantification because that has not been really in dispute in so far as the Insurance Co. totally denies its liability on the ground that the driver of the vehicle did not possess a valid driving licence at the time of the accident. The alternate plea canvassed is that assuming that this defence fails, that the liability of the Insurance Co. is limited to that under the Workmen's Compensation Act in so far as the three persons were only employees and, they were not covered under the terms of the policy.

3. It is necessary for me to dispose of the I.A. for additional evidence which has been filed by the appellant Insurance Co. It has been contended that it was not possible for the Insurance Company to trace out the policy documents while the proceeding was pending before the trial Court and that the production of this document is vital in so far as it goes to the very genesis or root of the liability, that is cast on the Insurance Company and that therefore this Court should permit the appellant to rely on this document in the form of additional evidence. The I.A. in question has been opposed by the respondents on the ground that it is not permissible to add to the record within the framework of the law and that therefore, I.A.IV should be rejected, Mr. Ramesh, learned Counsel who represents the appellants has drawn my attention to a decision of the Division Bench of this Court reported in *United India Insurance Co. Vs. Balasubramanyam*, wherein, under more or less identical circumstances the Court permitted the Insurance Company to produce a copy of the policy document as additional evidence. On a strict construction of the law, the Insurance Company would have been precluded from being permitted to produce the additional evidence before this Court particularly because the law is very clear to the effect that if the document could not have been produced despite due diligence or circumstances that prevented the appellant from producing it or if the evidence was something that has emerged at a later point of time, then alone it would be permissible to admit additional evidence. In this case, the registration number of the vehicle was known to the Insurance Company, the Branch of the Insurance Company which had issued the policy namely the Shimoga Branch had been named by the applicant and merely because the policy number was not set out, the Insurance Company could easily have traced out the

policy. I do not believe that the Shimoga Branch is" so large or so over burdened that the policy could not have been traced out. The fact of the matter is that the case had been conducted on behalf of the Insurance Company in an extremely cavalier manner before the Tribunal and it is very clear to me that the lawyer who conducted the case did not take the trouble to direct his clients to produce the policy. This may not completely exonerate the Company's Officers but the fact of the matter is that it is very clear to me from the manner in which the case was conducted that it has gone by default. If this is to be the position, one would have to apply the old maxim that a client cannot suffer for the default of his lawyer and to this extent therefore, I would have to make a concession in favour of the Insurance Company. The company did call upon the insured to produce a copy of the policy which was not done and it is contended that only at a later point of time was the Company able to trace out a copy. This is virtually a border line case and considering the fact that something does turn on the document, I cannot shut out the reception in evidence with regard to the Insurance policy. The I.A. is accordingly allowed but I do propose to penalise the Insurance Company for this lapse because an example will have to be made with regard to the manner in which these cases are conducted and it is therefore directed that costs quantified at Rs. 1000/- will have to be paid by the appellants in each of these appeals to the claimants.

4. Mr. Ramesh, on behalf of the appellants placed strong reliance on the decision of the Supreme Court reported in Kashiram Yadav and Another Vs. Oriental Fire and General Insurance Co. and Others, wherein the Supreme Court took cognizance of the fact that the usual false plea had been taken up that the vehicle was being driven by some other person and the fact that the driver was found to be a person who did not possess a valid driving licence was held to be sufficient to exonerate the Insurance Company from its liability. Relying on this decision, Mr. Ramesh submitted that on the facts of the present case it must be held that the appellants have wrongly been held liable, He reiterated his submissions by pointing out that despite a specific plea being taken by the appellants to the effect that respondent No. 1 did not possess a driving licence, which plea has been taken in the written statement and despite the fact that written notice was given to their learned advocate to produce the driving licence and the insurance policy whereby this fact was specifically highlighted that no driving licence was forthcoming. Mr. Ramesh went to the extent of pointing out that there is a specific finding of the Court that Respondent No. 1 was in fact driving the vehicle and that the plea to the effect that one Murugesh was driving it is false and he also brings it to my notice that in the cross-examination of PW3 that the learned advocate who represented respondents 1 and 2 has put a positive case to the witness that the driver of the vehicle namely respondent 1 lost control because some buffaloes had crossed the road. He submitted that in this background, the burden of proof which undoubtedly lay on the Insurance Company has been sufficiently discharged and he contended that the Tribunal was wrong in having ignored this vital fact and in having straight away fixed the

total liability on the appellant Insurance Company.

5. The learned advocate who represents the claimants has submitted that this aspect of the matter was never seriously agitated before the Tribunal as is evident from the order and in this regard, he is strongly supported by the learned advocate who represents the other respondents namely the driver and owner. I need to mention here that the driver is none other than son of the owner. Normally, I would not have permitted Mr. Ramesh to raise an entirely new contention if it was never canvassed before the Tribunal but in the present instance the record does indicate that the plea was taken in writing and that there is nothing to show that it was given up. Possibly, having regard to the manner in which the case was conducted this point was never argued at the final stage but even if that was the position it being a pure point of law the learned advocate cannot be precluded from canvassing it before the High Court in appeal.

6. The two learned advocates have thereafter submitted that u/s 96 of the Motor Vehicles Act if the Insurance Company decides to invoke one of the defences that the burden of proof shifts to the Insurance Company and the learned advocates have been very vehement in pointing out to me that nobody on behalf of the Insurance Company has given evidence and they submit that the defence now raised namely that the onus of proof is sought to be discharged on the basis of posts of the record and default on the part of the original respondents 1 and 2 is something that cannot absolve the appellants from their basic legal liability of discharging the burden of proof that shifts to them. In this regard, the learned advocates have drawn my attention to two judgments of the Supreme Court reported in 1985 ACJ 397 : AIR 1987 SC 1184 as also a Division Bench judgment of this Court reported in United India Fire and General Insurance Co. Ltd., Bangalore Vs. Kum. Naga Ratna, in support of the plea that the Courts have consistently held that a defence whereby there is disclaimer of liability must be established by the party pleading it namely the Insurance Company or the owner as the case may be, and discharged, in the absence of which the Court may proceed on the basis of a deemed liability. The learned advocates have vehemently contended that the applicant as also the driver and owner were under the obligation to assist or facilitate the appellants in the discharge of their burden of proof and since no conclusive evidence was established before the Court in support of the contention that the driver did not possess a valid driving licence that the Court must refuse to uphold the plea. Mr. Ramesh did seek to point out that the latest judgment of the Supreme Court in Kashiram's Case is an all fours with the present case and that in identical circumstances the Supreme Court accepted the defence without insisting on any positive evidence. He also pointed out that the non-existence of a driving licence is not something which a representative of the Insurance Company can depose about and that therefore the Insurance Company did the next best thing in serving a notice on the driver and in relying on the fact that despite specific notice the driving licence was not forthcoming and he also points out that the party is represented before this Court and that at no stage in the course of the present proceeding

had the licence been produced. In totality therefore, he has submitted that the manner in which the burden of proof can be discharged differs from case to case and that in the facts and circumstances of the present case, the Court must hold that there is sufficient ground to uphold the defence that has been pleaded.

7. I do concede that the respondents learned advocate is right with regard to the first proposition of law canvassed by them that the burden of proof in such circumstances shifts to the Insurance Company. There can be no two opinions about the fact that the best method of discharging this burden would have been by leading some positive evidence before the Tribunal which has not been done. Mr. Ramesh seeks to justify this position by pointing out that no representative of the Insurance Company can positively make a statement on oath that respondent No. 1 did not possess a valid driving licence even if the officers had reason to believe that this was the position and that therefore, a legal notice was served on the respondent 1 to produce the driving licence and the Insurance Company heavily relies on the legal inference that can arise in such circumstances particularly u/s 114 of the Evidence Act. He submits that an adverse inference would have to be drawn against respondent 1 and that having regard to this position, it must be held that the appellants have discharged the burden of proof. I need to mention here that even though the Insurance Company served a notice on respondents 1 and 2 namely the driver and the owner that the inference alone would not be sufficient for the Court to come to the conclusion that the burden has been completely discharged, the reason for it being that either through negligence or even if it was done deliberately, it would be difficult to hold that a defendant is required to assist an opposite party in such circumstances. Even if a certificate had been brought from the local R.T.O. or even if the officer of the Insurance Company had stepped into the witness box and stated that his investigations have revealed that respondent 1 did not possess a valid driving licence, the remaining material relied on by Mr. Ramesh would have fully corroborated this evidence and established the appellants case to the hilt. This procedure not having been complied with, to my mind, it would have to be held at the very highest that there is a serious doubt as to whether respondent 1 possessed a valid driving licence on that date but that this fact is not conclusively established. I hasten to add that this finding does not mean that the Court approves in the least of the fact that respondents 1 and 2 have taken up a false defence that somebody else was driving the vehicle or the manner in which they have failed to produce the driving licence when called upon to do so. Incidentally, the learned advocate who represented these parties heavily relied on the evidence recorded before the criminal Court and the finding that one Murugesh was driving the vehicle but that material is not on record and even if it was, it does not bind the Tribunal or this Court.

8. The last aspect of the matter which has arisen is the submission canvassed by Mr. Ramesh that under the policy, the employees who are covered are only the driver and the cleaner and that therefore, the liability of the Insurance Company vis-a-vis the present claimants stands considerably reduced to that under the

Workmen's Compensation Act. On a plain construction of Section 95 of the M.V. Act read with the terms of the policy this appears to be the position. Mr. Ramesh has relied heavily on proviso (b) of Section 2 of the policy for this purpose. The claimants' learned advocate drew my attention to a Division Bench decision of this Court in MFA.Nos. 1850 and companion matters dated 6.1.1988 wherein the Division Bench of this Court negated such a contention. Reference was also drawn to a decision of the High Court reported in 1989 ACJ p.400 wherein the view taken was that a labourer engaged for loading and unloading cannot be treated as a workman and the liability of the Insurance Company is not limited as per the Workmen's Compensation Act. One needs to take cognizance of the fact that the present case is on a slightly different footing in so far as it has been clearly established from the evidence that respondent 2 owned a stone quarry and that the claimants were his employees apart from the fact that the vehicle also belonged to him. It is this aspect of the matter that makes a slight difference coupled with the fact that the provisions of the policy themselves limit the liability to the driver and the cleaner as no additional premium was paid for any coolies. It is in these circumstances that one would have to uphold the submission canvassed on behalf of the Insurance Company that the liabilities would be limited to those prescribed under the Workmen's Compensation Act. That liability works out to Rs. 37,436/- in MFA.No. 1867/89, to Rs. 18,370/- in MFA No. 1868/89 and to Rs. 225/- in MFA. 1869/89. The claimants would however be entitled to 6% interest on this amount from the date of application until the date of realisation apart from which they would be entitled to costs in the sum of Rs. 1000/- each in all these appeals which has been awarded by this Court. The award of the Tribunal in these three appeals stands modified to the extent that the liability of the Insurance Company is limited to this extent which means that the balance amount shall be paid by the original respondents 1 and 2.

9. The original respondents to the M.V.C. cases shall accordingly deposit the balance amounts due from them with the Tribunal within an outer limit of 12 weeks from today and on receipt of the amount, the Tribunal shall proceed to disburse the same to the claimants. The appeals partially succeed to this extent and stand disposed of.

10. It is clarified, that the Insurance Company as also the driver and owner will be required to deposit the amounts to the extent of their respective liabilities as quantified by this Court.

The office of this Court shall forthwith retransmit the records to the Tribunals.