(2014) 10 MAD CK 0181

In the Madras High Court

Case No : Civil Miscellaneous Appeal No. 3565 of 2011 M.P. No. 1 of 2011

United India Insurance Co. Ltd. APPELLANT

Vs

N.V. Shyamala RESPONDENT

Date of Decision : 30-10-2014

Acts Referred:

Motor Vehicles Act, 1988 — Section 118, 173, 180, 181, 184
Penal Code, 1860 (IPC) — Section 304A

Citation : (2014) 10 MAD CK 0181

Hon'ble Judges : P.R. Shivakumar, J

Bench : Single Bench

Judgement

P.R. Shivakumar, J.—The insurer of the vehicle involved in the accident, has come forward with the present Civil Miscellaneous Appeal challenging the award of the Motor Accident Claims Tribunal (Chief Judge, Court of Small Causes), Chennai dated 25.03.2011 made in MCOP No. 3032/2007, both in respect of fixation of liability on the appellant (insurer) and in respect of quantum of compensation awarded by the Tribunal.

2. A claim for compensation was made for the death of M.R.Subramanian by the respondents 1 to 4 herein, who are the wife, son and daughters of deceased Subramanian contending that the said Subramanian died of injuries sustained in a road accident on 22.07.2007 at 19.00 hrs caused by the driver of the auto-rickshaw bearing Regn. No. TN-22 R-3975 belonging to the 5th respondent herein/first respondent in the MCOP, which stood insured with the appellant herein/second respondent in the MCOP.

3. According to the petition averments, the deceased Subramanian, aged 72 years, was hit by the auto-rickshaw due to the rash and negligent driving of the same by its driver while he was walking along the Velachery 100 Feet Road near Appasamy hospital. The further averment made in the claim petition is that, while the deceased was walking on the eastern edge of the north-south road from north to south keeping left, the above said auto-rickshaw that came in the

opposite direction hit the deceased resulting in grievous injuries; that the deceased was given treatment at Government General Hospital for the said injuries for three days and that despite such treatment, he succumbed to the injuries and the death occurred on 25.07.2007.

4. Contending that the accident occurred due to the rash and negligent driving of the above said auto-rickshaw by its driver and hence the 5th respondent herein, as owner and the appellant herein, as insurer of the vehicle, were jointly and severally liable to pay compensation to the respondents 1 to 4 herein, they claimed a compensation of Rs. 6,00,000/- as compensation for the death of Subramanian, based on their averment that he was having an income of Rs. 10,000/- per month as Proprietor of Ram Provisional Stores at Velachery.

5. The 5th respondent herein/first respondent in the MCOP filed a counter statement contending that a wrong charge-sheet came to be filed by the police against him in respect of the accident concerned in this appeal before the IV Metropolitan Magistrate, Saidapet for an offence under Section 118 r/w Section 5 of the Motor Vehicles Act, 1988 as if he had allowed a person without a valid licence to drive the vehicle and that in the said case he was acquitted. It was also contended by him that the petitioners had not stated the details of the driver and non-impleadment of the driver would make the MCOP bad for non-joinder of necessary parties. He also disputed the petition averments regarding the age, employment and income of the deceased and the reasonableness of the quantum of compensation claimed by them. However, he had stated in the counter statement that the vehicle owned by him, which was involved in the accident, was insured with the appellant herein/second respondent in the MCOP as on the date of accident and hence the compensation, if any to which the claimants may be entitled, shall be recovered only from the insurer, namely the appellant herein.

6. The appellant herein, namely the insurer of the offending vehicle, who figured as the second respondent in the MCOP contested the case by filing a counter statement denying the petition averments regarding the manner in which the accident took place and the averment regarding the age and income of the deceased. It was also contended that the appellant/insurer was not liable, since the owner of the vehicle had allowed a person not duly licensed to drive the vehicle. Besides the above said averments, the appellant herein also contended that the amount claimed by the respondents 1 to 4 herein was highly excessive and exorbitant.

7. In the enquiry before the Tribunal, two witnesses were examined as PWs.1 and 2 and five documents were marked as Exs.P1 to P5 on the side of the claimants. On behalf of the fifth respondent herein/first respondent in the MCOP, namely the owner of the vehicle, he himself figured as RW1 and Exs.R1 to R5 were produced. No witness was examined on behalf of the appellant herein/ second respondent (insurer) and only one document was produced as Ex.R6.

8. The Tribunal (Chief Judge, Court of Small Causes, Chennai), at the conclusion of enquiry, considered the evidence in the light of the arguments advanced on both sides and passed the award holding the 5th respondent herein, as owner of the vehicle and the appellant herein, as insurer of the vehicle, jointly and severally liable to pay compensation to the respondents 1 to 4 herein based on its finding that the accident took place due to the rash and negligent driving of the auto-rickshaw belonging to the 5th respondent herein, which stood insured with the appellant herein and that the said accident was caused by one Balan, who took the auto-rickshaw without the consent or knowledge of either the 5th respondent herein (owner of the vehicle) or its regular driver Purushothaman. The Tribunal took the age of the deceased to be 72 years and the annual income of the deceased to be Rs. 36,000/-, deducted 1/3rd from it for personal and living expenses of the deceased and fixed the multiplicand after deducting 1/3rd as Rs. 24,000/-. It selected multiplier 5 and assessed the loss of support to the family at Rs. 1,20,000/-, added a sum of Rs. 5,000/- to the first respondent towards loss of consortium, a sum of Rs. 5,000/- to the respondents 2 to 4 for loss of love and affection and a sum of Rs. 5,000/- towards funeral expenses and transport expenses and arrived at the final figure Rs. 1,35,000/- as the total amount of compensation. Accordingly, the award came to be passed directing the 5th respondent herein and the appellant herein, to jointly and severally pay the above said amount together with an interest at the rate of 7.5% per annum from the date of petition till payment and also cost. The award also provided for apportionment among the claimants, namely respondents 1 to 4 herein.

9. As against the said award, the 5th respondent herein, namely the owner of the vehicle did not file any appeal. The appellant herein, namely the insurer of the vehicle alone has chosen to present the appeal under Section 173 of the Motor Vehicles Act, 1988.

10. The points that arise for consideration in this appeal are:

"1) Whether the Tribunal committed an error in holding that the auto-rickshaw bearing Regn. No. TN-22 R-3975 belonging to the 5th respondent herein was driven by Balan without the knowledge and consent of either the owner of the vehicle or its regular driver and caused the accident leading to the death of the deceased?

2) Whether the Tribunal committed an error in holding the appellant herein/ insurer of the vehicle involved in the accident to be liable to pay compensation to the claimants even though the vehicle was driven by a person not duly licensed to drive it?

3) Whether the amount awarded as compensation is excessive requiring downward revision?

11. The arguments advanced by Mr. J.Chandran, learned counsel for the appellant, by Mr. C.Munusamy, learned counsel representing C&K Law firm, counsel on record for the respondents 1 to 3 and by Mrs. S.Sridevi, learned

counsel for the 5th respondent were heard. The materials available on record were also perused.

12. There is no dispute regarding the fact that in an accident that took place on 22.07.2007 at 19.00 hours at Velachery 100 Road'' near Appasamy Hospital, the deceased M.R.Subramanian was hit by the auto-rickshaw bearing Regn. No. TN-22 R-3975 belonging to the 5th respondent herein, which stood insured with the appellant herein, leading to grievous injury and that the injuries subsequently proved to be fatal, as the deceased succumbed to the injuries on 25.07.2007, despite the treatment given in the hospital.

13. It is the contention of the respondents 1 to 4/claimants that the deceased was walking along the road keeping the extreme left side of the road at the time of accident and that the auto-rickshaw that came in the opposite direction came to the wrong side and hit him leading to the grievous injuries, which ultimately resulted in his death. So far as the negligence aspect is concerned, though PW1 was not an eye witness, PW2 clearly spoke about the nature of the accident proving the petition averments that the accident took place due to the rash and negligent driving of the auto-rickshaw bearing Regn. No. TN-22 R-3975 by the person who was driving the auto-rickshaw. Therefore, the finding of the Tribunal that the accident took place due to the rash and negligent driving of the auto-rickshaw bearing Regn. No. TN-22 R-3975 by its driver cannot be said to be either defective or infirm warranting interference. The appellant has also not challenged the said finding seriously.

14. On the other hand, the main contention of the appellant is that the owner having violated the policy condition, is not entitled to reimbursement as per the contract of insurance and that hence the entire liability should be mulcted on the owner of the vehicle alone. It is true that the respondents 1 to 4 herein/ claimants, in their claim petition, did state that the particulars of the driver of the auto-rickshaw, who caused the accident, were not known to them. The 5th respondent herein/owner of the vehicle also contended that he was not aware of the fact as to who drove the vehicle at the time of accident. However, he had taken a clear stand that one Purushothaman was the regular driver of the auto-rickshaw and he had entrusted the same to Purushothaman alone. When he was confronted with Ex.R6, copy of the charge-sheet, he did admit that a charge-sheet was filed against him accusing him that he had given the vehicle to one Purushothaman, who in turn gave the vehicle to Balan and that Balan, who did not possess a valid driving licence, caused the accident. However, he would plead absence of knowledge as to whether Purushothaman or Balan drove the vehicle.

15. The evidence of RW1 will make it clear that he did not deny that the vehicle was driven by Balan at the time of accident and that the said Balan did not possess a valid driving licence at the time of accident. If the said Balan was an employee of the 5th respondent or in any other way, the 5th respondent had permitted the above said Balan to drive the vehicle, then there would not be any difficulty in holding that the 5th respondent (owner of the vehicle), committed

breach of an essential condition of the policy, which will exonerate the insurer from reimbursing the insured, namely the owner of the vehicle. However, a plea was taken by the 5th respondent herein (owner of the vehicle) that he did not know the above said Balan at all and that he had entrusted the vehicle to its regular driver Purushothaman only. If at all there is evidence to show that the said Purushothaman permitted Balan to drive the vehicle, the 5th respondent can be held vicariously liable for the act of his driver Purushothaman. Copy of the Driving Licence of Purushothaman has been produced as Ex.R1. Copy of the insurance policy has been produced as Ex.R2. Ex.R3 is the copy of the judgment of the criminal court in a criminal case instituted against the 5th respondent herein/owner of the vehicle. He was prosecuted for an offence under Section 180 r/w Section 5 of the Motor Vehicles Act, 1988. He was prosecuted on the charge of having allowed the vehicle to be driven by one Balan, who did not possess a valid Driving Licence to drive the vehicle. In the said criminal case, the 5th respondent herein took a plea that he had entrusted the vehicle to his regular driver Purushothaman, but one Balan took the vehicle without the consent or knowledge of either the owner of the vehicle or the above said Purushothaman, regular driver of the vehicle. Though the said Balan was examined as a witness in the said criminal case, he did not support the prosecution case. The above said Purushothaman was also examined as a witness on the side of the prosecution in the above said case and he had given evidence to the effect that the said Balan had taken the auto-rickshaw without his knowledge. The same resulted in acquittal of the 5th respondent herein/owner of the vehicle in the above said criminal case. No doubt, the criminal case would have resulted in the acquittal of the 5th respondent. But that judgment shall not be relevant and the parties to the claim petition in the MCOP should prove their case independently of the judgment of the learned IV Metropolitan Magistrate, Saidapet dated 30.01.2010 made in M.V.3/2008, because the said judgment of the Criminal Court was not based on any admission.

16. Whenever a violation of a policy condition is pleaded by the insurer to claim that it is to be exonerated from reimbursing the insured, the burden of proving such violation shall lie on the insurer. In this case, nothing was canvassed in the cross examination of the witnesses examined on the side of the claimants as to whether the driver who caused the accident did possess a valid driving licence or not? and whether the owner of the vehicle or his employee did permit the unlicensed person to drive the vehicle?. Only when the 5th respondent herein was examined as RW1, questions were put to him in the cross examination based on Ex.R6, copy of the charge-sheet. Of course it is true that Ex.R6 reveals the fact that the 5th respondent herein was charge-sheeted for an offence under Section 180 r/w Section 5 of the Motor Vehicles Act, 1988, as if he had given the auto-rickshaw to Balan knowing fully well that he had no valid driving licence, since the regular driver Purushothaman fell ill. In the said criminal case, he was acquitted and the same was spoken to by RW1 in clear terms. He has given clear evidence that he did not entrust the vehicle to the said Balan for driving. It is his

clear evidence that he did not even know who the Balan was? He had taken a clear plea that Purushothaman was his regular driver and he was in charge of the vehicle to his knowledge. When such is the evidence, it shall be the duty of the insurer to prove that either the 5th respondent (RW1) or the said Purushothaman permitted the above said Balan to drive the vehicle. There is nothing in the charge-sheet to show that Purushothaman was prosecuted for any offence regarding the said incident. On the other hand, a charge-sheet came to be filed against Balan accusing him of committing an offence punishable under Section 304A IPC and Section 184 of the Motor Vehicles Act, 1988 and also an offence under Section 3 r/w 181 of the said Act. There is no evidence to show what happened to the said criminal case. Even if there was any admission made by the said Balan resulting in his conviction, the same could not be used against the respondents 1 to 4 herein/claimants or the 5th respondent (owner of the vehicle). At least the insurer could have summoned and examined the said Balan and Purushothaman to prove that the said Balan was permitted by the 5th respondent to drive the vehicle knowing fully well that Balan did not possess a valid driving licence or at least that such a permission was given with such knowledge by the above said Purushothaman. No such evidence has been adduced on the side of the appellant herein/second respondent (insurer). In this regard, the learned Presiding Officer of the Tribunal, relied on the following judgments to arrive at the conclusion that the appellant herein/insurer, was not absolved of its liability to reimburse the insured. They are:

(1) Vaidyanatha Pillai Vs. Narasimhan and Others, ; and

(2) United India Insurance Co. Ltd. Vs. Geetha and Others, .

17. In Vaidyanatha Pillai''s case, the owner had employed a qualified driver and had entrusted the vehicle to him. However, another person drove the vehicle without the knowledge and consent of the regular driver. Holding that the insured did everything in his power to keep, honour and fulfill the promises made by him under the policy of insurance and he had not committed breach of any of the terms of the policy of the insurance, it was held therein that unless the insured himself committed breach of any of the terms of the policy, the insurer could not avoid the liability.

18. In United India Insurance''s case, it was held that the breach of contract on the part of the owner of the vehicle would not absolve the insurer of the liability towards third parties and that in such cases, the insurer, after satisfying the award, could proceed against the insured, if there is a breach of contract on the part of the insured.

19. Assailing the said finding, the learned counsel for the appellant contended that the fact that the vehicle was allowed to be driven by a person not holding a valid driving licence, will amount to breach of contract, which will totally exonerate the insurer from reimbursing the insured. In support of his contention, the learned counsel for the appellant relied on the judgment of the Hon''ble

Supreme Court in Bhuwan Singh Vs. Oriental Insurance Company Ltd. and Another, and a judgment of a Division Bench of the Karnataka High Court in The Oriental Insurance Co., Ltd., Vs. Sri K.C. Subramanyam and Sri J.M. Nagaraj .

20. With great respect, I am of the view that none of the judgments are relevant for deciding the issue involved in this case. In Bhuwan Singh''s case, a driver, who caused the accident was holding a Learner''s Licence, which expired 16 days prior to the date of accident and the application for getting regular licence was submitted on the 17th day after the accident. Under the said circumstances, it was held that the Learner''s Licence, which was issued for a limited period had expired long before the accident and regular licence was obtained long after the accident and therefore on the date of accident, the driver did not possess a valid driving licence. There was no dispute in the said case that the said driver had been allowed by the owner of the vehicle to drive the vehicle. Under the said circumstances alone, the Hon''ble Supreme Court held that the insurer was not liable to reimburse the insured, as there was a breach of a condition of the contract of insurance. The only issue that was decided in the said case was, whether the validity period of 30 days from the expiry of driving licence for renewal shall be applicable in case of Learner''s Licence? It was held therein that the 30 days grace period shall be available only for the renewal of regular licence and it shall not be applicable in case of Learner''s Licence.

21. The judgment of the Division Bench judgment of the Karnataka High Court is also not relevant, because in the case on hand, the liability of the insurer is fixed on the ground that there was no act or omission on the part of the insured, which would amount to breach of condition of the policy of insurance.

22. It is the contention of the respondents that the insured took all steps to ensure that the conditions of the policy were not violated by entrusting the vehicle to a person having valid driving licence. It is also the case of the respondents that without the consent or knowledge of either the owner or the regular driver, Balan took the vehicle and caused the accident and that therefore, there was no violation of the policy condition by the owner of the vehicle either by himself or through his employee. The contesting respondents have also relied on the judgment of a Division Bench of this court in (2) United India Insurance Co. Ltd. Vs. Geetha and Others, . The said judgment has also been referred to in the judgment and award of the Tribunal. However, I am of the considered view that the consideration of the same is not necessary in this case because, it has been held supra, that there was no breach of condition of the contract of insurance on the part of the 5th respondent, as he had not permitted Balan to drive the vehicle. The other judgment referred to in the judgment of the Tribunal, namely Vaidyanatha Pillai Vs. Narasimhan and Others, squarely applies to the case on hand. In the said case the vehicle was driven by the cleaner without the permission of the regular driver. At least in the said case, there was a possibility of holding that the cleaner, who drove the vehicle and caused the accident being an employee of the owner of the vehicle, could have been permitted by the

owner or the driver and thus the owner had directly or through his employee violated the condition of the policy. But, in the case on hand, there is no such connection between the 5th respondent/owner of the vehicle and Balan, the person who drove the vehicle and caused the accident. It has also been contended that the vehicle had been entrusted to the regular driver Purushothaman and even without the consent or knowledge of the said Purushothaman, the vehicle was taken by Balan. As such, the finding of the Tribunal that there was no breach of condition of the contract of insurance on the part of the 5th respondent herein/owner of the vehicle exonerating the insurer from its liability to reimburse the owner, cannot be said to be either infirm or defective warranting interference by this court. The said finding deserves confirmation. Points Nos. 1 and 2 are answered accordingly.

23. The deceased was aged about 72 years. The respondents 1 to 4 herein/ claimants contended that the deceased was running a provision store and was getting a monthly income of Rs. 10,000/- at the time of accident. But, no document was produced to prove that he was having such business. All business income cannot be taken into account, as it shall not be the earning of the deceased. That portion of the income, which could account for his personal contribution of physical labour and supervisory skill shall alone be taken into account. In this regard, the Tribunal chose to take the minimum amount, namely Rs. 3,000/- as the monthly income and assessed the annual income at Rs. 36,000/-. Deducting 1/3rd from it, Rs. 24,000/- was taken as the multiplicand. As he was aged about 72 years, the minimum multiplier 5 was taken by the Tribunal. It is not possible to take a multiplier below ''5''. For loss of consortium and loss of love and affection, a sum of Rs. 5,000/- each alone has been awarded. The deceased did take treatment for three days and only thereafter he succumbed to the injuries. Still for transport expenses and funeral expenses, only a sum of Rs. 5,000/- has been awarded. The said amounts are clearly on the lower side. The respondents 1 to 4/claimants could have even preferred an appeal or a cross objection for enhancement of the compensation, but they have not done so. Though it is a fit case in which enhancement can be ordered, taking into account the fact that the deceased was in the last lap of his life, namely at the age of 72 years and the claimants could not be stated to be solely depending on him and the further fact that they have not chosen to file any appeal or cross objection, this court is not inclined to enhance the compensation amount. At the same time, this court comes to the conclusion that the challenge to the award made in respect of the quantum is quite unjustifiable and unwarranted. So also, the interest awarded @ 7.5% per annum by the Tribunal, is quite reasonable and it does not require any interference by this court. Point No. 3 is answered accordingly. Hence, this court holds that the appeal preferred by the insurance company deserves to be dismissed with cost.

In the result, the award of the Motor Accident Claims Tribunal (Chief Judge, Court of Small Causes) at Chennai dated 25.03.2011 made in M.C.O.P. No. 3032 of 2007 is confirmed and the civil miscellaneous appeal is dismissed with cost, directing the appellant to pay the cost of the appeal to the respondents 1 to 4 herein. Consequently, the connected miscellaneous petition is also dismissed.