
(1989) 01 MAD CK 0072
In the Madras High Court

The New India Assurance Company Limited
Vs

APPELLANT

Andal Ammal and Another

RESPONDENT

Date of Decision : 03-01-1989

Acts Referred:

Evidence Act, 1872 — Section 114, 114(e)
Motor Vehicles Act, 1988 — Section 112, 2(21), 3
Penal Code, 1860 (IPC) — Section 304A

Citation : (1989) 2 ACC 52

Hon'ble Judges : Padmini Jesudurai, J

Bench : Single Bench

Judgement

Padmini Jesudurai, J.—This Appeal coming on for hearing on Friday, the 4th Friday, the 11th Monday the 21st days of November 1988, and on this day upon perusing the petition of Appeal, the order of the Lower Court, and the material papers in the case, and upon hearing the arguments of Mrs. Bagheerathi Narayanan of M/s. A.R. Ramanathan, P. Sukumar and J. Zeenathunissa, Advocates for the Appellant and of Mr. A.N. Viswanatha Rao advocate for the 1st Respondent and notice to the 2nd Respondent having been dispensed with and he remained absent and set ex-parte in the lower court the court made the following order:

2. The Insurance Company, which had been directed by the Motor Accidents Claims Tribunal to pay compensation of Rs. 40,000/- to the legal representative of the victim of the accident, has filed the present appeal challenging its liability to indemnify the owner of the vehicle.

3. Facts briefly are : -The deceased Mani, aged 26, working as a Fitter in Sri Sakthi Industries in Poondi Thangammal first Lane, Madras, was crushed to death on 9-1-1981 at about 1:45 P.M. by a Baby Taxi bearing Registration No. TMN 5700 belonging to the second respondent and insured with the appellant while he was seated on the steps of the workshop. The vehicle at the time of the accident was driven in a rash and negligent manner and practically entered the

workshop wherein the deceased was sitting. The vehicle was driven by one Devaraj. The wife of the deceased, who is the first respondent herein, filed O.P. No. 317 of 1981 before the Motor Accidents Claims Tribunal (Chief Judge Court of Small Causes) at Madras u/s 110-A of the Motor Vehicles Act, claiming a total compensation of Rs. 50,000/-.

4. The second respondent, who is the owner of the vehicle, remained ex parte.

5. The appellant, the Insurance Company, resisted the claim contending that even if the first respondent established that the accident was due to the negligence of the driver of the vehicle, there was also contributory negligence on the part of the deceased. The appellant disclaimed its liability to indemnify the second respondent, contending that the driver of the vehicle, Devaraj was a minor aged 15 and did not possess any valid driving license on the date of the accident.

6. Before the Tribunal, the first respondent examined herself as P.W. 1 and examined one Selvaraj as P.W. 3 to speak to the occurrence and examined one Mani, the Manager of Sakthi Industries, as P.W. 2 to speak to the income of her deceased husband. Exs. P. 1 and P. 2 were marked on her side. On behalf of the appellant, the Sub Inspector of Police, who investigated into the case and who filed a charge against the said Devaraj, was examined as R.W. 1. Exts. R-1 to R-3 were marked on its side.

7. On the available evidence, the Tribunal found that the accident was due solely to the rash and negligent driving of the Taxi by the driver Devaraj and assessed the quantum of damages at Rs. 40,000/- and holding that in the light of the admission of R.W. 1 himself that Devaraj had a driving license, whose validity could not be challenged in these proceedings, held the appellant liable for the amount of compensation awarded to the claimant. Challenging the last finding, the Insurance Company has preferred this appeal.

8. Thirumathi Bageerathi Narayanan, learned Counsel for the appellant contended that R.W. 1 in his evidence has stated that he investigated into the case relating to this accident, that the Radiologist, who examined Devaraj for his age, had offered opinion that Devaraj was only 15 years old and on the basis of that opinion he had filed a charge against Devaraj for the offence u/s 304-A I.P.C. and u/s 3 r/w Section 112 of the Motor Vehicles Act (hereinafter referred to as the Act) and Devaraj had pleaded guilty to all the charges, stating his age to be 15 and was convicted on his plea of guilt. On the basis of this evidence of R.W. 1, the learned Counsel for the appellant contended, that the further admission of R.W. 1 that Devaraj did have a license would not in any way make the insurance company liable, since the license of Devaraj, if any, could not be a valid license, in view of his age being less than 18. The insurance company, therefore, could take shelter under the exclusion clause provided in the policy of insurance, Ex. P. 3, since there had been a breach of one of the terms of the policy of insurance, viz., that the vehicle should not be driven by one, who had

no license to drive. Learned Counsel placed reliance upon certain decisions of various High Courts, which have held that the insurance company could not be liable if the vehicle was driven by one who had no license to drive.

9. Per contra, Thiru A.N. Viswanatha Rao, learned Counsel for the 1st respondent contended that in view of the positive admission of R.W. 1 that the driver, Devaraj, did have a valid license issued by the Licensing Authority, there is a presumption raised under law, that all official acts are presumed to have been validly performed and it would not be open to the appellant to question the validity of the driving license issued under the Act, by the authorities competent to issue the same. The opinion of the Radiologist and the filing of a charge sheet on the basis of that opinion against Devaraj, describing him as a juvenile and the self-serving admission of Devaraj in the criminal Court that he was aged only 15 would be of no consequence, as against a license issued by the competent authorities under the statutory provisions. learned Counsel also contended that the burden of proving, that there had been a violation of any of the terms of the policy of insurance, thereby enabling the appellant to void liability he had under taken to indemnify under the policy of insurance, is squarely on the appellant itself. For both these contentions, several decisions were placed before me. I shall refer to the relevant decisions relied on by both the counsel in the course of my discussion.

10. The Tribunal had found that the accident was due to the rash and negligent driving of Devaraj, the driver of the taxi. That finding has now become final. The tribunal had assessed the compensation at Rs. 40,000/-. That finding has also become final. The only finding of the Tribunal that has been challenged is the finding that the appellant is not entitled to take immunity under the exemption clause that if the vehicle is driven by one, who does not hold a valid license to drive, the insurance company could not be called upon to indemnify the owner of the vehicle. In this case, RW 1 has clearly stated that Devaraj does possess a license to drive. It has, therefore, to be taken that this license has been issued by the competent authorities under the relevant provisions of the Act, RW 1, however, would say that Devaraj was aged only 15 at the time of the occurrence and the Radiologist to whom he had sent Devaraj for opinion regarding his age, had offered opinion that Devaraj was only 15 and on that basis he had filed charge sheet before the Juvenile Court and Overran himself had admitted in the criminal court that he was aged only 15. The appellant, therefore, contends that there is a breach of the terms of the policy of insurance and the absence of a valid driving license would be a complete defense to the insurance company.

11. The burden of proving that there is a breach of any one of the terms of policy of insurance thereby enabling the insurance company to take shelter under the exclusion clause, is clearly upon the insurance company. Though several decisions on this aspect were placed before me by the learned Counsel for the first respondent, suffice it to mention two decisions, one of this Court and the other of the Supreme Court.

12. In *The National Insurance Company Vs. Sugantha Kunthalambal and Others*, a Bench of this Court held that the burden of proving that the driver of the vehicle did not have a valid license to drive the vehicle is on the insurance company since it is the Insurance Company that seeks to avoid its liability under the policy on the ground that the terms of the policy had been violated. In *Narcinva V. Kamat and Another Vs. Alfredo Antonio Doe Martins and Others*, the Supreme Court in no uncertain terms, laid down that if the Insurance Company claims breach of a term of contract, which would permit it to disown its liability under the contract of insurance, the burden is clearly on that party which complains of breach to prove that the breach has been committed by the other party to the contract. The test in such a situation would be who would fail if no evidence is led. The Supreme Court placed the burden on the insurance company to prove that the driver had no driving license at the time of the accident. The two decisions have indicated as to the manner in which this burden has to be discharged by the insurance company. In *The National Insurance Company Vs. Sugantha Kunthalambal and Others*, already referred to, this Court held that a mere allegation by the police in the charge sheet that the driver did not have a valid license to drive the vehicle would not amount to proof. In another decision of this Court in *New India Assurance Co. Ltd. Vs. C.B. Shannnkar and Others*, this Court held that even where the driver of the vehicle had been charged u/s 3 read with 2(21) of the Motor Vehicles Act and the owner of the vehicle was charged u/s 5 of the Act and both had pleaded guilty to the charges, the insurance company by mere proof of those facts, could not be held to have established that the driver did not have a valid license to drive. The Supreme Court in *Narcinva V. Kamat and Another Vs. Alfredo Antonio Doe Martins and Others*, already referred to pointed out that the proper way for the insurance company to prove that the driver had no driving license is to get the records from the concerned Regional Transport Authorities and to substantiate the allegation. Neither the owner nor the driver was under any obligation to furnish evidence so as to enable the insurance company to wriggle out of its liability under the contract of insurance. It is, therefore, clear that in the instant case too, if the appellant wants to establish that there is a breach of the policy of insurance since the vehicle was driven by Devaraj, who had no license to drive, it is for the appellant to establish in a proper way that a breach, in fact, has been committed, failing which the terms of the policy of insurance, will prevail.

13. Learned Counsel for the appellant, however, contended that courts cannot ignore the fact that the prosecution itself has been launched by RW 1 against Devaraj on the basis that Devaraj was 15 years old and, therefore, the incompetent to hold a license as laid down u/s 4 of the Act and that Devaraj himself had admitted his age to be 15. No doubt this is so. However, in view of the fact that Devaraj does possess a license issued by the Licensing Authority under the Statute, merely on the basis of these circumstances, the Court cannot go into the validity of the license held by Devaraj to render a finding that the license is not a valid one. We cannot lose sight of the fact that Section 114(e) of

the Evidence Act, which raises a presumption that all official acts have been duly performed. Issuing a license by the Licensing Authorities under the Act is an Official act. In fact Chapter II of the Act deals only with licensing of drivers of motor vehicles. Section 3 therein provides that no can drive a motor vehicle in any public place unless he holds an effective driving license. Section 4 of the Act lays down that no person under the age of eighteen years shall drive a motor vehicle in any public place. Application for grant of driving license is u/s 7 of the Act. The application has to be made in the prescribed form, as is found in Form A of the first Schedule to the Act which consists of three schedules. Question No. 4 of Schedule II requires the age of the applicant on the date of the application. In the end of the form, the applicant declares that to the best of his knowledge and belief the particulars. Given in Schedule II and the declaration made in Schedule III are true. The testing authority constituted under the Act subjects the applicant to test his competency to drive. His physical fitness is also ascertained. If the licensing authority finds that the applicant suffers from any disease or disability specified in the Second Schedule to the Act, the licensing authority shall refuse to issue the driving license. After all these tests are completed, we come to Sub-section (8) of Section 7 of the Act, which is as follows:

When an application has been duly made to the appropriate licensing authority and the applicant has satisfied such authority of his physical fitness and of his competence to drive and has paid to the authority such fee as the Central Government may, by rules made under this Act, specify the licensing authority shall grant the applicant a driving license unless the applicant is disqualified u/s 4 for driving a motor vehicle or is for the time being disqualified for holding or obtaining a driving license.

It is, therefore, clear that the licensing authority when it reaches the stage of Sub-section (8) of Section 7 of the Act, has to satisfy itself that the applicant is not disqualified u/s 4 of the Act from holding a driving license, which, in other words is that he has completed the age of 18 to drive a motor vehicle and the age of 20 to drive the transport vehicle. If the issuing authority is satisfied that the applicant is not so disqualified, then the license has to be issued.

14. Once it is admitted that Devaraj does possess a license to drive, by virtue of Section 114(e) of the Evidence Act, it is presumed that the licensing authority was satisfied that Devaraj was not disqualified u/s 4 of the Act, that is, that Devaraj had completed the age of 18, No doubt, this presumption u/s 114 of the Evidence Act is a rebut-table presumption. But unless and until it is rebutted in the proper way, by the person who seeks to rebut it, the presumption will stand and the validity of the license held by Devaraj has to be upheld.

15. We shall now proceed to find the manner in which the presumption is sought to be disturbed by the appellant. As stated earlier, learned Counsel for the appellant placed reliance only on the evidence of RW 1, who had filed the charge sheet treating Devaraj as a juvenile and also on the admission of Devaraj before the Juvenile Court that he was aged only 15. I am afraid these two

circumstances would not help the appellant to discharge the burden of rebutting the presumption raised u/s 114(e) of the Evidence Act. The only basis for RW 1 to treat Devaraj, as a Juvenile is the opinion offered by the Radiologist. Any opinion offered by a Radiologist on the age, based upon physical appearance as well as by radiological examination of the ossification of bones, could only be approximate. It could never be accurate and a margin on either side has to be given. The opinion of the Radiologist is only his opinion regarding the age and is not proof of age. That apart, the Radiologist has not been examined and made available for cross-examination before the Tribunal. The fact that Devaraj accepted his age to be 15 is a self-serving admission. Ultimately it is seen, that for a fatal accident caused in a reckless manner, the vehicle itself has gone right inside the workshop and killed a man who was seated at the door-step, Devaraj had gone off with a mere fine of Rs. 400/- in the aggregate, merely because he was treated as a Juvenile. If taken as an adult, under the circumstances in which the accident had taken place, Devaraj could never have hoped to escape with a mere fine. His admission regarding the age, therefore, has to be ignored. If the appellant was so minded to establish that the driving license held by Devaraj was not valid, on account of he being less than 18, the appellant should have summoned the authority that had issued the license summon the application for license and the connected records and then rebut the presumption raised by law. Even Devaraj has not been produced before the tribunal and examined. The decision in Harbans Singh Vs. Kishan Lal and Others, relied on by the learned Counsel for the appellant will not help the appellant since in that case the father of the driver was examined to show that his son was aged only 16. Further, in that case, the driver did not have a license at all. It, therefore, follows that the appellant has not rebutted the presumption raised under the Evidence Act, that the driving license held by Devaraj is a valid one. The appellant has not established that there has been breach of the terms of the policy of insurance and cannot, therefore, disclaim its liability to indemnify.

16. Apart from these considerations, the Supreme Court, through some of its later decisions, has clearly laid down that in every case where the accident vehicle ultimately happens to be driven by one, who does not hold a license to drive the insurance company would not automatically be entitled to the benefit of the exclusion clause, irrespective of the circumstances under which that contingency has arisen. Before establishing that the insured has committed a breach of the terms of the policy of insurance in that the vehicle was driven by one, who did not have a license, the insurer will have to establish that it was the insured who caused or permitted the vehicle to be driven by that unlicensed driver. Section 5 of the Act prohibits the owner from causing or permitting any person, who does not possess a license to drive or who is below the age of 18. Hence, when the vehicle is driven by one, who does not possess a license to drive, the insurance company will not automatically get exonerated, but will also have to prove that it was the owner of the vehicle who caused or permitted an unlicensed driver to drive the vehicle. Only then the insurer could complain that

the insured has committed breach of the terms of the policy of insurance, by entrusting the vehicle to or causing the vehicle to be driven by one, who did not possess a license to drive.

17. In *Skandia Insurance Co. Ltd. Vs. Kokilaben Chandravadan and Others*, the owner of a truck had entrusted the vehicle to a licensed driver, who had been driving the vehicle upto a point and has stationing the vehicle leaving it in the custody of the cleaner. He had gone to the opposite shop for some snacks. The cleaner meddled with the vehicle, drove it and there was an accident. The cleaner had no license to drive. The Supreme Court held that the owner of the vehicle bad entrusted the vehicle to the driver who had a valid license to drive and the owner, therefore, had done all within his power to keep to the terms of the policy. The Court therefore, concluded that the owner of the vehicle had not committed any breach of the terms of the policy and the insurance company could not take shelter under the exclusion clause. The condition excluding driving by a person not duly licensed, is not absolute and the promiser is absolved once it is shown that he has done everything in his power to keep, honour and fulfill the promise and he himself is not guilty of a deliberate breach. Similarly, in a later decision in *Guru Govekar Vs. Miss Filomena F. Lobo and Others*, where an employee of an electrical repairer, to whom the vehicle had been entrusted by the owner for repairing, had driven the vehicle and had caused the accident, the Supreme Court held that the owner had not committed any breach of the terms of the policy of insurance, since he, on his part, bad entrusted the vehicle to an electrical repairer for the purpose of repairing, and the owner had not allowed or caused or permitted any unlicensed driver to drive the vehicle.

18. It follows therefore that in the instant case Devaraj had a valid license to drive. The presumption raised under the Evidence Act, has not been rebutted by the appellant. The insurance Company, therefore, cannot invoke the exclusion clause to get itself absolved from the liability, which it had undertaken under the policy of insurance. The Tribunal has rightly held the appellant liable.

19. In the result, the appeal fails and is dismissed. No costs.