
(2014) 06 AP CK 0144
In the Andhra Pradesh High Court
Case No : M.A.C.M.A. No. 534 of 2009

The New India Assurance Co. Ltd.

APPELLANT

Vs

Turubilli Bharathi

RESPONDENT

Date of Decision : 03-06-2014

Acts Referred:

Citation : (2015) ACJ 1715 : (2014) 6 ALD 756 : (2014) 6 ALD(Cri) 756

Hon'ble Judges : U. Durga Prasad Rao, J

Bench : Single Bench

Advocate : Naresh Byrapaneni, Advocate for the Appellant; Venkateswar Rao Gudapati and Ch. Ravinder, Advocate for the Respondent

Final Decision : Partly Allowed

Judgement

U. Durga Prasad Rao, J.—Aggrieved by the Award dated 24-11-2008 in MVOP No. 574 of 2005 passed by Chairman, MACT-cum-I Additional District Judge, Vizianagaram (for short the Tribunal), the Insurance company preferred the instant MACMA.

The third respondent before the Tribunal is the appellant herein; respondents 1 and 2 before the Tribunal are respondents 2 and 3 herein and claimant before the Tribunal is the first respondent herein.

2. The factual matrix of the case is thus:

a) On 17-11-2003 at about 6 PM, when a twelve year old minor girl Turubilli Bharathi was walking on the left side of the road of Kantakapalli junction, a Hero Honda motor-cycle being driven by its driver/1st respondent in a rash and negligent manner without blowing horn and dashed the minor girl and thus caused the accident. Thereby the minor girl received grievous injuries on her stomach besides other injuries. Immediately she was admitted in KGH, Visakhapatnam. It is averred that she suffered much pain and mental agony and thereby her education and future were marred. It is further averred that accident was occurred due to the fault of driver of the motorcycle. On these averments

the minor girl represented by his father T. Krishna filed MVOP No. 574 of 2005 against respondents 1 and 2 who are the driver and owner of Hero Honda Motor cycle and respondent No. 3 who is the insurer of the offending motorcycle and claimed Rs. 1 lakh as compensation.

b) Respondents 1 and 2 filed their counter and opposed the claim. They denied the negligence on the part of the driver of the motorcycle and urged to put the claimant to strict proof.

c) R3 in its counter denied all the petition averments including claimants suffering injuries. R3 contended that claim is highly excessive.

d) During trial PWs. 1 and 2 were examined and Exs. A1 to A4 and Ex. X1 were marked on behalf of the claimant. On behalf of respondents RW1 was examined and Exs. B1 and B2 were marked.

e) A perusal of the award would show that issue No. 1 is concerned, the Tribunal having regard to the evidence of PW1/eyewitness-cum-victim of the accident coupled with Exs. A1 FIR, A2 wound certificate and A3 charge sheet came to the conclusion that the driver of motor cycle was responsible for the accident.

f) Coming to the quantum of compensation, the Tribunal considering the evidence of PW2 doctor who treated the claimant in the hospital, has granted compensation of Rs. 30,000/- with proportionate costs and simple interest at 6% per annum from the date of OP till the date of realization against the respondents.

Hence, the appeal by the third respondent/Insurance company questioning its liability.

3. Heard Sri B. Naresh, learned counsel for the appellant/Insurance company and Sri Venkateswar Rao Gudapati, learned counsel for the first respondent/claimant and Sri Ch. Ravinder, learned counsel for the respondents 2 and 3.

4. Challenging the award in so far as fixing the liability on insurance company, learned counsel for the appellant vehemently argued that the driver of the offending motor cycle had no valid driving licence as on the date of accident and this fact was cogently established before the Tribunal by the Insurance company by issuing exhibit B2 notice to the counsel for the second respondent/driver to produce the driving licence, but he failed to respond. Thus it was evident that the driver had no valid driving licence. Instead of drawing an adverse inference against the insured that he allowed an unlicensed driver to drive the vehicle and thus caused breach of the terms of the policy, the Tribunal on a wrong appreciation of facts and law held as if the insurance company failed to prove that the owner has deliberately committed the breach and the said breach was so fundamental that it contributed to the accident and fastened liability on the insurance company.

5. Learned counsel argued that when driver failed to respond to the notice, it is

suffice to draw an adverse inference that he was not holding a valid driving licence. On this proposition of law, he relied upon a decision in UNITED INDIA INSURANCE CO. LTD. V. MADIGA THAPPETA RAMAKKA AND OTHERS. Learned counsel further argued that when the above adverse inference is drawn and held that the driver had no valid driving licence at the relevant time of accident, it would amount to breach of terms of policy on the part of the owner of the vehicle and thereby the insurance company will be absolved of its liability. In this regard, he relied upon a decision reported in SARDARI AND OTHERS V. SUSHIL KUMAR AND OTHERS. He thus prayed to allow the appeal and exonerate the insurance company.

6. Per contra, supporting the award, learned counsel for the respondent argued that there was a valid policy in operation by the date of accident and therefore, the insurance company cannot avoid its liability towards third party. In order to avoid its liability, it has to establish not only that the driver had no valid driving licence at the relevant time of accident but also that the owner of the vehicle had consciously and deliberately committed the breach of the terms of the policy by allowing an unlicensed person to drive the vehicle. In the instant case, they argued, by issuing notice to produce the driving licence, the insurance company at best might established that the driver had no valid driving licence but it failed to further establish that the owner of the vehicle had consciously and deliberately committed breach of the terms of policy by allowing an unlicensed person to drive the vehicle. They vehemently argued that without proving this fact, as the burden of proof lies on insurance company, the insurance company cannot gain say that it can repudiate its liability against third party claims. They further argued that the Tribunal relying upon the decision reported in THE NATIONAL INSURANCE COMPANY LIMITED REP. BY ITS DIVISIONAL MANAGER V. PARITAL VENKATESWARLU AND ANR., held that the insurance company shall not only prove the lack of driving licence but also show that breach is committed by the owner and the same is fundamental that it contributed to the accident and the insurance company failed in this regard to discharge its burden. They submitted that the Tribunal rightly dismissed the contention of the insurance company and in view of it, its appeal is not maintainable. Hence, they prayed to dismiss the appeal.

7. In the light of the above rival arguments, the point for determination in this appeal is:

Whether the appellant/insurance company discharged its burden to absolve itself from the liability?

8. POINT:

The accident, coverage of exhibit B1 policy as on the date of accident are not in dispute. The appellant/insurance company seeks exoneration on the breach of the terms of the policy by the insured i.e., allowed an unlicensed driver to drive the vehicle.

On a careful hearing of arguments of either side, I am of the considered view that it is a fit case to direct appellant/insurance company to pay compensation and recover from insured for the following discussion:

(a) It is true that as per the evidence of RW1, the insurance company issued notice under exhibit B2 to the counsel of the driver of the offending vehicle to produce the driving licence of the second respondent/driver, but they failed to produce the driving licence. In the cited decision reported in UNITED INDIA INSURANCE (1 supra), it was observed that if the driver did not respond to summons and did not appear nor did he produce the driving licence, an adverse inference can be drawn that he was not holding a valid driving licence. So, basing on this ratio, at best an adverse inference may be drawn against the second respondent/driver to the effect that he had no valid driving licence as on the date of accident. However, the pertinent question is whether by that count alone, the appellant/insurance company can be exonerated from its liability? Certainly not, in view of the ratio laid down in the case of NATIONAL INSURANCE CO. LTD., v. SWARAN SINGH AND OTHERS. The said decision was relied upon in the case of PARITAL VENKATESWARLU AND ANR. (3 supra) which was cited by the lower Tribunal to arrive its decision.

9. In that above case, the Hon"ble Apex Court was dealing with wide spectrum of defence pleas of Insurance Companies basing on the deficiencies in driving licences. Such deficiencies are:

- a) Fake driving licenses of the driver.
- b) Driver not having licence whatsoever.
- c) No renewal of driving licence as on the date of accident.
- d) License granted for one class or description of vehicle but vehicle involved in accident was of different class or description.
- e) Driver holding only a learners licence.

The Apex Court after discussing various issues involved in this regard, summarized its findings thus:

i) Mere absence, fake or invalid driving licence or disqualification of the driver for driving at the relevant time, are not in themselves defences available to the insurer against either the insured or the third parties. To avoid its liability towards insured, the insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by duly licensed driver or one who was not disqualified to drive at the relevant time.

ii) The insurance companies are, however, with a view to avoid their liability must not only establish the available defence(s) raised in the said proceedings but must also establish "breach" on the part of the owner of the vehicle; the burden of proof wherefore would be on them.

iii) Even where the insurer is able to prove breach on the part of the insured concerning the policy condition regarding holding of a valid license by the driver or his qualification to drive during the relevant period, the insurer would not be allowed to avoid its liability towards insured unless the said breach or breaches on the condition of driving licence is/are so fundamental as are found to have contributed to the cause of the accident. The Tribunals in interpreting the policy conditions would apply "the rule of main purpose" and the concept of "fundamental breach" to allow defences available to the insured u/s 149(2) of the Act.

iv) The question as to whether the owner has taken reasonable care to find out as to whether the driving licence produced by the driver, (a fake one or otherwise), does not fulfill the requirements of law or not will have to be determined in each case.

v) Where on adjudication of the claim under the Act the tribunal arrives at a conclusion that the insurer has satisfactorily proved its defence in accordance with the provisions of section 149(2) read with sub-section (7), as interpreted by this Court above, the Tribunal can direct that the insurer is liable to be reimbursed by the insured for the compensation and other amounts which it has been compelled to pay to the third party under the award of the tribunal.

10. From the above summarization, it is clear that an Insurance Company in order to succeed in its defence pleas touching the driving licence issues must:

a) Firstly establish that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicle by a duly licensed driver or one who was not disqualified to driving at the relevant time.

b) Secondly, the breach which was committed by the insured was so fundamental as is found to have contributed to the cause of the accident.

Even upon establishing the above conditions by the Insurance Company, the Tribunal can direct that the insurer to pay and recover compensation amount from the insured.

11. The above decision of Apex Court was relied upon by the learned single judge of this Court in *PARITAL VENKATESWARLU AND ANR.* (3 supra). In that case also, the plea of insurance company was that the driver of the motor cycle had no valid driving licence and the driver failed to produce the licence pursuant to the notice got issued by the appellant/insurance company under exhibit B2. The contention of the appellant/insurance company in that case was considered by the learned Judge in the light of the ratio in *SWARAN SINGH* (4 supra). Ultimately, learned judge held thus: Coming to the matrix of the case, as discussed hereinabove, the evidence is not clear that the driver of the motor vehicle by name Sudheer was not having any licence at all. It is no doubt true that the second respondent-owner did not respond to the notice got issued by

the appellant insurer for causing production of the licence. That will not absolve the insurer from discharging its obligation to show before the Court that the owner has breached the condition of policy of possessing valid driving licence by the driver. It may be reiterated here that the insurer can absolve its liability only when it was an admitted case that the driver did not hold any licence at all and the owner allowed consciously the said driver to drive the vehicle, then only, as held by the Apex Court in para 82 in Swaran Singhs case, the insurer can avoid its liability. It is not relieved of its burden from proving that it was not only a case where the driver had no valid driving licence at the appropriate time, but also a case where the owner breached the condition of the policy in regard to the valid driving licence by the driver. The insurer must show that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by duly licenced driver. Such a proof is not coming forth in the instant case.

Accordingly, he dismissed the contention of the insurance company and held it jointly and severally liable to pay compensation along with owner.

Basing on the above decision, the Tribunal, it appears has come to the conclusion that the appellant/insurance company failed to prove that the owner has consciously and deliberately committed the breach of the terms of the policy and the said breach is so fundamental that it contributed to the accident.

12. In the instant case, by virtue of exhibit B2, an adverse inference at best can be drawn against the driver to the effect that he had no driving licence at the relevant time of accident, but however, going by the ratio laid down in SWARAN SINGH case (4 supra) that is not sufficient to exonerate the appellant/insurance company from its liability as against third party claims. The duty is cast on the insurance company to establish that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by a duly licenced driver or one who was not disqualified to drive at the relevant time.

In my view, the appellant/insurance company has not discharged this burden. In the entire evidence of RW1, we do not find a single sentence to the effect that the owner of the vehicle is guilty of negligence and he failed to exercise reasonable care in fulfilling the condition of the policy regarding use of the vehicle by a duly licenced driver. In fact, no allegation is made against the owner that he consciously or deliberately allowed an unlicenced person to drive the vehicle. As per Swaran Singhs case, the burden is on the insurance company to prove the breach on the part of the insured and no inference can be drawn in this regard. The cited decision in SARDARI's case (2 supra) can be distinguished on facts. In that case, the driver of the crime tractor was examined before the Tribunal who admitted that he never possessed any valid driving licence to drive the tractor and he never applied therefor. It appears the owner also was conscious of this fact. In those circumstances, the insurance company was exonerated from the liability. In the instant case, except invoking an adverse

inference regarding holding of licence by the driver, he was not summoned and examined. That apart, the conscious breach committed by the insured is also not established.

Hence, it is a fit case to direct appellant/insurance company to pay compensation at first and recover from the insured.

13. In the result, this MACMA is partly allowed directing the appellant/insurance company to pay compensation awarded by the tribunal at first and later recover the same from insured/owner of the vehicle. No costs in the appeal.

As a sequel, miscellaneous applications pending, if any, shall stand closed.