

(1994) 03 KAR CK 0016

In the Karnataka High Court

Case No : Misc. First Appeal No's. 2368 and 2347 of 1990

The Oriental Insurance Co. Ltd.

APPELLANT

Vs

Smt. Rukminibai and others

RESPONDENT

Date of Decision : 01-03-1994

Acts Referred:

Insurance Act, 1938 — Section 64 VB
Motor Vehicles Act, 1939 — Section 110 D

Citation : (1994) ACJ 811 : AIR 1995 Kar 18 : (1994) ILR (Kar) 861 : (1994) 2 KarLJ 138

Hon'ble Judges : T.J. Chouta, J;M. Ramakrishna, J

Bench : Division Bench

Advocate : S.P. Shankar, for the Appellant; K.T. Gurudeva Prasad and V.M. Markhandegowda, for the Respondent

Judgement

Ramakrishna, J.—The appellant-Oriental Insurance Company being aggrieved by the Judgment and Award passed by the M.A;C.T., Metropolitan Area, Bangalore City, in M.V.C. 1585/88 on 13-8-1990, has come up before this Court, in these Appeals u/s 110-D of the Motor Vehicles Act, 1939 (hereinafter called the "Act").

2. The appellant has sought for setting aside the findings recorded by the Tribunal in regard to the liability of the Insurer to make good the compensation, on more than one ground.

3. The undisputed facts as borne out of the records are that the tractor and trailer bearing registration No. MEZ 6506 and 6507 respectively belonging to Nanjegowda, one of the respondents herein, dashed against the Scooter from behind on Bangalore-Bellary road on 5-7-1988 at 7.00 a.m. causing injuries to the rider and the pillion rider of the scooter. The rider husband of R-1, succumbed to the injuries, later Rukmini Bai, R-1 and her two minor children along with the parents of the deceased filed claim in M.V.C. No. 1584/ 1988, whereas R-1 herself filed claim petition M.V.C. No. 1585/1988 for the injuries sustained by her. The Tribunal having considered the evidence on record awarded

compensation of Rs. 1,29,500/- in MVC 1584/1988 and Rs. 22,400/- in the other case with a direction to the appellant herein to pay the entire amount of compensation awarded. Hence these appeals.

4. We have heard Sri S. P. Shankar, learned Counsel for the Insurer, who having taken us through the relevant portion of the Judgment and the evidence recorded by the Tribunal, Urged that at the outset Ex.R-I covering note purporting to cover the risk arising out of the tractor-trailer in question was a fraudulent and concocted document entered into between one Srinivasaiah, alleged Agent of the appellant, and the owner of the vehicle Nanjegodwa, in order to escaping latter's liability arising out of the accident in question. According to him, no policy covering the vehicle was issued prior to the date of the accident by the appellant and it came to know only on receipt of the notice from the Court that that cover note was issued by the said Agent on 3-7-1988 to make believe that the vehicle was covered by Insurance on the date of the accident. The learned counsel further, submitted that that Agent was engaged by the appellant temporarily as a part time Agent and soon after the appellant came to know of the fraudulent creation of Ex. R-I he was removed from service.

5. Be that as it may, to find out whether the tractor and trailer were in fact insured with the appellant as on the date of the accident, this Court by an order dated 17-2-1992 directed the Tribunal to hold an enquiry and record its finding on- the above question. Accordingly, the Tribunal held a detailed enquiry and passed an order on 19-8-1992 answering the question in the affirmative. Accordingly, it submitted the records to this Court.

6. Sri S.P. Shankar, learned Counsel for the appellant, argued that the finding recorded by the Tribunal in para 33 on the question of the liability arising out of Ex. R1 that the liability could be fastened against Insurer is wholly incorrect and erroneous and the same is liable to be set aside. The legal argument advanced by Sri S.P. Shankar, in support of the Appeal is that in the absence of a completed contract between the Insurer and the Insured as required by Section 64VB of the Insurance Act, the Court cannot act upon the cover note, Ex.R1, to fasten the liability on the Insurer. According to him, the contract was not complete as on the date of the accident and mere issue of a cover note by the Agent of the Insurer cannot amount a contract between the Insurer and the Insured.

7. Another contention of Sri S. P. Shankar, learned counsellor the Insurer, is that as held by this court and the Supreme Court in more than one case, unless a receipt is produced showing payment of premium in respect of a vehicle for covering the risk, there is no contract. He relied upon the following decisions;

(1) AIR 1984 SC 1014 (Life Insurance Corporation of India v. Raja Vasireddy Komalavallikamba);

(2) Smt. Asma Begum and others Vs. Nisar Ahmed and others,

Oriental Fire and General Insurance Co. Ltd. Vs. Panvel Industrial Co-operative Estates Ltd.,

8. In view of the rulings in the above decisions directly arising out of the inter petition of Section 64VB, the submission is that the view taken by the Tribunal fastening the liability against the Insurer cannot be sustained.

9. Opposing the submissions of Sri. S.P. Shankar, learned Counsel for the appellant, Sri V. Markande Gpwda, learned Co appearing for the Insured and Sri. K.T. Gurudeva Prasad, learned Counsel appearing for the claimants, submitted that the Tribunal having examined the witnesses and the evidence on record, particularly Ex. RI, Cover note, came to a conclusion that as on 3-7-1988, there had been a contract, by which the Insurer had undertaken to, indemnify the Insured against his liability arising out of the use of the vehicle in question. Therefore, this court need not interfere with the findings recorded by the Court below as regards liability.

10. Sri. Markande Gowda, learned Counsel appearing for respondent 2, vehemently argued that it is too much on the part of Sri Shankar to allege that Srinivasaiah, Agent of the appellant, connived with Nanjegowda, owner of the vehicle, to create the Cover note, Ex. R1. He submitted that if there was fraud or concoction in Ex.R1, as alleged, the Branch Manager could have held an enquiry in that behalf. But, no such action has been taken. Therefore, to say that Ex.RI is the result of fraud and concoction is wrong.

11. Having regard to the arguments advanced by both sides, the following questions arise for consideration in these appeals.

(1) Whether the appellant was able to make out a case that the Cover note, Ex.RI, is the result of connivance between Srinivasaiah, ex-agent of the Insurance and Nanjegowda.

(2) If so, whether the finding recorded by the Tribunal that, in view of the condition imposed in document Ex.R1-Cover Note, the insurer was liable to make good the compensation awarded, could be justified?

12. The undisputed facts are that the tractor-trailer in question was involved in the accident that took place on 5-7-1988 at 7 a.m. on Bangalore-Bellary Road, resulting in the death of the husband of Rukmini Bai, RI in both appeals, and injuring her; that earlier to 3-7-88 on which date the Cover note, Ex.RI, came to be issued covering the said vehicle, the vehicle was not insured with the appellant; that on 3-7-1988 the Cover-note was issued but no policy came to be issued thereafter following the Cover note and that Nanjegowda sold the vehicle two months after the accident.

13. The most important and significant aspect to be considered here in that we have to see whether there is any scrap of paper disclosing transactions between the Insurer and the Insured earlier to the Cover note, Ex. R1, in view of what is contained in Section 64VB. It says:

"64 VB. No risk to be assured unless premium is received in advance:--

(1) No insurer shall assume any risk in India in respect of any insurance business on which premium is not ordinarily payable outside India unless and until the premium payable is received by him or is guaranteed to be paid by such person in such manner and within such time as may be prescribed or unless and until deposit of such amount as may be prescribed, is made in advance in the prescribed manner.

(2) For the purpose of this section, in the case of risks for which premium can be ascertained in advance, the risk may be assumed not earlier than the date on which the premium has been paid in cash or by cheque to the insurer."

14. The Division Bench considering and interpreting the above provisions of the law in *Smt. Asma Begum and others Vs. Nisar Ahmed and others*, held as follows (at pp. 355-56 of AIR):

"In view of the above provision the risk of the Insurance Company commences only on the payment of the premium either in cash or by cheque. In the present case, as can be seen from the receipt Exhibit R-2 the amount of premium of Rs. 256/- was received at 11 a.m. as expressly stated in the receipt. Therefore, it is beyond doubt that the premium amount, was accepted after the accident which had occurred at 10 a.m. Therefore, the risk of the insurer commenced after the accident, and therefore, did not cover the risk arising out of the accident."

15. In the light of the- provisions of Section 64VB of the Insurance Act, 1938, we will have to see whether there is compliance with the requirement of the said Section.

16. Before that, it is pertinent to note, what is the law that governs a contract between the insurer and the insured? It can be seen that like all contracts, a contract of insurance is governed by the general law of contract. Though Indian Contract Act, 1872 (Act 9/72 Central Act) does not deal with the rights and liabilities arising out of a contract between the insurer and the insured, yet the contract in insurance is based on the rudimentary principles of law of contract. Therefore, it is necessary to refer to Section 2A of/ the Indian Contract Act to find out whether in the case on hand the contract between the appellant and Sri Nanjegowda is complete in conformity with the said section. It reads:

"2a. When one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal.

2b. When the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. A proposal when accepted, becomes a promise."

Therefore in the light of the above principle we will have to see in the instant case whether there was a proposal made by the owner of the vehicle and

whether it had been accepted by the appellant. It is not the case of the owner that such a proposal had been made in the prescribed form duly filled up by him. Therefore, in the absence of a proposal, question of signifying the willingness of the other would not arise. Secondly in the light of the ruling of this Court in Smt. Asma Begum and others Vs. Nisar Ahmed and others, the risk of the Insurance Company commences only on the payment of the premium either in cash or by cheque because this is a condition precedent to be complied with to complete the requirement of Section 64VB. Therefore we will have to see whether Nanjegowda paid any premium either by cash or cheque in respect of the vehicle in question. RW 2 Srinivas, the agent of the appellant deposed before the Court below on 3-8-1992 that on 3-7-1988, Sunday, Nanjegowda had come to him in order to cover insurance to his tractor and trailer; that he insisted him to sign and give the proposal form and that simultaneously he prepared insurance cover note also.

17. He further says that as he had received a call from his house he went there. Be that as it may, admittedly no such proposal form was either prepared and signed by Nanjegowda. Secondly in the examination-in-chief, RW2 says that when he came back from his house he did not find the said Nanjegowda at that place. He says that though he prepared the cover note, he did not give his code number, mention date and place of issue and put branch seal and agency seal on the cover note as he did not pay the premium. According to him, all the above formalities will be done only after the premium is paid. That shows that before these formalities are completed, the cover note, Exhibit R.I, was taken away by Nanjegowda in the absence of RW 2. Therefore we will have to see whether the dealings between RW 1 and RW 2 were normal, in the usual course of action, result ing in the cover note Exhibit R.I.

18. In the cross-examination, RW 2 says that he knows the second respondent who is the owner of the tractor and trailer, that he filled up the cover note, Exhibit R.I, in the Co-operative Milk Producers Society since he was its Secretary then, that the records of his agency were also kept in that office only and that a clerk and a tester were present in the office when the cover note was made. He has further stated that the distance between his native place and the village of Nanjegowda is about 16 Kms. but both of them are in Hoskote Taluk and that he has come to know of Nanjegowda only 3-7-1988. He has admitted that the office in which Exhibit R.I was prepared was attached to his house. He denied the suggestion that since he had collected the premium amount from Nanjegowda, he issued the cover note at Exhibit R.I to him. Therefore, it is clear that RW 2, without receiving premium amount of Rs.80/-, prepared the cover note. He has nowhere stated that on the completion of proposal form prescribed by the company and on the completion of the said contract, he prepared the cover note. On the other hand, he admitted that no such proposal form was given by Nanjegowda. Two aspects from the above statement of RW 2 signify: (1) No proposal came from Nanjegowda, and (2) no amount of premium has been paid by him to RW 2. Therefore, we will have to see whether the dealing of this kind could be said to be a genuine dealing taken place in the normal course of action

after completing the formalities required for a contract in law, so as to bind the insurer for the liability of the insured. In *L.I.C. v. Raja Vasireddy Komalavalli Kamba* AIR 1984 SC 1014 the Supreme Court dealing with this question held as under:

"The general rule is that the contract of insurance will be concluded only when the party to whom an offer has been made accepts it unconditionally and communicates his acceptance to the person making the offer. Though in certain human relationships silence to a proposal might convey acceptance but in the case of insurance proposal, silence does not denote consent and no binding contract arises until the person to whom an offer is made says or does something to signify his acceptance. Mere delay in giving an answer cannot be construed as an acceptance, as, prima facie, acceptance must be communicated to the offerer. Similarly mere execution of the policy is not an acceptance; an acceptance, to be complete, must be communicated to the offerer. The mere receipt and retention of premium until after the death of the applicant or the mere preparation of the policy document is not acceptance."

In the instant case, except producing the cover note, which is not in accordance with law, Nanjegowda, owner of the vehicle, has not produced any other evidence to show that he had paid the premium. Therefore, question of acceptance, of the offer by the appellant herein does not arise. Secondly, payment of premium in advance in the prescribed manner being a condition precedent u/s 64VB, and the said condition having not been complied with here, it is not possible for the Court to come to a conclusion that there has been a complete contract having complied with the requirement of Section 64VB. Further, in order to make a proposal into a promise, there must be an absolute and unqualified acceptance by express terms in the usual form by the acceptor. Here there is no such express acceptance of the proposal of Nanjegowda by the appellant herein. In this view of the matter also it is not possible to come to a conclusion that in the instant case there has been a complete contract so as to enable the Court to fasten the liability on the insurer, inasmuch as the requirement of Section 64VB has not been complied with. That means, no premium was paid in advance and the proposal was not duly completed. The issuance of the cover note by RW 2 agent of the appellant, without receiving the premium amount and issuing a receipt thereon, itself is improper and it is for this reason only the insurer has taken action subsequently to remove him from the services. Therefore, the transaction said to have taken place on 3-7-1988 was not a genuine transaction. In the absence of a conclusive contract, Exhibit R. 1 cover note is of no assistance as it has no binding character for the reasons stated above.

19. Sri Markandegowda contended that the cover-note was issued on 3-7-1989 i.e., two days earlier to the date of accident on 5-7-1988; that the Act itself provides for 15 days from the date of cover-note for issue of a policy; that during that period of 15 days only payment of premium will be paid and that therefore

the Court should presume that the cover-note was the result of genuine transaction in which event the appellant was statutorily liable for payment of compensation arising out of the risk of the vehicle insured with him.

20. Presuming for the sake of arguments that a real policy follows the cover-note, yet as already stated, payment of premium is a condition precedent and unless the premium is paid even cover-note cannot be issued. Allowance of time for 15 days or whatever it may be is only for the purpose, of completing certain formalities by the company for issue of a full-fledged policy. If the cover note is issued in accordance with law, it, like a policy binds the insurer to compensate for the risk undertaken by him. But, in this case, we have already held that the cover note has not been issued in conformity with the requirement of Section 64VB. Therefore, it cannot be acted upon. The 15 days time alleged to have been allowed in the cover note will have nothing to do with the genuineness of the cover note. Moreover, the cover note stipulates no date for expiry as the relevant column is left blank. Therefore, we do not see any force in the submission of Sri Markandegowda in this behalf.

21. It is seen that this is an unfortunate case which has come before this Court for the second time exposing the conduct of the employee working for the Insurance Company. In this context a Division Bench of this, Court in *United India Insurance Co. Vs. Kalavathi*, held in para 12" as follows:

"It is unfortunate, the situation which has arisen in this case has been created on account of inadvertence of the Branch Manager and deliberate act of mischief by the agent of the appellant-Insurance Company. The learned Counsel for the appellant submitted that having full confidence in the Insurance Agents, Branch Managers used to sign the blank cover notes and hand over the same to the agents and the agent in collusion with the 5th respondent has antedated the original cover note making him to believe that risk was covered from 5-5-1984, but at the same time in the carbon copy correct impression was given to the Insurance Company to the effect that cover note commenced only on 7-5-1984 at 9.30 a.m. The learned counsel for the appellant submitted that as far as the officer, who had handed over the blank signed cover note to the agent, disciplinary proceedings were instituted against him and as far as the agent is concerned, his whereabouts were not known. Whatever there may be, the documentary evidence clearly establish that the 5th respondent took the insurance cover only at 9.30 a.m. on 7-5-1984 after the accident on the said date at 6.30 a.m." .

22. In that view of the matter, the Insurance Company reposing confidence in their agents entrusts them signed blank cover notes to do business of the company and those agents not being regular employees thereof, it cannot take disciplinary action against them as per rules in case some of them do something unbecoming of their part in order to oblige certain parties. Therefore, we hope that earnest steps will be taken by the companies to prevent those dishonest and unscrupulous employees working as agents of the company from committing

such acts of mischief in future.

23. In the circumstances, we hold that the finding of the Tribunal fixing the liability to pay the compensation awarded on the appellant is wholly wrong and hence it cannot be sustained. The Tribunal ought to have seen whether there was compliance of the mandatory requirement of law before issue of Exhibit R. 1 and whether the liability could be fasten on the insurer on such documents. Apart from assessing the evidence on record, the Courts below have to see whether the transactions in a case of this kind are genuine and bona fide.

24. In the result, we make the following

ORDER

Both the appeals are allowed and judgments and awards under appeal in so far as they relate to the direction to the appellant herein to pay the amount of compensation awarded are hereby set aside and the remaining parts of the judgments and awards are left undisturbed. Nanjegowda, respondent 2, in the Court below is hereby directed to pay the amount of compensation awarded in favour of the claimants in both the appeals. In case he fails to do so, the claimants are at liberty to proceed against his property for the recovery of the said sum.

The appellant is entitled to costs of the appeals.

Advocate's fee is fixed at Rs. 1000/-.

25. Appeals allowed.