
(2001) 01 AP CK 0013

In the Andhra Pradesh High Court

Case No : A.A.O. No. 565 of 1998 & C.M.A. No. 565 of 1998 and Ors.

United India Insurance Co. Ltd.

APPELLANT

Vs

Guguloth Khana and Others

RESPONDENT

Date of Decision : 20-01-2001

Acts Referred:

Motor Vehicles Act, 1939 — Section 95(1)
Motor Vehicles Act, 1988 — Section 147

Citation : (2001) 2 ACC 392 : (2001) 2 ALT 185

Hon'ble Judges : N.V. Ramana, J

Bench : Single Bench

Advocate : K.L.N. Rao, for the Appellant; J. Kanakaiah, for Respondent Nos. 1 and 2, D.V. Sivaprasad Advocate (not present), for the Respondent

Final Decision : Dismissed

Judgement

N.V. Ramana, J.—This batch of appeals arises out of one accident, which took place on 23-5-1991. The United India Insurance Company/ respondent in the O.Ps, is the appellant in all these appeals.

2. Brief facts:-- On 23-5-1991 a lorry bearing No. AP 26-T-364 belonging to M/s. Amruthesh Transport Company started at Warangal with some load of groundnut oil cake to go to Anakapalle in Visakhapatnam. One Ch. Mallikarjun was engaged as driver of the said lorry. There was a comprehensive insurance policy for the lorry with the United India Insurance Company. When the lorry reached near Thorrur village on the way leading to Khammam P.W.D. Road, several villagers were waiting on the road, due to lack of transport facility because of the assassination of Sri Rajiv Gandhi on the previous day (22-5-1991). Then, about 25 persons, including some children and women boarded the lorry. The lorry, after travelling about five kilometers from Thorrur village and reached near Mattedu village, the driver of the lorry applied sudden brakes whereby the lorry turned turtle, as a result of which twelve persons died on the spot and three more persons also died after they were taken to hospital. Ten persons sustained

injuries. The claimants, either the injured or the legal heirs of the persons who died in the accident, have filed the O.Ps against the owner, driver and insurer of the lorry.

3. Before the Motor Accidents Claims Tribunal, the driver of the lorry who was served with notices in the O.Ps remained ex parte. Before the Tribunal, owner of the lorry filed counter, denying the averments in the O.Ps, contending that the driver of the lorry was not responsible for the accident. It was contended that at the time of the accident, another lorry was coming in the opposite direction at high speed in a rash and negligent manner, and to avert accident, the driver of the lorry applied sudden brakes by taking the lorry to the extreme left side of the road. Due to bad condition of the road, the lorry turned turtle resulting in fatal road accident. He also contended that he has given strict instructions to the lorry drivers not to carry passengers on their lorries.

4. Before the Tribunal, the present appellant-Insurance Company also filed counters admitting that the lorry involved in the accident was insured with it as a goods vehicle, in which passengers are not allowed to travel. It was contended that as per the conditions of insurance policy only six persons are authorised to travel in the lorry and that the persons who travelled in the lorry were unauthorised passengers. It was contended that even if for any reason it is considered that the deceased and injured are non-fare paying passengers, the liability of the Insurance Company is limited to Rs. 15,000/- in case of death and lesser amount for injuries. The Insurance Company disputed the quantum of compensation claimed in the O.Ps. by the respective claimants.

5. Initially, the following issues were framed by the Tribunal for trial:

- (1) Whether the accident took place due to rash and/or negligent driving by respondent No. 1?
- (2) To what compensation if any, the petitioners are entitled to and if so, against which of the respondents?
- (3) To what relief ?

Subsequently, the issues were recast as under:

- (1) Whether the accident took place due to rash and/or negligent driving of the lorry by its driver Ch. Mallikarjun?
- (2) Whether there were specific instructions issued to the drivers of the Transport Company that they should not carry passengers enroute and if so, on that ground that owner of the crime vehicle is not liable to pay the compensation in the claim petitions?
- (3) Whether the third respondent Insurance Company is not liable to cover the risk of the deceased and injured involved in the accident under the terms of the Insurance policy, the copy of which is marked as Ex.B-1 along with the terms and conditions of the policy including Indian Motor Tariff marked as Ex. B-2?

(4) Whether the petitioners are entitled for compensation, if so, to what amount and from whom?

(5) To what relief?

6. In the Tribunal, P.Ws. 1 to 9 were examined and Exs. A-1 to A-15 were marked on behalf of the claimants in the O.Ps. The Manager of the Transport Company was examined as R.W. 1 and Exs. B-1, copy of insurance policy and Ex. B-2 were marked, on behalf of the respondents.

7. On consideration of the oral and documentary evidence on record, the Tribunal held that the accident has taken place due to rash and negligent driving of the lorry by its driver. The Tribunal negatived the contention of the owner of the lorry that he is not liable to pay compensation. Basing on these two findings and the medical and documentary evidence available on record, different amounts of compensations were granted to the different claimants in the respective O.Ps, who are arrayed as respondents in the appeals.

8. Aggrieved by the same, the present appeals are filed by the Insurance Company.

9. The first contention advanced by the Counsel for the appellant-Insurance Company is that the injured/deceased who travelled in the lorry are unauthorised passengers in a goods vehicle and the insurance policy issued is for the goods vehicle and there is no reason to fasten the liability on the Insurance Company; it is a violation of policy conditions and there is no need to fix the liability against the present appellant-Insurance Company.

10. The second contention advanced by the Counsel for the appellant-Insurance Company is that the owner of the lorry got examined R.W. 1, Manager in the Transport Company, who stated that he was informed by the driver of the lorry that the injured/ deceased unauthorisedly entered the lorry, and the maxim/ doctrine "volenti non fit injuria" applied to this case as they voluntarily entered into the lorry at their own risk and there is no reason to fasten liability on the Insurance Company.

11. In these appeals, on behalf of the driver and owner of the motor vehicle, though some learned Counsel entered appearance, none appears on their behalf, in spite of number of adjournments. However, in C.M.A.No. 565 of 1998 Sri Jalli Kanakaiah, learned Counsel, appeared on behalf of the respondents/claimants therein and made his submissions. Therefore, I have perused the orders under appeal and heard the arguments of Mr. K.L.N. Rao, appearing for the appellant and Mr. Jalli Kanakaiah, appearing for respondents/ claimants in C.M.A.No. 565 of 1998.

12. In these cases, so far as the first contention of the Counsel for appellant that the claimants/respondents are travelling as gratuitous passengers in a goods vehicle and not entitled for compensation and the Insurance Company is not liable to pay any such compensation, is concerned, it is contrary to the principle

laid down by the Supreme Court in *New India Assurance Company Vs. Shri Satpal Singh and Others*, . In that case, the Supreme Court considering clause (ii) of proviso to Sub-section (1) of Section 95 of the Motor Vehicles Act, 1939 (Old Act) and Section 147 of the Motor Vehicles Act, 1988 (new Act), and noticing the absence of a similar clause in the new Act, held".....under the new Act an insurance policy covering third party risk is not required to exclude gratuitous passengers in a vehicle, no matter that the vehicle is of any type or class". In view of the above ruling of the Supreme Court, there is no merit in the first contention of the appellant, that the injured/legal heirs of the deceased in these cases are not entitled to any compensation on the ground that they are gratuitous passengers, is without substance and the same is hereby rejected.

13. So far as the second contention is concerned, eventhough R.W. 1, Manager of the Transport Company to which the lorry in question belongs stated in his chief-examination that he has given clear instructions to all the drivers of the Transport Company not to carry passengers in goods vehicle, during cross-examination he stated that there is no documentary evidence with him to show that such express instructions were in fact given to all the drivers working with the Transport Company. Apart from that, in all these cases, crucially the driver of the lorry remained absent and was set ex parte. No efforts were made either by the owner of the lorry or the Insurance Company/ present appellant to take any steps to examine the driver of the lorry. Apart from that, the grounds taken by the Insurance Company in the present appeals were not taken before the Tribunal. Simply relying on the evidence of R.W. 1, Counsel for the Insurance Company, in these appeals argued that the claimants/deceased in these cases forcibly entered the lorry by threatening the driver of the lorry with dire consequences if he does not allow them to travel in the lorry in view of the prevailing situation on that day, i.e., the day next to Rajiv Gandhi's assassination as there is no transport facility. These facts have normally to be narrated by the driver of the lorry only. R.W. 1 is only a Manager of the Transport Company, to which the lorry belongs. He says that he gathered this information from the driver of the lorry. To support this theory he has not examined any other witness and in his cross-examination he admitted that he has not filed any criminal case against the passengers who forcibly entered into the lorry. Further he has not shown the reasons why he has not examined the driver of the lorry in question as a witness has in this case. He did not even depose whether the said driver was in service or not. On the gathered information, R.W. 1 stated that the passengers entered into the goods vehicle/lorry forcibly without payment of any fare also and contended that they are gratuitous passengers. To appreciate the said contention, except the vehement argument of the Counsel for appellant, there is no supporting evidence in this regard. As rightly contended by Sri Jalli Kanakaiah, learned Counsel for respondents/claimants in C.M.A.No. 565/1998, there is no police complaint lodged against the passengers who entered into the lorry without consent of the driver. The best witness to speak about these aspects is the driver of the vehicle only. There is ample evidence produced by the

claimants to show that they have entered into the vehicle after the lorry is stopped by the lorry driver who agreed to carry them on payment of Rs. 5/- each by way of fare. In the claim applications themselves, the claimants alleged/narrated these facts, which were not at all disproved by any evidence by the appellant herein. Except, the oral evidence of R.W. 1, there is no other evidence to show that the claimants entered into the lorry on their own volition. When a defence is taken by the appellant-Insurance Company, it is for it to prove that defence beyond doubt. The burden lies on the Insurance Company only. A sweeping plea or evidence placing some material before the Court or Tribunal is not sufficient. The insurer must specifically plead and prove beyond doubt whether there is any violation of conditions of policy or how the claimants are not entitled to any compensation. For applying the doctrine "volenti non fit injuria" in insurance company must prove by acceptable evidence that the claimants/respondents entered into the lorry without permission of the driver. Even in the decision, *Padmavati v. Dugganaika* 1975 ACJ 222, cited by the learned Counsel for appellant, the deceased entered into the zeep voluntarily and later the accident took place. In the factual background of that case, the High Court of Karnataka while considering the applicability of the principle "volenti non fit injuria" held that even though the accident took place due to the rash and negligent driving of the driver of zeep, the driver of the zeep was not liable to pay compensation because the deceased has voluntarily travelled in the zeep. Added to that, in that case, on behalf of the respondents-therein, the zeep driver (R-3) himself entered the witness box and gave evidence as D.W. 1. Basing on the said evidence, the High Court of Karnataka while applying the said doctrine "volenti non fit injuria" came to the conclusion that for application of the said doctrine there is sufficient evidence particularly that of the driver of the vehicle who was examined as D.W. 1. So, basing on the said evidence, the Court came to the conclusion that the injured as well as the deceased entered into the vehicle voluntarily. But, in this case, except the hearsay evidence of D.W. 1, there is no other evidence. Particularly, the driver of the lorry was not examined and no steps have been taken by the appellant-Insurance Company or the owner of the vehicle to substantiate their case. Once the insurance company failed to establish that its liability under the contract of insurance remains intact and unhampered, it was bound to satisfy the award under comprehensive policy of insurance.

14. Learned Counsel for the appellant-Insurance Company relied on the decision in *Vallapu Gangamma and Others Vs. The New India Assurance Company*, wherein a learned Single Judge of this Court held that the Insurance Company is not liable to pay compensation to the dependants of the deceased persons who are travelling in the vehicle at the time of accident as trespassers and not as passengers. The facts of that case are entirely different from that of the facts in these appeals. In the case cited, the claimants were treated as passengers on the basis of evidence of R. W. 1 (the driver of the lorry therein), who categorically stated that the claimants-therein have forcibly entered into the lorry

asking him to take them to particular place and threatened to beat him if he does not do so. In the present cases, there is no evidence to show that the claimants/deceased entered into the lorry forcibly with any threat to the driver of the lorry. So, the decision in Gangamma's case (3 supra) is not applicable to the case on hand.

15. For the above reasons, the appeals are dismissed. No costs.