(2012) 08 KL CK 0083

In the High Court Of Kerala

Case No : M.F.A (W.C.C.) NO. 6 of 2007 and Cross Objection No. 78 of 2007

The National Insurance Company Ltd., Kannur — APPELLANT

Vs

M.V. Narayanan (Died) — RESPONDENT

Date of Decision : 07-08-2012

Acts Referred:

Motor Vehicles Act, 1988 — Section 2(13)

Citation : (2012) 08 KL CK 0083

Hon'ble Judges : Thottathil B. Radhakrishnan, J;K. Vinod Chandran, J

Bench : Division Bench

Advocate : Rajan P. Kaliyath, for the Appellant; M.V. Amaresan, for R1 and R2, Sri. V.N. Ramesan Nambisan and Sri. O.V. Maniprasad, for R3, for the Respondent

Final Decision : Allowed

Judgement

Vinod Chandran, J.

The insurer is in appeal against the order of the Workmen''s Compensation Commissioner on the specific ground of violation of policy. The finding of the Commissioner that the insurer is liable to indemnify the insured for the liability to compensate the fatal accident of the insured''s workman is challenged. The case of the applicants, dependent parents of the deceased workman, was that while their son was employed as a drilling assistant under the first opposite party, he met with an accident which resulted in his death. The accident occurred in a quarry owned by the 4th opposite party on 09.01.1997 while the deceased was operating a drilling machine attached to the tractor owned by the first opposite party. The first opposite party contented in the counter filed by her that neither the deceased person nor RW5 who was alleged to be the driver of the tractor at the time of the incident, were ever employed by her. The ownership of the vehicle and the attachment of the drilling unit to the said vehicle was not denied in the counter. The fact that the vehicle and the drilling unit were being used in the quarry where the accident took place also was not disputed. The firstopposite party disputed the employer-employee relationship and alleged that the deceased was merely a way-fairer who had been visiting a friend of his at the quarry and while so slipped from a rock and fell to his death. The quarry was owned by the fourth opposite party and it was the case of the first opposite party that the deceased person being either an employee of the quarry- owner or a visitor at the quarry; the liability to compensate the dependents of the deceased workman was entirely on the quarry owner. By an additional affidavit it was also contented by the first opposite party that in any event the vehicle was insured with the third opposite party and in the event of any liability to compensation being found against her, the third opposite party was liable to indemnify her as per the terms of the policy.

2. Before the Commissioner the first applicant was examined as AW1. AW1 marked the FIR, in which the F.I. Statement by an eye witness regarding the accident having occurred while the deceased was operating the drilling machine is disclosed. RW1, the husband of the first opposite party was examined on behalf of the employer. RW 2 and 3 were the Sub Inspector of Police and Assistant Manager of the insurer. RW4 was the owner of the quarry and RW5 the driver of the tractor. On the basis of the evidence recorded the Commissioner found that the accident had occurred as disclosed in the FIR, which was supported by RW5 who was the driver of the vehicle at the relevant point of time. The employer employee relationship between the first opposite party and the deceased was also established from the evidence recorded. Having found the accident to be proved as arising out of and in the course of employment, the Commissioner determined the compensation payable to the dependents of the deceased workmen and found the first opposite party to be liable to pay such amounts. There is no appeal by the insurer from these findings. The appeal by the insurer is confined to the finding of the Commissioner rejecting their claim of violation of policy. The employer has filed a cross objection in which the following questions are raised:-

(i) Can in the nature of the evidence the Commissioner reach the conclusion that the deceased was a workman under the 1st opposite party and is not this finding perverse and contrary to evidence?

(ii) Can the Court of Commissioner for Workmen''s Compensation rely on a statement prepared by the police u/ 161 Crl.P.C. during investigation of the crime without examining the maker of the statement and confronting the same to him and what would be the evidentiary value of such statement in Workmen Compensation Cases?

(iii) Can the Court of Commissioner for Workmen''s Compensation rely on a First Information Statement given by a person in a crime without examining the maker of the statement and confronting the same to him and what would be the evidentiary value of such statement in Workmen Compensation Cases?

(iv) Was the Commissioner went wrong in fastening the liability on the owner of the tractor and exonerating the owner of the quarry?

3. We will first consider the appeal of the insurer. The insurer contended on the strength of the policy that the tractor was insured only for the purpose of carriage of goods within the meaning of Motor Vehicles Act, 1988. The attachment of a drilling unit to the said vehicle and the use of the drilling unit with the aid of the engine of the tractor was not an activity which was covered under the insurance policy issued in the name of the first opposite party with respect to the concerned vehicle/tractor. Any peril caused in the course of an activity which was not specifically covered under the policy, it is contented, cannot impose on the insurer the liability to indemnify the insured. Much less would be the liability in the case of total exclusion.

4. The learned counsel appearing for the insurance company took us through the policy which is marked as Ext. R3(1). The exclusion or rather limitation as to the use to which the vehicle is to be put is specifically provided in the policy document as follows:-

Limitations as to use

Use only for carriage of goods within the meaning of Motor Vehicle Act.1988. The policy does not cover:

1. Use for organised racing,pace-making reliability trial or speedtesting.

2. Use whilst drawing a trailer except the towing (other than for reward) or any one disabled mechanically propelled vehicle.

3. Use for carrying passengers in the vehicle except employees (other than driver) not exceeding six in number coming under the purview of Worksmen''s Compensation Act, 1923.

By virtue of the said limitation it is contended that the insurer is not liable to indemnify the insured since the peril was caused in the course of an activity not specifically covered by the policy.

5. Before interpreting the said limitations we have to look at the facts to understand what exactly the activity was, out of which the accident occurred. What is significant is the evidence of RW1 the husband of the first opposite party. While denying employee-employer relationship, RW1 would specifically depose that the quarry owner had requisitioned the tractor, super-imposed with a drilling machine for drilling work at his quarry. RW1 also would state that his capacity was that of a contractor. We have definite indications about the vehicle and the activity to which it was put to use in the quarry from the deposition of RW1. In cross examination RW1 would say that the drilling unit was mounted on the tractor. The drilling could not be proceeded with without the engine of the tractor being started/operated. The jacky of the drilling unit, which is employed in the actual drilling work, alone, is taken to the rock on which drilling is conducted. The jacky and the tractor are connected by a pipe. It can be safely concluded that the tractor was used as a prime vehicle for carrying on drilling operations with the drilling unit super imposed on the vehicle.

6. It is also admitted that for effective operations of drilling there has to be employed, two persons; the driver and the drilling assistant. Though RW1 speaks of having employed one Satheesan as driver there is no statement as to who had carried on the drilling operations. The said Satheesan was also not examined. RW5 specifically spoke of his employment as a driver in the said vehicle at the time the fatal accident took place as also the employment of the deceased workman. The version of RW5 was that the vibrations of the drilling unit caused the hand brake of the tractor to be disengaged, thus pulling the drilling jacky employed by the deceased workman. This resulted in the workman''s fall and consequent death.

7. We have looked in to the Motor Vehicles Act,1988. It defines "goods", "goods carriage" and "tractor" u/s 2 (13)(14) and (44):

(13) "goods" includes livestock, and anything (other than equipment ordinarily used with the vehicle) carried by a vehicle except living persons, but does not include luggage or personal effects carried in a motor car or in a trailer attached to a motor car or the personal luggage of passengers travelling in the vehicle;

(14) "goods carriage'' means any motor vehicle constructed or adapted for use solely for the carriage of goods, or any motor vehicle not so constructed or adapted when used for the carriage of goods;

xxx

(44) "tractor" means a motor vehicle which is not itself constructed to carry any load (other than equipment used for the purpose of propulsion); but excludes a road, roller;

8. The policy we have examined earlier would clearly show that what was intended to be covered was the use of the tractor as a carriage of goods within the meaning of the Motor Vehicles Act. The insurance cover of the tractor as defined in the Act, in the instant case, would extend to its use as a goods carriage. Specific limitations have been provided under three heads. One and three are not applicable in the instant case. However, two specifically indicates that any use while drawing a trailer except any towing not for reward or while drawing any disabled mechanically propelled vehicle, is specifically excluded. The exclusions/limitations cannot contemplate every situation possible. Primarily the cover of the policy is for carriage of goods within the meaning of Motor Vehicles Act, 1988. The definitions extracted above would show that neither was any goods being carried in the tractor at the time the accident occurred nor was it being used as a goods carriage. The policy specifically excluded even any towing activity for reward. The tractor had a drilling unit super- imposed on it and which functioned with the aid of the tractor engine. It is also admitted that while the tractor was super-imposed with such drilling unit it was rented out for carrying on drilling operations. The vehicle was put to use for operating a drilling (machine) unit an activity carried on with the aid of the vehicle. The same cannot at all be considered as carriage of goods within the meaning of the Motor

Vehicles Act,1988.

9. We have seen the decisions of the Supreme Court placed by the learned counsel for the Insurance Company in Oriental Insurance Company Ltd. V Brij Mohan & others[IV(2007) ACC 254 (SC)]. The insurer was released from its liability to indemnify by reason of violations of the terms of policy. In that case a tractor was insured for specific use in agricultural activity and while carrying earth in an attached trolly, to a brick-klin, the labourer sitting on top of the earth fell off and suffered grevious injuries. The court found that the activity to which the tractor was put to use; was not covered by insurance. The insurance policy having covered only agricultural work. In Smt. Yallwwa & others v National Insurance Co. Ltd [III (2007) ACC 259 (SC)], the Supreme Court opined as follows:

Although in a given situation having regard to the liability of the owner of the vehicle, a claim Tribunal need not go into the question as to whether the owner of the vehicle in question was at fault or not, but determination of the liability of the Insurance Company, in our opinion, stands on a different footing. When a statutory liability has been imposed upon the owner, in our opinion, the same cannot extend the liability of an insurer to indemnify the owner, although in terms of the insurance policy or under the Act, it would not be liable therefor.

10. The learned counsel for the respondents would rely on New India Assurance Co. Ltd. v Balakrishnan (2011 (4) KLT 412) to contend that the insurer cannot avoid the liability to the insured on mere proof of violation or breach of conditions of policy. Following the judgment of the Supreme Court in National Insurance Co. Ltd. V Swaran Singh [2004 (1) KLT 781] a Division Bench of this Court held that in the facts of that case; the driver of an auto rickshaw not having an authorisation/badge is not so fundamental a breach as to release the insurer from the liability to indemnify the insured. We notice that the Division Bench had held in the said case that an insurer cannot avoid liability to indemnify merely on proof of violation and proof of the breach. " It has got to be proved further that the breach was so fundamental and the breach had caused or contributed to the cause of the accident" (sic) was the specific finding of the Division Bench.

11. In the instant case the conclusions arrived at by us would clearly indicate that the tractor which was insured was never intended to be used other than as a goods carriage vehicle, and it was for that use insurance coverage was provided. The tractor at the time of accident was not being used as goods carriage vehicle. A drilling unit was super imposed on the tractor and the said unit could be operated only with the aid of the engine of the tractor. Drilling activity with the aid of a jacky connected to the drilling unit super imposed on the tractor was carried on at the time of the accident. The vibrations of the drilling unit caused the hand brake of the tractor to be disengaged. This resulted in the fatal accident. There is not a grain of doubt in our mind that the breach and violation of policy was so fundamental and that such breach had caused and contributed

to the cause of the accident. On the facts of the instant case we are unable to sustain the findings of the Commissioner regarding the insurers liability to indemnify the insured. In the circumstances, the questions of law raised regarding the liability of the insurer to indemnify the insured, on the facts and circumstances of the case is answered in favour of the insurer and against the insured. Considering the cross objection of the employer/first opposite party, the discussion and findings made above would apply here too. The conclusion of the Commissioner regarding the employer-employee relationship is unassailable. It emanates from the evidence recorded and cannot at all be termed perverse. The Commissioner has not placed any reliance on the First Information Statement. The finding is only that RW5''s deposition is in tune with the First Information Statement. Even if the First Information Statement is eschewed RW5''s evidence records the employer-employee relationship and the eye witness account of the occurrence of the mishap. There is nothing on evidence to mulct the quarry owner with the liability to compensate the death of the person; who was found to be the employee of the first opposite party. The questions of law raised by the employers/first opposite party in the cross objection are answered against her and in favour of the applicants. The liability to indemnify not being in existence by reason of clear violation of the terms of the policy; which violation led to the accident and death of a workman; stays our hand from directing the insurer to satisfy the liability and then proceed against the insured. In such circumstances, in view of the discussions above, the appeal is allowed and the cross objection is rejected. There shall be a consequential direction to the Commissioner to refund the amounts deposited by the insurance company and direction to the first opposite party, the employer to deposit the amounts together with interest as directed by the Commissioner in the impugned order before the Commissioner within a period of three months from the date of this judgment failing which recovery as contemplated under the Act can be proceeded against the first opposite party.

The appeal of the insurer hence is allowed, and the cross objection of the insured rejected.

