

(2015) 12 KAR CK 0136

In the Karnataka High Court

Case No : MFA No. 30207/2009 (MV) and MFA Nos. 30209/2009, 30210/2009 and 30211/2009 and MFA Crob. No. 1073/2009

United India Insurance Co. Ltd. and Others

APPELLANT

Vs

Kashappa and Others

RESPONDENT

Date of Decision : 04-12-2015

Acts Referred:

Citation : (2015) 12 KAR CK 0136

Hon'ble Judges : G. Narendra, J.

Bench : Single Bench

Advocate : Manavendra Reddy, Advocate, for the Appellant; Shivaleela S. and S.S. Sajjanshetty, Advocates, for the Respondent

Judgement

G. Narendra, J.—The MFA Nos. 30207/2009, 30209/2010, 30210/2009, 30211/2009 are all preferred by the insurer who is second respondent before the Tribunal. Being aggrieved by the award of the compensation in respect of an accident that occurred on 26.11.2006 at about 7.35 a.m. as a result of which all the four appeals arise out of the said accident and the cross objection is filed by one of the insured in MVC No. 923/2007. The appeals and cross objection arise out of the same accident and common facts and circumstances of the appeals and cross objection are taken up together by this common judgment and order.

2. The brief facts of the case is that;

"On 26.11.2006 at about 7.35 a.m. one Mashiyamma W/o: Kashappa (claimant in MVC No. 719/2007), Ananthamma W/o: Buggappa (claimant in MVC No. 921/2007), Mallamma W/o: Ningappa (claimant in MVC No. 922/2007), Hanmantha S/o: Kashappa (claimant in MVC No. 923/2007), were travelling in the offending vehicle being a TATA 407 bearing registration No. KA-32/3591 for coolie work and they were carrying and accompanying the cement concrete mixture machine. The said machine was being transported in the offending vehicle to the work spot at about 7.35 a.m., when they reached Sarjapur Road, Near Agare Kere in the vicinity of Lemon gross hotel, Bangalore City, the driver

of the offending vehicle lost control as he was driving at a high speed and as a consequence of losing control he rammed into the road divider resulting in head injuries and multiple fracture to the wife of the first claimant (wife of claimant in MVC No. 719/2007) as a result of which, she succumbed to the injuries. The claimant in MVC No. 921/2007 is said to have sustained grievous injuries to the right side of his face, shoulder and fracture of right clavicle bone and also to the other parts of the body and she was an inpatient between 26.11.2006 to 17.12.2006 and allegedly resulting in permanent disability and disfiguration. The claimant in MVC No. 922/2007 is said to have sustained grievous injuries to right hip, back of chest, left leg, behind right ear and other parts of the body and she was also admitted to Sanjaya Gandhi Hospital on 26.11.2006 and discharged on 17.12.2006. The claimant in MVC No. 923/2007 is said to have suffered grievous injuries to the left shoulder and other parts of the body and he was also admitted to Sanjaya Gandhi Hospital on 26.11.2006 as an inpatient and was discharged on 17.12.2006. It is this claimant who has preferred Cross Objection after a delay of 1055 days. On these allegations the claimants sought varying amounts as compensation."

3. The appellant who is second respondent entered appearance but the first respondent/owner of the vehicle remained ex-parte. It was claimed by the insurer that the claimants are all fare paying passengers but it was admitted that all the claimants are coolie and they were proceeding to Koramangala to do coolie work and because they were fare paying passengers they are unauthorized to travel in the goods vehicle. The coolie work is no way connected to the vehicle and the driver of the offending vehicle did not have valid and effective driving license and the vehicle has violated the policy terms and conditions and hence the insurer second respondent is absolved of the liability. It is also contended that the insured has not informed the insurer about the accident as is mandatory and in view of the breach the insurer stands absolved. In view of the above the tribunal framed the following issues;

"1. Whether claimant proves that on 26.11.2066 at about 7.35 a.m. deceased Mashlyamma alongwith her husband & others were travelling from HRS lay out to Koramangal in a vehicle TATA-407 bearing Regd. No. KA-32/3591 to attend their coolie works and on Serjapur road, Agar Kere, near Lemon gross Hotel, Bangalore City the driver of 1st respondent drove this vehicle with high speed, rash & negligent act & zigzag manner and due to high speed the driver lost his control over the said vehicle and due to that the said vehicle dashed to the road divider (diversion pole) and due to the accident deceased succumbed to the injuries by sustaining grievous head & multiple injuries and died at the spot as narrated in his claim petition?

2. Whether R-2 proves the contributory negligence on the part of deceased at the accident in question?

3. Whether R-2 proves that the driver of offending vehicle was not having valid driving licence on the data of accident and R-1 has violated the terms & condition

of the policy?

4. Whether R-2 proves that the claim petition is not maintainable?

5. Whether claimant/petitioner is entitled for compensation? If so what is quantum and from whom recoverable?

6. To what order to decree?"

4. The issues in all the four claim petitions are common. The tribunal has concluded that the accident has occurred as pleaded by the claimants. It has also negated the plea of contributory negligence on the part of the claimants. It has also negated the plea of the driver not holding a valid license. It has also negated the plea regarding maintainability of the petition and has also ordered various amounts as compensation to the claimants.

5. The counsel for the appellant specifically contended that the claimants are unauthorized passengers and they being fare paying passengers they are not entitled for any compensation rather the company is not liable to indemnify the claim against the first respondent as he is fare paying passenger. The factum of accident, claimants being occupants of the vehicle and the vehicle having been hired to transport the cement concrete machine mixture are all established in the course of trial and they are demonstrated in ample measure. It has been admitted in the written statement on behalf of the insurer and that the claimants are coolies. The fact that the vehicle was transporting the cement concrete mixture machine has been established and that they have been accompanying the cement concrete mixture machine to the work site is also demonstrated satisfactorily. The appellant insurer has not let in any evidence to controvert this fact and the fact had been established that the claimants are coolies accompanying the cement concrete mixture machine. The factum of the accident has not been denied by the respondent-witness RW.1 and as the said fact stood fortified by the police investigation and records and the wound certificate issued by the hospital authorities and the above Exs. P1 to P-6 and P-8, are public documents which fortifies the assertion and evidence of the claimants. It has come out in the evidence that the owner of the vehicle has hired the coolies to load and unload the concrete mixture machine and hence this Court is of the considered opinion that the finding of the tribunal upholding the claim of the claimants that they are coolies hired for the purpose of loading, transporting and unloading the concrete machine mixture is correct and does not warrant interference. No material is placed before this Court to disprove the same. It is also seen that the insurer apart from examining the witness has not let in any other material to support his claim that they were not accompanying the concrete mixture machine. Nextly, the appellant counsel submits that the liability of the insurer is limited to only two persons and that the claimants are four in number, the appellant should not be burdened with the liability of compensating the claim of the other two persons. The said contention is not an argument before the tribunal nor is it the contention in the written statement nor is any

evidence let in on the same. The appellant having neither pleaded nor proved it, now taking a new plea before this Court is impermissible on the ground that the said plea is being founded on Ex. P-7. The policy being a document, which shall relied upon and proved before the tribunal it was always open for the insurer to raise the said ground in the written statement. The insurer appellant herein having failed to raise the said contention, it is now not open to the appellant to raise a new plea at the appellate stage.

6. Apart from the above, the perusal of the policy also does not substantiate the contention of the appellant. The policy/document on verification clearly states in the column of liability "under Section I (2) in respect of any one claim or series of claimants arising out of one event Rs. 7,50,000/-." The said entry clearly belies the contention of the appellant that the liability of the insurer is restricted to two persons only. Even assuming that the said fact would have to be considered even for the argument sake, it is seen that the contention is not fortified by the contents of the policy. So even factually the contention that the liability is restricted to only two persons is unsustainable. It is settled law that any fact, which requires to be proved has to be pleaded and proved with the assistance of cogent evidence and material. The appellant having failed to discharge his burden, this Court does not hesitate to reject the contention and hence it must fail. Accordingly, the appeals are rejected and having been devoid of merits.

7. The cross objection is preferred by the claimants in MVC No. 923/2007.

8. I have perused the grounds of cross objection. The tribunal while considering the evidence on behalf of the claimants/cross objectors has arrived at the conclusion that the disability certificate and the wound certificate do not compliment each other. It is observed that out of the four claimants one of them is grievously hurt. It is also to be seen that PW.2 who has issued the disability certificate is not the doctor who treated the claimants and also the evidence is not conclusive. The accident occurred on 26.11.2006. Ex. P-11 the disability certificate issued on 23.06.2008. As observed by the tribunal an examination of the same i.e. Ex. P-4 and P-11 would show that they are at variance with each other and no evidence is let in to show that the disability is directly relatable to the injuries caused on account of the accident dated 26.11.2006. In Ex. P-4 only one injury i.e. fracture of humerus has been noted as a grievous injuries and the doctor has recorded swelling and tenderness of the left shoulder and abrasion in the limbs. In Ex. P-11, it is stated that there is;- (1) abnormal bony prominence seen and felt on left shoulder, (2) left arm shortening of 1 cm., (3) wasting of left side of chest, arm and fore arm muscles, (4) left shoulder abduction and internal and external rotation etc. (5) X-ray evidence is fracture of humerus and shoulder dislocation. Neither shoulder dislocation nor the abnormal bony prominence, have been recorded at the first instance. Ex. P-11 does not inspire the confidence of this Court. Accordingly, cross objection also stands disposed off.

9. Cross objectors submit that this being the case of injury the deduction of 1/3rd is contrary to the law laid down by the Apex Court in the case of Sarla Verma v. Delhi Transport Corporation Limited and catena of judgments. She would submit that the tribunal has erred in adopting 10% of disability after having fixed the notional income at Rs. 3,000/- per month and ought not to have deducted 1/3rd of the same.

10. In that view of the matter, the cross objection is partly allowed. The deduction 1/3rd from the notional income is set aside. The loss of future income is worked out as under:

"Rs. 3,000/- x 12 x 13 x 10% = Rs. 46,800/-"

11. It is seen that the no compensation is awarded under the head for the period of treatment. Admittedly the claimant was hospitalized between 26.11.2006 and 17.12.2006 and it is also admitted that he has suffered grievous injuries of the fracture of humerus bone. Nature of injuries suggests he must have been under rest and treatment for a period of two months, therefore, a sum of Rs. 6,000/- is awarded towards loss of income during laid-up period.

12. It is also seen that no amount has been awarded under conventional heads i.e. conveyance, food, nourishment and attendant charges. Therefore a sum of Rs. 10,000/- is awarded towards conventional heads.

13. A sum of Rs. 15,000/- awarded by the Tribunal towards paid and suffering is confirmed.

14. Accordingly the cross objection is partly allowed. Cross objectors are entitled for an additional compensation of Rs. 26,600/- with interest at the rate of 6% p.a. from the date of petition till the date of realization.

The enhanced compensation shall be deposited before the Tribunal within a period of four weeks from today.