
(1980) 06 MAD CK 0001
In the Madras High Court

The National Insurance Company

APPELLANT

Vs

Sugantha Kunthalambal and Others

RESPONDENT

Date of Decision : 19-06-1980

Acts Referred:

Motor Vehicles Act, 1988 — Section 2(33), 3, 3(1), 96, 96(2)(3)(ii)
Penal Code, 1860 (IPC) — Section 304A

Citation : (1981) ACJ 302 : (1980) 93 LW 583 : (1980) 2 MLJ 572

Hon'ble Judges : G. Ramanujam, J

Bench : Single Bench

Judgement

G. Ramanujam, J.—The above appeal has been filed by the National Insurance Co., Tiruchirapalli, against the award of the Motor

Accidents Claims Tribunal, Tiruchirapalli. awarding to the respondent-claimants a sum of Rs. 30,000 as compensation for one accident that took

place 011 4th March, 1974, at about 3.30 P. M. near Tiruchirapalli junction. Cross-objections have been filed by the respondents-claimants

claiming an enhanced compensation.

2. On 4th March, 1974 at about 3.30 P. M. one T.S. Krishnamurthi who was working as an accountant in Coaching section, Southern Railway at

Tiruchirapalli, while crossing the road was hit by an auto-rickshaw bearing registration No. M/TNY 1878 belonging to one Joseph and as the

result of the impact, the said T.S. Krishnamurthi fell down, sustained injuries and died at the spot. On the ground that the accident had occurred

due to the rash and negligent driving of the auto-rickshaw by its driver, the legal representatives of the said Krishnamurthi filed a claim before the

Motor accidents Claims Tribunal, Tiruchirapalli, claiming a sum of Rs. 1,00,000 The said claim was opposed both by the owner of the auto-

rickshaw as well as the Insurance Company with which the auto-rickshaw had been insured. Their common case was that the accident did not

occur as a result of the rash and negligent driving of the auto-rickshaw by its driver and therefore, they are not liable to pay any compensation. So

far as the Insurance Company is concerned, it took another defence to avoid the liability of paying compensation. It took the plea that the driver of

the auto-rickshaw did not have a valid licence to drive that vehicle and therefore, under the terms of the policy it had issued, the Insurance

Company cannot be held liable. The following three points arose for consideration before the Tribunal-

1. Whether the accident occurred due to the rash and negligent driving of the auto-rickshaw by its driver ?
2. Whether the driver of the auto-rickshaw had valid licence to drive the said vehicle ? and
3. What is the compensation amount, if any, payable to the claimants by any of the respondents ?

The Tribunal after considering the evidence adduced by all parties held on the first point that the accident occurred due to the rash and negligent

driving of the auto-rickshaw and that, therefore, the claimants are entitled to compensation arising out of the death of the said Krishnamurthi as a

result of the accident. On the second question as to whether the driver of the auto-rickshaw had valid licence to drive the vehicle, the Tribunal took

the view that though the Insurance Company had taken the plea that the driver of the auto-rickshaw had no valid licence to drive the vehicle, it has

not chosen to adduce acceptable and convincing evidence to establish that fact and therefore, it cannot avoid the liability to pay compensation

arising out of the policy on that ground, On the question of compensation arising under Point No. 3, the Tribunal held that the deceased was

spending on his family a sum of Rs. 500 per month, out of his salary and therefore, the annual dependency could be determined at Rs. 6,000 and

having regard to the fact that he had only five years of service before retirement, a sum of Rs. 30,000 will be a fair and reasonable compensation

payable to the claimants in the circumstances of the case.

3. The insurance Company has chosen to challenge the finding of the Tribunal on the question whether the driver of the auto-rickshaw had a valid

licence to drive the vehicle. The claimants have filed the memorandum of cross-objections claiming enhanced compensation, not satisfied with the

quantum awarded by the Tribunal. Thus, in this appeal, the following two questions have to be considered by us-

1. Whether the driver of the auto-rickshaw had a valid licence to drive the vehicle at the time of the accident ?

2. Whether the Insurance Company can avoid the liability to pay compensation on that ground?

4. There cannot be any dispute that if the driver of the auto-rickshaw was not duly licensed to drive the vehicle, the appellant Insurance Company

can avoid its liability arising out of the policy, in view of the following clause occurring in the policy ""Provided that the person driving holds a licence

to drive the motor vehicle or has held, and is not disqualified for holding or obtaining such a licence"". Such provision for exclusion of liability is also

contained in Section 96(2)(3)(ii) of the Motor Vehicles Act, which provides for a condition excluding liability in case the vehicle was driven by a

named person or persons or by any person who is not duly licensed, or by any person who has been disqualified for holding or obtaining a driving

licence during the period of disqualification. Therefore, if a driver of the auto-rickshaw did not have a valid licence for driving the vehicle in

question, then the appellant Insurance Company can avoid its liability. But, the onus of proving that the driver of the vehicle did not have a valid

licence to drive the vehicle will squarely lie on the Insurance Company, because, it is the Insurance Company which seeks to avoid its liability

under the policy on the ground that the terms of the policy had been violated. In this case, the Insurance Company took the stand that the driver of

the auto-rickshaw which was involved in the accident was not duly licensed to drive the vehicle and to establish that fact it has examined R. W. 1

the Police Officer, who prosecuted the driver for an offence u/s 304-A, Indian Penal Code and also marked Exhibit R-1 certified copy of the

charge-sheet filed in the criminal case. R. W. 1 has in chief examination deposed that the driver of the auto-rickshaw had a licence to drive a light

motor vehicle at the time of the accident, but he did not have an endorsement on the licence authorising him to drive an auto-rickshaw. But, in

cross-examination he concedes that the auto-rickshaw also will come within the definition of light motor vehicle. Exhibit R-1 which is a copy of the

charge-sheet filed in the criminal case, against the driver, merely alleges that the driver did not have a valid licence to drive the auto-rickshaw. But,

a mere charge sheet which is in the nature of an allegation cannot be taken to be positive proof of the fact sought to be established by the Insurance

Company that the driver of the auto-rickshaw did not have a valid licence. In this case, the Insurance Company had not taken steps to call upon

either the owner of the auto-rickshaw or its driver to produce the driver's licence by invoking the provisions of Section 100-C (2) of the Motor

Vehicles Act. The Insurance Company could have caused the production of the driver's licence by issuing a notice for producing the same either

to the driver or to the owner of the auto-rickshaw. In the absence of the actual production of the driver licence before the Court, it is not possible

to assume that the licence which he had did not authorise him to drive the auto-rickshaw either as a private vehicle or as a public transport vehicle.

Having regard to the evidence referred to, the Tribunal came to the conclusion that the Insurance Company has not established its plea that the

driver of the auto-rickshaw was not duly licensed to drive the said vehicle. In that view the Tribunal held that the Insurance Company cannot

escape its liability under the Insurance policy.

5. Before me, the learned Counsel for the appellant took a slightly different stand. According to him, though the auto-rickshaw may come under

the definition of light motor vehicle, still for a person to drive the auto-rickshaw, as a transport vehicle his licence should specifically authorise him

to drive such a vehicle. The learned Counsel in support of his submission refers to Section 3 and Section 2(33) of the Motor Vehicles Act.

According to the learned Counsel, even if the driver of the auto-rickshaw had possessed a licence to drive a light motor vehicle, he cannot drive an

auto-rickshaw as a transport vehicle unless he has a licence to drive a light motor vehicle containing an endorsement, authorising him to drive the

auto-rickshaw as a transport vehicle. Section 3(1) of the Motor Vehicles Act is as follows:

No person shall drive a motor vehicle in any public place unless he holds an effective driving licence issued to himself authorising him to drive the

vehicle, and no person shall so drive a motor vehicle as a paid employee or should so drive a transport vehicle unless his driving licence specifically

entitles him so to do.

The ""transport vehicle"" which is referred to in Section 3 of the Act, has been defined in Section 2(33) as public service vehicle or a goods vehicle.

There cannot be any dispute in this case that the autorickshaw was used as public service, vehicle, for, even at the time of the accident, the vehicle

was carrying passengers. Having regard to Section 3 read with Section 2(33) of the Motor Vehicles Act, there may not be any difficulty in

accepting the submission of the learned Counsel for the appellant that for a person to drive a light motor vehicle, as a public service vehicle, or as a

goods vehicle, there should be a special endorsement in the licence authorising the licencee to drive the vehicle.

6. However, the position here is that the absence of endorsement has not been proved on the facts of this case. The learned Counsel for the

appellant would contend that when the appellant has taken up a specific plea before the Tribunal that the driver of the auto-rickshaw had not been

duly licensed to drive the vehicle in question as a public service vehicle, the onus is on the owner of the auto-rickshaw, who is also a party before

the Tribunal to positively prove the existence of such an endorsement and as he has not shown that the licence possessed by the driver of the auto-

rickshaw did contain the endorsement authorising him to drive the vehicle, the case of the appellant has to be taken to be proved. We are not able

to appreciate the said argument of the learned Counsel. The appellant who has insured the vehicle and who is normally bound by the terms of the

policy cannot avoid its liability under the policy unless it establishes those facts which will enable it to disown its liability. In cases where the insurer

establishes that the terms of the policy have been violated or facts established invalidate the policy, it can escape the liability under the policy.

Therefore, the onus is clearly on the appellant to establish that the driver did not have a valid licence to drive the vehicle. It is not sufficient for the

appellant to make allegations that the driver had no licence at all to drive the vehicle without adducing necessary proof and escape its liability under

the policy. The learned Counsel for the appellant would say whether the licence contains the endorsement or not as required u/s 3 of the Act, is

within the exclusive knowledge of the driver and the owner, of the auto-rickshaw and that therefore, that fact need not be proved by the Insurance

Company. As already stated, even if the licence is in the custody of the driver, who is not a party before the Tribunal, the Insurance Company can

call upon him to produce the licence by issuing notice to produce the same and if the licence is not produced notwithstanding such a notice, the

Insurance Company may request the Court to draw adverse inference. But in this case, no such step has been taken by the Insurance Company

and it got satisfied merely by examining the police officer and producing Exhibit R-1 which, In our view, is quite insufficient to establish the absence

of the authorisation to drive the vehicle in the licence, admittedly possessed by the driver to drive a light motor vehicle.

7. The learned Counsel refers to the decision in *The Anand Insurance Company Ltd. Vs. Hasanali and Others*, , in support of his submission that

the owner of the auto-rickshaw should prove that the licence actually possessed by the driver contained authorisation authorising him to drive the

auto-rickshaw. After going through the said decision, we find that the decision cannot be taken to support the appellant's stand. In that case, the

driver who caused the accident had a licence to drive light motor vehicles. But, the vehicle driven by him was not a light motor vehicle, but a truck

The Insurance Company in that case took up the stand that the driver did not have a driving licence for driving the truck. It was urged on behalf of

the insured and the claimants that the Insurance Company having failed to prove the absence of a driving licence in favour of the driver, the issue

should be decided against the Insurance Company. However, the Court rejected their contention on the ground that the licence actually possessed

by the driver, had been actually produced before the Court and that licence did not actually authorise the driver to drive the truck The decision in

that case proceeds on that basis that the concerned licence having been produced before the Court and that licence having not authorised the

driver to drive a truck, the case of the Insurance Company that the driver did not have a licence to drive a truck should be accepted. That decision

cannot apply to the facts of this case, where the licence possessed by the driver of the auto rickshaw at the time of the accident had not been

produced nor the Insurance Company has taken any step to cause production thereof and to establish its plea that the licence did not authorise the

driver to drive the auto-rikshaw as public service vehicle. As a matter of fact in *Appa Rao v Danna Mukanda* (1973) A.C.J. 222, the Orissa High

Court has held that the onus is on the insurer to establish his immunity from liability under the particular ground set forth in Section 96 of the Motor

Vehicles Act, and if the Insurer fails to discharge its onus, it cannot escape its liability. In *The New India Assurance Co. Ltd. Vs. Srikanta Ghosh*

and Another, the Insurance Company repudiated its liability on the ground that the driver of the truck did not hold a licence for driving heavy

vehicles and the owner of the truck failed to produce the licence stating that the driver had left the services. The same Court held that the Insurance

Company ought to have taken steps to bring on record the licence so as to show that it was not valid for driving heavy vehicles. It was also

observed by the Court in that case that difficulty in establishing such a fact by the insurer cannot give rise to a position that an adverse inference

should be drawn against the truck owner and the burden that lay on the insurer can be taken to have been discharged. This is quite in accord with

the view expressed by us earlier. We have to therefore agree with the view taken by the Tribunal that the appellant in this case has not established

that the driver of the auto-rickshaw had no valid licence to drive the vehicle in question. Hence the appellant has to fail.

8. Coming to the cross objections filed by the claimants, it is seen that the deceased was aged 53 years at time of the accident and that the age of

retirement was 53. The Tribunal therefore, proceeded on the basis that the deceased would have served in the Railway for a period of five years

and there is loss of financial benefit for his family as a result of the death of the deceased for a period of five years. Therefore, adopting five years

as the basis, and taking the annual dependency as Rs. 6,000 it determined the compensation as Rs. 30,000. The learned Counsel for the cross-

objectors contends that the sum of Rs. 30,000, is too low having regard to the fact that the deceased would have earned from other sources even

after retirement. In this case, it is seen that the Tribunal took note of all the circumstances including the capacity of the deceased, if alive, to earn

after retirement for maintaining the family, fixed a lump sum of Rs. 30,000 taking into account the payment of lump sum as compensation and the

sure possibility of the claimant getting periodical income by way of interest by investing the lump sum which is paid as compensation. The Tribunal

has taken all the relevant circumstances into consideration in fixing the compensation as Rs. 30,000. We do not see any reason for interfering with

the quantum. In this view, the appeal and the cross objections are dismissed. No costs.