

(2003) 07 KAR CK 0001
In the Karnataka High Court
Case No : M.F.A. No. 3913 of 2001

United India Insurance Co. Ltd.

APPELLANT

Vs

Bharamappa Doddabirappa Pujari and Another

RESPONDENT

Date of Decision : 18-07-2003

Acts Referred:

Motor Vehicles Act, 1988 — Section 10, 10 (2), 149 (2), 177, 3

Citation : (2004) 1 ACC 568 : (2005) ACJ 1509 : (2003) ILR (Kar) 3511 : (2003) 4 KCCR 215 SN

Hon'ble Judges : S.B. Majage, J

Bench : Single Bench

Advocate : O. Mahesh and Veena O. Mahesh, for the Appellant; Veeresh B. Patil, for R2, for the Respondent

Final Decision : Dismissed

Judgement

Magage, J.—This appeal is filed by the Insurance Company challenging the Judgment and Award dated 30.4.2001 passed by the Court of District Judge and MACT at Gadag, by which, a sum of Rs. 80,000/- has been awarded to the claimant since, according to it, the claimant is not entitled to any compensation from it.

2. Heard the Counsel for the parties. It is submitted for the appellant - Insurance Company that the Tribunal has committed an error in holding it (Insurance Company) liable to pay compensation when the rider of the motorcycle, who was arrayed as 1st respondent before the Tribunal had no valid and effective driving licence to drive motorcycle as on the date of accident, which has been established as of fact by adducing documentary evidence. On the other hand, the learned Counsel for the other side supported the impugned Judgment and Award. Perused the records carefully.

3. In brief, the facts giving rise to the present Appeal are : The claimant filed claim petition before the Tribunal stating that on 19.12.1996 when he was

proceeding towards his village on his cycle, near Raju Dhaba Hotel at Naragund on Nargund-Solapur road, a motor-cyclist came at great speed from opposite direction driving a motorcycle in a rash and negligent manner and dashed against him causing grievance injuries, for which he took treatment but left with certain disabilities inspite of treatment taken and hence, claimed compensation of Rs. 2,00,000/- from the Driver, owner and insurer of the said motorcycle jointly and severally. The 1st and 2nd respondents before the Tribunal i.e., the rider and owner of motorcycle respectively, though appeared through their learned Counsel, did not file any written statement. However, the 3rd respondent, who is appellant before this Court, filed objections putting the claimant to strict proof of the averments in the claim petition and disputed the liability to pay any compensation since, according to it, the accident was not due to any rash or negligent act of the motorcyclist and as the owner of the motor-cycle had not handed-over the motor-cycle to the person holding driving licence and consequently requested to dismiss the claim. The Tribunal, after enquiry, held 1st respondent- rider of the motor-cycle alone as responsible for the accident and consequently awarded compensation of Rs. 80,000/- with interest Rs. 6% per annum to claimant and payable by the 3rd respondent, the correctness of which is assailed before this Court by way of Appeal.

4. Since the appellant - Insurance Company has not assailed the finding of the Tribunal regarding actionable negligence of the 1st respondent - rider of the motor cycle in causing accident to the claimant on the date of accident besides the amount of compensation determined by the Tribunal, the only point for consideration is:

"Whether the Insurance Company has proved that the rider of the motor-cycle had no valid and effective driving licence to drive the motor-cycle as on the date of accident and as such, it is not liable to pay compensation?"

5. It is the specific case of the appellant- Insurance Company that the rider of the motor-cycle was not holding valid and effective driving licence as on the time of accident and the 2nd respondent-owner of the said vehicle has failed to hand-over the vehicle to the person, who was holding valid and effective driving licence and violated the terms of conditions of policy and consequently, it is not liable to pay any compensation to the claimant. It is well settled that burden to prove the said facts squarely lies on insurer only. If need be, reference can be had to the decision of the Supreme Court in the case of Rukmani and Others Vs. New India Assurance Co. and Others, .

6. In support of its case, the insurer relies only on Ex.R.2-endorsement issued by ARTO, but not examined any official/officer to prove it. A Division Bench of Punjab and Haryana High Court has observed as under in the case of National Insurance Co. Ltd. Vs. Santosh and Others, .

"Mere production of a report/certificate from Motor Licensing Authority does not prove the document Ex.R.4. No witness as already pointed out above from the

Licensing Authority had been examined. Only he could produce the record and on basis of that can make the statement in Court. There could be no cross-examination in the absence of such a witness having been examined in Court. In that view of the matter, therefore, Ex.R.4 could not be read in evidence..."

Same is reiterated in the case of Karam Singh Vs. Balwinder Kaur, .

7. Further, it is pertinent to note that in support of its pleading, except Ex.R.2, the Insurance Company has neither produced any other record nor examined any witness nor summoned the driver (R1) much less any official/officer from RTA office, nor even suggested to claimant/PW-1 that Respondent No. 1 had no driving licence. Ex.R.2 is only an endorsement issued by the ARTO, Dharward. It shows that the 1st respondent was holding driving licence under which he was authorised to drive LMV upto 21.1.2007 (from 17.12.1991) and MPV, HPV (valid from 17.12.1991 to 16.12.1994). So, it requires to be considered whether by producing Ex.R.2, the insurer has discharged the burden cast on it or not.

8. In the case of RUKMANI AND ORS. v. NEW INDIA ASSURANCE COMPANY AND ORS. (supra), the Supreme Court has observed as under:

"3.We have seen the only evidence which the Insurance Company produced in support of the plea. This is the evidence of Inspector of Police who investigated the accident. In his evidence, PW-1 who was the Inspector of Police, stated in his examination -in-chief, "my enquiry revealed that the 1st respondent did not produce the licence to drive the above said scooter. The 1st respondent even after my demand did not submit the licence since he was not having it." In his cross-examination he has said that it is the Inspector of Motor Vehicles who is required to check whether the licence is there but he had not informed the Inspector of Motor vehicles that the 1st respondent was not having a licence since he thought it was not necessary. In our view, this evidence is not sufficient to discharge the burden which was cast on the Insurance Company. It did not summon the driver of the vehicle. No record from the Road Transport Authority has also been produced. In these circumstances, the Insurance Company has not discharged the burden cast upon it u/s 96(2)(b)(ii) of the Motor Vehicles Act, 1939". (Underline supplied)

9. So also, in the case of INDIAN MUTUAL INSURANCE COMPANY NOW MERGED IN THE UNITED INDIA FIRE AND GENERAL INSURANCE COMPANY LIMITED v. VIJAYA RAMULU AND ORS. 1978 ACJ 366 when the insurer had not taken effective steps to examine the driver of the offending vehicle, the High Court of Andhra Pradesh held that the Insurance Company cannot be absolved from its liability.

10. Similarly, in the case of H.G. Ramachandra Rao Vs. Master Srikantha and others, when the insurer had not taken steps to examine driver or any other witness, though produced charge-sheet and order-sheet to show that the driver pleaded guilty, this Court held that insurer failed to discharge the burden that driver had no driving licence.

11. That apart, the record Ex-R.2 relied on by the Insurance Company itself shows that the rider of the motor-cycle-the respondent No. 1 had a valid and effective driving licence to drive LMV as on the date of accident. So, it is not a case, where Respondent No. 1 had no driving licence at all to drive a motor vehicle. On the other hand, it is a case, where the respondent No. 1 had driving licence, but it did not cover or specify the motor-cycle (2 wheeler with gears).

12. In the case of United India Insurance Co. Ltd. Vs. Smt. Lakshamma and Others, a learned Single Judge of this Court has held that a person holding driving licence, which authorises him to drive "transport vehicle" can also driver light motor vehicle, whose unladen weight does not exceed 7500 Kgs." So also, in the case of Pratap Singh and Another Vs. Smt. Sharmila and Others, a Division Bench of Punjab and Haryana High Court has held that non mentioning of the category of "transport vehicle" in driving licence could not lead to a conclusion that on the date of accident, the driver was not holding a valid driving licence, when it is shown that the driver had a licence to drive HM vehicle and the vehicle involved was a truck. Similarly, in the case of Maduraiveeran and Another Vs. Subburaj and Others, where the driver of a lorry had driving licence to drive stage carriage, but without an endorsement permitting him to drive goods vehicle, the Madras High Court has not exonerated Insurance Company from its liability on the ground taken by Insurer that the Driver had no driving licence to drive lorry. So also, in the case of New India Assurance Co. Ltd. Vs. R. Jayalakshmi and Another, .

13. Last but not least, it is on record that police, though charge-sheeted Respondent No. 1 for rash and negligent driving and contravention of some of the provisions of M.V. Act, have not even alleged that he drove the motor-cycle without holding a valid driving licence and thereby committed offence under M.V. Act, as is clear from Ex.P.6- Judgment. There was no reason for police, not to charge-sheet Respondent No. 1 for the offence punishable u/s 3 r/w Section 177 of M.V. Act when, according to Respondent No. 3, Respondent No. 1 drove motor-cycle without holding a valid and effective driving licence to drive motor-cycle. This aspect of the matter also cannot be ignored.

14. Further, it is also pertinent to note that in view of Section 149(2) of the Act, the Insurance Company can avoid its liability only on proof of any breach or violation of Policy Condition and not by simply showing that the driver had no driving licence. This is what has been even held by the Supreme Court in the case of United India Insurance Company Ltd. Vs. Lehu and Others, as under:

"We are thus in agreement with what is laid down in the aforesaid cases viz. that in order to avoid liability it is not sufficient to show that the person driving at the time of accident was not duly licenced. The Insurance Company must establish that breach was on the part of the insured". (underline supplied)

So, unless the Insurance Company proves its stand that there was breach of the terms and conditions of policy by the Respondent No. 2 - Insured, simply on the

ground that the driver had no driving licence as on the date of accident it cannot be absolved from the liability.

15. Thus, it is only in case of a breach or violation of the promise on the part of the insured that the insurer can hide under the umbrella of the exclusion clause. The expression "breach" is of great significance. The dictionary meaning of "breach" is "infringement or violation of a promise or obligation". It is, therefore, abundantly clear that the insurer will have to establish that the insurer is guilty of an infringement or violation of a promise that a person, who is duly licensed, will have to be incharge of the vehicle. The very concept of infringement or violation of the promise that the expression "breach" carries within itself induces an inference that the violation of infringement on the part of the promiser must be a wilful infringement or violation. As such, the Insurance Company will have to not only establish that insured was guilty of an infringement or violation of promise, it has also to satisfy the Tribunal that such infringement or violation on the part of the insured was wilful, as held in the case of SKANDIA INSURANCE CO. LTD v. KOKILABEN CHANDRAVADAN and approved in the case of Lehu (supra).

16. At the cost of repetition, it may be noted that Insurance Company, except pleading and producing record at Ex.R.2 besides Insurance Policy at Ex.R.1, has not adduced any other evidence. It has not examined any person to state on oath that the Respondent No. 2 has committed any breach of the conditions of the policy by allowing Respondent No. 1 (who had no driving licence to drive motor-cycle) to drive motor-cycle or that he knew very well that respondent No. 1 had no driving licence to drive motor-cycle and despite he caused or permitted the Respondent No. 1 to drive it and thereby violated promise that a person who is duly licensed will be incharge of the vehicle. So, even if assumed for a moment that the Insurance Company has shown that the Respondent No. 1 was not duly licensed when he drove motor-cycle and caused accident, that itself cannot be taken to hold that the Respondent No. 3 - insurer proved that the insured - Respondent No. 2 committed breach as provided in Section 149(2)(a)(ii) of the Act. So, it cannot be absolved from its liability.

17. Further, in the case on hand, except pleading in para - 8 of its objections that the 1st respondent was not having valid and effective driving licence at the time of accident and there was violation of terms and conditions of policy by the 2nd respondent, the Insurance Company has not pleaded anything more. In other words, it has not specifically referred to breach of any specific term or condition in Ex.R.1 - Policy by the 2nd respondent - insured. It need not be said that it was for the Insurance Company not only to plead but also to prove violation or breach of specific term or condition in the policy issued to get itself absolved from the liability to pay compensation to third party. However, in the present case, no such specific clause/term/condition has been referred to in the pleading stating its violation by the 2nd respondent - insured.

18. Still, based on para -8 of the objections referred to above, if Policy - Ex.R.1 is

considered, it shows that:

"Person or class of persons entitled to drive:

Any person including insured provided that the person driving holds an effective driving licence at the time of the accident and is not disqualified from holding or obtaining such a licence".

So, the Insurance Company was not only required to show that the person, who drove the vehicle had no effective driving licence but also to plead and prove that such a person was disqualified from holding or obtaining such a licence since the word "and" cannot be read as "or". Unfortunately neither there is any pleading nor evidence in that regard by insurer. On the other hand, in view of Ex.R.2 - driving licence for LMV, it cannot be said that the Respondent No. 1 was disqualified to hold or obtain a driving licence for motor - cycle with gears.

19. At this stage, it is pertinent to note that by Act No. 54 of 1994, which came into effect from 14.11.1994, the words "or motorcycle" came to be inserted in Section 3 of the MV Act which deals with necessity for driving licence and runs as under:

"Section 3: Necessity for driving licence :(1) No person shall drive a motor vehicle in any public place unless he holds an effective driving licence is sued to him authorising him to drive the vehicle; and no person shall so drive a transport vehicle (other than a motor cab or motor - cycle hired for his own use or rental under scheme made under Sub-section (2) of Section 75) unless his driving licence specifically entitles him to do".

So also by same Act, in place of "(e) medium goods vehicle ; (f) medium passenger motor vehicle; (g) heavy goods vehicle and (h) heavy passenger motor vehicle:", the words "transport vehicle" came to be substituted in Section 10(2) of the MV Act. Said amendments also can't be lost sight.

20. Now, we can look at Section 10 of the MV Act. It shows types of vehicles in respect of which licence to ride or drive has to be obtained. They are:

- (a) motor cycle without gear;
- (b) motor cycle with gear;
- (c) invalid carriage;
- (d) light motor vehicle;
- (e) medium goods vehicle;
- (f) medium passenger motor vehicle;
- (g) heavy goods vehicle;
- (h) heavy passenger motor vehicle;

(i) road roller;

(j) motor vehicle of a specified description.

Thus, it starts with a light vehicle and goes up in the order of laden weight. In other words, after listing the light ones, heavy vehicles have been listed. The listing clearly shows that the one lower down in the order requires something extra, something more than what the driver is to be equipped with for the previous one. So, in my view, a person who has a licence to drive motor cycle with gear cannot be permitted to drive a invalid carriage that is to say, a person having a licence to drive a motor cycle with gear can very well drive a motor cycle without gear and not that he can't drive it. To construe otherwise will not be proper. Similarly, a person holding licence to drive a light motor vehicle cannot be permitted to drive a medium goods vehicle, but he can drive a invalid carriage or motor-cycle with or without gear. Same view has been expressed by the High Court of Madras in the case of NEW INDIA ASSURANCE CO. LTD. v. R. JAYALAKSHMI AND ANR.. This being so, the Respondent No. 1 who had driving licence to drive a light motor vehicle could drive motor-cycle with gear. In this view of the matter also, I do not find any force in the case of the Insurance Company.

21. Lastly, it is pertinent to note that, the offending vehicle had insurance coverage as on the date of accident and the claimant is admittedly a third party. "Third party risks" are covered by the provisions contained in Chapter VIII of MV Act and as such, in the case of G. Govindan (Supra), the Supreme Court has observed as under:

"12:- The heading of Chapter VIII of the old Act reads as "Insurance of Motor Vehicles Against Third Party Risks". A perusal of the provisions under Chapter VIII makes it clear that the legislature made insurance of motor vehicles compulsory against third party (victims) risk. This Court in New Asiatic Insurance Co. Ltd., v. Pessumal Dhanamal Aswani after noticing the compulsory nature of insurance against the third - party risks, observed that once the company had undertaken liability to third parties incurred by the persons specified in the policy, the third parties: right to recover any amount under or by virtue of the provisions of the Act is not affected by any condition in the policy."

(Underline supplied).

22. So, while considering the right of a third party to have compensation, after a detailed discussion made with reference to relevant provisions of M.V. Act and decisions of the Supreme Court in the cases of Skandia Insurance Co. Ltd. Vs. Kokilaben Chandravadan and Others, , LEHRU(supra), Sohan Lal Passi Vs. P. Sesh Reddy and others, , New Asiatic Insurance Co. Ltd. Vs. Pessumal Dhanamal Aswani and Others, and also G. Govindan Vs. New India Assurance Co. Ltd. and Others, the Court, in the case of MAHABALA v. SATYANARAYANA AND ORS., MFA NO. 3420/2001 DD. ON 18.7.2003 has held that the right of a third party - claimant to recover compensation under or by virtue of the provisions of the M.V.

Act, is not affected by any condition in the policy.

23. In view of the above and when kept in mind the object and intention of the Legislature in having compulsory insurance for the purpose of protecting the interest of the third party, it can be said that the right of third party is not affected in any way by any of the conditions incorporated in the policy of Insurance. If that is so, the Insurance Company cannot avoid its liability to pay compensation to a third party, even though driver of an offending motor vehicle had no valid and effective driving licence and the insured has committed breach of policy condition. Otherwise, the very purpose of having Insurance Policy for the purpose of protecting the interest of third party risk will be frustrated.

24. Thus, considered from any angle, the Insurance Company is not absolved from the liability to pay compensation to the claimant - third party and the decision of the Supreme Court in the case of Ashok Gangadhar Maratha Vs. Oriental Insurance Co. Ltd., relied on for the Insurance Company is not of much help to it. So, the point raised is answered against it.

No other point has been raised nor canvassed before this Court.

In the result, the Appeal is dismissed. However, parties are directed to bear their costs. The amount in deposit in this Court is ordered to be transferred to the concerned Tribunal forthwith.