

(2018) 11 KAR CK 0007

In the Karnataka High Court

Case No : Miscellaneous First Appeal No. 7203, 8282 of 2013 (MV)

United India Insurance Co.Ltd

APPELLANT

Vs

Sri Rajendra

RESPONDENT

Date of Decision : 23-11-2018

Acts Referred:

Motor Vehicles Act, 1988 — Section 149(2)(a)(i)(a), 66(3)(i)

Citation : (2018) 11 KAR CK 0007

Hon'ble Judges : S. Sunil Dutt Yadav, J

Bench : Single Bench

Advocate : Janardhan Reddy, Prakash M. H

Final Decision : Allowed

Judgement

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1. The appeal M.F.A.No.7203/2013 filed by the insurer assailing the imposition of the liability and the appeal M.F.A.No.8282/2013 filed by the,

claimant seeking enhancement of the compensation ordered by the Tribunal are heard together and disposed of by this common judgment.,

2. The parties herein are referred to by their ranks before the Tribunal for the sake of convenience.,

3. The facts made out in the claim petition are that the claimant who was travelling in the TVS Motor Cycle bearing Registration No.TN-70-B-7362,

met with an accident when the Tractor bearing Registration No.CNR-3355 collided with the petitioner's vehicle and the said Tractor was said to,

have been driven in a rash and negligent manner. The petitioner is stated to have suffered grievous injuries to his head, groin and other parts of the",

body.,

4. It is stated that the petitioner was initially admitted to Balaji Nursing home and later shifted to NIMHANS and then to St.Johns Hospital for further, treatment and has continued to take treatment till date. It is stated that the petitioner was working as a power loom operator and was said to be, drawing a salary of Rs.10,000/- per month. Consequent to the injuries sustained in the accident, the petitioner has been put to great financial loss and a", claim petition as against the insurer of the Tractor and also against the owner of the Tractor had been filed.,

5. The owner of the tractor has remained ex parte before the Tribunal while the insurer has contested the claim petition by filing written, statement/objections on 20.4.2012 and additional written statement/objections on 23.9.2012.,

6. The contentions made out by the insurer which are of relevance as regards the present appeals are that the vehicle of the second respondent was, sought to be falsely implicated in the accident, that there was no policy taken as regards the trailer and hence, there was no liability as regards the", petitioner in terms of the judgment in the case Oriental Insurance Company Vs. D.Laxman and others reported in ILR 2006 KAR 4355, which", mandates that the trailer was also required to be insured. It was also contended that the tractor did not have a valid permit and such a lapse would, exempt liability of the insurer.,

7. The other defences usually taken by the insurer were also raised to the effect that driver of the tractor did not have a valid and effective driving, licence and there has been denial as regards the other factual averments.,

8. After evidence on both sides, the Tribunal has allowed the claim in part awarding compensation and has negatived the defence of the insurer.",

9. Appeal of the appellant-insurer:.,

The insurer has challenged the judgment and award of the Tribunal and has raised the same contentions in the grounds of appeal as were taken in the, written statement/objections filed before the Tribunal. At the time of hearing of the appeal, the insurer has raised the contention that the tractor was", being used for commercial purpose, as the trailer fitted to the tractor was a water tanker, such action resulted in a fundamental breach of the terms of", the policy.,

It is also contended that the owner of the vehicle was not the second

respondent, viz., Krishnappa and in fact, the owner was one Mr.Manjunath.",

As regards the contention that Krishnappa was not the owner and hence, the claim petition was not maintainable, the said contention stands on weak",

footing and is not supported by any material on record. In fact, the insurer has admitted in the affidavit filed on 01.02.2013 at para-3 that policy was",

issued in the name of Krishnappa and that the said Krishnappa was the owner of the vehicle as reflected in the R.C. book as on the date of issuance,

of policy. The averment in the affidavit of RW1 is sufficient to repel the contention of the insurer.,

As regards the contention that the vehicle was being put to commercial use, the said contention is liable to be rejected, as there is no foundation for the",

same in the pleadings of the insurer and such a contention not backed by pleading does not deserve any consideration, even otherwise, there is no",

acceptable evidence placed by the insurer to substantiate the said contention. At the appellate stage, no fresh contention without any foundation in the",

pleading can be permitted to be raised.,

One of the main points urged at the time of arguments was that the tractor and the trailer were required to be insured separately and as the insurance,

policy for the tractor was issued in the name of Krishnappa the second respondent and as no policy was taken as regards the trailer, no liability could",

be fastened on the insurer of the tractor.,

On the other hand, the claimant would contend that the accident admittedly had been caused by the tractor which collided with the rear portion of the",

motorcycle and the said fact is corroborated by the charge sheet which indicates the manner of the accident and hence, it is contended that as long as",

the tractor is insured, the liability would subsist on the insurer of the tractor.",

Both counsels have relied on various judgments in support of their contentions, which are discussed as below.",

Re. non-insuring of the trailer:.,

The insurer has contended that in the absence of the trailer being insured, there would be no liability. In support of the above contention, reliance has",

been placed on the following judgments:-,

(a) Nagamma alias Nagarathna and others Vs. R.Chandramma and Others reported in ILR 2008 KAR 1293 wherein this Court has upheld the finding,

of the Commissioner for Workmen's Compensation declining to affix liability on the insurer in a claim arising on behalf of the workers travelling in, the trailer where the trailer was not insured. This was a case where the loaders were travelling in the trailer which was attached to a tractor and had, met with an accident resulting in casualties and though the tractor was insured, the trailer however was not insured. This is a case, which could be", differentiated on facts in so far as claims were lodged on behalf of the persons travelling in the trailer and it was not a case wherein the tractor had, anything to do with the accident. This Court has stated that it was obvious that liability of the trailer could not be sustained, as the trailer being a", separate vehicle, the liability of its owner would be governed by the policy taken as regards the trailer. The following observations clarify the said", point:

But the third respondent being the insurer of the vehicle is expected to indemnify the owner of the vehicle in respect of claims arising out, of accident of vehicle which is insured under him and not otherwise. In the instant case, the tractor is only insured as such the insurer is expected to", indemnify the owner in respect of claims arising out of accident involving the said tractor, but in a tractor the permitted seating capacity is only one", i.e., the driver alone and nobody else. In the instant case, no claim petition has been filed by the driver of the tractor as such, no claims arise out of the", accident involving the said tractor and thus, there is no liability on the third respondent/insurer to indemnify the owner. As regards trailer is concerned", though trailer bearing no KA-02-834 is insured by the owner of the vehicle, he used trailer bearing no KA-02-T-601, which was not insured with the", third respondent or any other insurer. Therefore, the third respondent is not liable to indemnify the owner of the vehicle in respect of the claims arising", out of involvement of the said trailer. In the instant case, the coolies/claimants were travelling in the trailer which met with the accident and the same", was not insured. Merely because the tractor to which the said trailer was attached was insured with the third respondent, it does not mean that the", third respondent should indemnify the owner in respect of the claims arising out of accident involving the said trailer".

Said judgment supports the contention of the claimant and the law laid down is self-explanatory.,

(b) The Oriental Insurance Co. Ltd. Vs. D.Laxman and Others reported in ILR 2006 KAR 4355.,

This case is a judgment on reference made to answer whether the "insurance company can be made liable to pay the compensation in respect of,

the coolies carried in a vehicle, which is not covered by the insurance policy",

The Court while interpreting the definition of "Motor Vehicle" as referred to under the Motor Vehicles Act, 1988 has concluded that a trailer by",

itself is a motor vehicle and holds that the non-insurance of the trailer independently, though the tractor had been insured, would not make the owner",

of the tractor liable to compensate the claims arising out of injury/death of those travelling in the trailer. This Court has observed as follows:-,

"32. There is no authority for the proposition, that when the vehicle is not insured, the claimant/claimants are not entitled to any amount.",

33. In view of the above, our answer to the issue that we have raised for our consideration is, that for the coolies carried in a trailer which is not",

covered by an insurance policy, the insurance company is not liable to pay any compensation....",

Though while answering the said question raised, the Court has observed that both the tractor and trailer are required to have been insured as a",

precondition for any liability, however, the answer to the question raised is clear and unambiguous and any other observation made is liable to be",

ignored, as the ratio of the case and the law laid down would only be the answer to the question that had been referred. Hence, the judgment rendered",

in the context of liability as regards owner of the trailer merely fortifies the principle that liability as regards accident arising out of use or relatable to,

the trailer requires that the trailer be insured separately which proposition of law is not in dispute. Hence, this judgment also does not come to the aid",

of the insurer.,

The claimant, on the other hand, has relied on the judgment in the case of Noor Baig Vs Syed Anwer @ Anwer Sab and Others reported in ILR 2003",

KAR 3203. The facts were that the tractor had collided against a Luna from behind. The said tractor was attached to a trailer and the contention that,

was taken by the insurer was that there was no liability, as the trailer was not insured. The Court while observing that it was the tractor which had",

collided with the Luna held as under:,

8. From this it is clear that the accident has occurred due to the use of the tractor and not due to the use of the trailer. In the,

circumstances, this Court has to consider whether the insurance company can be exonerated on the ground that the trailer was also attached to the",

tractor which had no policy.,

9. Deceased died on account of the accident caused by the tractor and not by the use of the trailer. No doubt, trailer was attached to the",

tractor, if any portion of the trailer had touched the Luna or the deceased and due to such impact if the deceased had died, then this Court to have",

confirmed the findings of the tribunal in exonerating the insurance company. When no part of the trailer has dashed against the Luna or the deceased",

question of exonerating the liability of the insurance company will not arise at all, since the accident has been occurred in using the tractor and not due",

to the use of the trailer.",

The learned counsel for the claimant has also relied on the judgment of this Court dated 25.06.2018 in the case of Sri Khadar Basha Vs. K.V.,

Lakshmana Gowda and another passed in M.F.A. No. 8948/2009(MV)] wherein, this Court was called upon to consider a similar question as to the",

liability arising out of injuries caused to the claimant consequent to the accident by the tractor. This Court, after considering the judgments on the issue",

has held that the liability of the Tractor which hit the claimant and caused injuries was to be sustained irrespective of non-insuring of the trailer which,

was attached to the tractor.,

The facts of the present case being similar to that of Noor Baig and Khadar Basha (supra), as the tractor had collided with the motorcycle from",

behind and the tractor was insured, liability as regards the claim ought to be satisfied by the insurer of the tractor. In fact, the charge sheet at Ex.P3",

clearly records that the accident occurred due to collision by the tractor with the motorcycle at its rear portion and hence, the liability of the tractor",

cannot be exempted. The said fact of nature of collision has been corroborated by the evidence of PW.1 and the suggestions made by the insurer in,

the cross-examination does not contradict the version of collision from behind. The admissions made in cross-examination of RW.1 also corroborates,

with the version of the claimant as regards the collision. RW.1 has stated as follows:

It is true to say that according to the prosecution papers there is mention (sic) that the driver of the tractor was driven hit (sic) in a high speed in a, rash and negligent manner came from back side of the TVS and dashed to the back side of the TVS and caused damages. It is true to say that, neither the trailer nor tanker attached to the tractor dashed to the TVS. It is clear that where the accident has been caused by the tractor and the tractor has been separately insured, the liability could be fastened on the", owner of the tractor, despite the trailer which was appended to the tractor not being insured.",

Re. Use of Tractor for commercial purpose:,

It is only for the first time in the appeal, a contention is taken that the insurer was not liable, as the tractor was attached to a water tanker and the", vehicle that is tractor-trailer was being used for commercial purpose. However, there is no pleading in the statement of objections as regards", unauthorized use nor is there any statement made in the evidence adduced by the insurer as regards this unauthorised use. No suggestion was put, forward during the cross-examination of the claimant as regards these aspects. The claimant has contended that the burden was on the insurer to, establish such unauthorised use and the defence could not be taken up for the first time in the appeal proceedings.,

The claimant has relied on the judgment in the case of Fahim Ahmad and others Vs. United India Insurance Company Limited and others reported in,

(2014) 14 SCC 148. The Apex Court considering a case where the insurer had alleged that the trolley that was attached to the tractor was carrying, sand for the purpose of construction of an underground tank near the farm land for irrigation purposes, the Court has held as follows:",

5. However, merely because it was carrying sand would not mean that the tractor was being used for commercial purpose and consequently", there was a breach of condition of the policy on the part of the insured. There is nothing on record to show that the tractor was being used for the, commercial purpose(s) or purpose(s) other than agriculture purpose(s) that is for hire or reward, as contemplated under Section 149 (2)(a)(i)(a) of the", said Act.,

6. In our opinion, it was mandatory for respondent No.1 insurance company not only to plead the said breach, but also substantiate the same by",

adducing positive evidence in respect of the same. In the absence of any such evidence, it cannot be presumed that there was breach of the conditions",
of policyâ?|.â??,

The claimant has also relied on the judgment in the case of Khadar Basha (supra) wherein this Court while dealing with the contention of the insurer, seeking exemption from liability while contending that the trailer attached to the tractor was carrying the water for commercial purpose, this Court",
following the observation in Fahim Ahmadâ??s case (supra) and referring to the observations in paras 5 and 6 of the same judgment, rejected the",
contentions of the insurer that there was breach of terms of the policy disentitling fastening of liability on the insurer as a result of unauthorised use. In, the present case, the said contention is not based on any pleading in the written statement/objection or the additional written statement/objections, there",
was no suggestion put to PW.1 in cross-examination as regards such a defence nor has RW.1 contended in his examination-in-chief as regards illegal,
use. It is only for the first time that in the appeal memorandum, such a defence has been raised. In view of the law laid down in the above mentioned",
judgment, it is clear that the insurer has failed to discharge the burden of proving the defence and such a defence without any foundation by way of",
pleadings cannot be accepted. Further, it is to be noted that there was no issue framed by the Tribunal as regards this aspect.",

Re.Permit,

Though the insurer has contended in the pleadings that the tractor had no permit, in the cross- examination of R.W.1 (Assistant Manager of",
M/s.United India Insurance Co. Ltd.), the following answer pre-empts any further examination:",

â??The unladen weight of tractor is about 1470 kgs. It is true to say that which vehicles unladen weight will be (sic) below 3000 kgs to such,
vehicles permits are not requires. It is true to say that offending tractor is also not required (sic) permit...â??,

The findings of the Tribunal that weight of the vehicle is less than 3000 kilograms cannot be interfered with in the absence of any other evidence by,
the insurer to show that the gross weight of the vehicle exceeded 3000 kilograms. As only vehicles with weight in excess of 3000 kilograms require a,
permit under Section 66(3)(i) of the Motor Vehicles Act, 1988, in the facts of the

present case, it cannot be held that the vehicle required permit. The",
insurer has also not taken any steps to discharge the burden of proving its contention as regards requirement of permit to the vehicle in question.,
Hence, no case is made out to interfere with the finding of the Tribunal on this aspect.",

10. Re. appeal by the claimant for enhancement: The claimant has filed M.F.A.No.8282/2013 seeking for enhancement. The claimant has averred,

before the Tribunal that he had sustained grievous injuries and had suffered fracture to D12 vertebra with chord compression and had been diagnosed,

on clinical examination with paraplegia. It has also been averred that he had sustained grievous injuries to his Groin as a result of which lower limbs of,

his body was paralysed and has made him immobile. The claimant had stated that as a result of injury he had suffered disability in so far as he could,

not move, could not walk and was always dependent on an attendant. The claimant has asserted that due to the disability arising out of the injuries, he",

was not in a position to work and that he lost his job. In support of the nature of injuries sustained, he has relied on the wound certificate Ex.P.6 and",

other medical records including the discharge summary-Ex.P7 of St. John's Hospital. The doctor, who was examined as PW.2 has stated that",

"patient underwent D-11 and L1 stabilisation with Trans Pedicular screws and rods and implant augmentation by Intertransverse bone graft and D-,

12 Laminectomy on 10.11.2011. Post operatively patient was rehabilitated with physiotherapy, wheel chair ambulance, clean intermittent self",

catheterization for draining urine and other necessary rehabilitation." As on the date of filing of his affidavit, the Doctor has observed as follows:",

"I have personally examined the patient on 8.7.2012 who continues to have complete Spinal Chord Dysfunction below L1 level. Grade 0 power in,

both lower limbs.,

Which is a 100% disability for the lower limbs according to DGHS guidelines.",

Nothing substantial has been elicited during cross-examination so as to water down the doctor's evidence, which is self explanatory as regards to",

the nature of disability. The Tribunal however has assessed the disability at 33% and calculated the compensation as regards loss of future income of,

Rs.3,16,800/-. The appellant has contended that he has suffered 100% disability as per the report of the doctor and this disability is to be taken as",

100% as regards the functional disability. The claimant contends that as regards the consideration while assessing damages there is an observation in, the case of Ward Vs. James reported in (1965) 1 ALL E.R. 563 which ought to weigh in the mind and relies on the following extract:,

“You can compensate him for his loss of earnings during that time, and for the cost of treatment, nursing and attendants. But how can you, compensate him for being rendered a helpless invalid? He may, owing to grave injury be rendered unconscious for the rest of his days, or, owing to a, back injury be unable to rise from his bed. He has lost everything that makes life worth while. Money is no good to him. Yet judges and juries have to, do the best they can and give him what they think is fair. No wonder they find it nigh insoluble. They are being asked to calculate the incalculable. The, figure is bound to be for the most part a conventional sum. The judges have worked out a pattern, and they keep it in line with the changes in the value”, of money?”

The petitioner-claimant has rightly contended that what needs to be taken note of is the effect of personal disability on the earning capacity of the, injured and considering the nature of disability and taking note of the fact that the petitioner was working in a power loom, as an operator, there would”, be total functional disability. Petitioner has relied on the case of Raj Kumar Vs. Ajay Kumar and others reported in (2011) 1 SCC 343 and in particular, to the observation at paras 11 and 13 which are extracted herein below:,

“11. What requires to be assessed by the Tribunal is the effect of the permanent disability on the earning capacity of the injured; and after, assessing the loss of earning capacity in terms of a percentage of the income, it has to be quantified in terms of money, to arrive at the future loss of”, earnings (by applying the standard multiplier method used to determine loss of dependency). We may however note that in some cases, on”, appreciation of evidence and assessment, the Tribunal may find that the percentage of loss of earning capacity as a result of the permanent disability”, is approximately the same as the percentage of permanent disability in which case, of course, the Tribunal will adopt the said percentage for”, determination of compensation.,

13. Ascertainment of the effect of the permanent disability on the actual earning capacity involves three steps. The Tribunal has to first ascertain what,

activities the claimant could carry on in spite of the permanent disability and what he could not do as a result of the permanent disability (this is also, relevant for awarding compensation under the head of loss of amenities of life). The second step is to ascertain his avocation, profession and nature of", work before the accident, as also his age. The third step is to find out whether (i) the claimant is totally disabled from earning any kind of livelihood, or",

Particulars,"Amount

(in `)

Loss of future income

(13,44,000 â€" (minus) 3,16,800)", "10,27,200

Attendant Charges, Food and

Nourishment

[1,00,000 â€" (minus) 15,000]", "85,000

Pe`rmanent disability

[50,000 â€" (minus) 5000]", "45,000

Total,"11,57,200