The Oriental Insurance Co. Ltd. Vs N.S. Devaraja and Others

Court: Karnataka High Court

Date of Decision: Nov. 20, 1996

Acts Referred: Evidence Act, 1872 â€" Section 11
Motor Vehicles Act, 1939 â€" Section 110 D

Citation: (1998) 2 ACC 338 : (1997) ILR (Kar) 1061

Hon'ble Judges: Hari Nath Tilhari, J

Bench: Single Bench

Advocate: H.G. Ramesh, for the Appellant; S.M. Nagendra Rao, for R-3, for the Respondent

Final Decision: Allowed

Judgement

Harinath Tilhari, J.
This appeal u/s 110-D of the Motor Vehicles Act, 1939 has been preferred by the Insurance Company, while Appeal

No. 756/ 92 has been preferred by the owner and rider of the motor cycle.

2. Learned Counsel appearing for the appellant in M.V.C.No.756/ 92 Sri Lingappa G., submitted and had stated in writing in the order sheet of

that appeal, that in the best interest of his client, the appeal is not pressed and as such he submitted that the appeal may be dismissed as not

pressed and as such that appeal No. 756/92 has been dismissed by separate order, the present appeal No. 420/92 which arises from the same

judgment of motor accident Claims Tribunal, Shimoga dated 13th September, 1991 in M.V.C.No. 77/87, raises one and the sole question for

determination by this Court, namely whether the Tribunal was justified and did it act according to law in holding and ordering in its award that the

compensation awarded to the claimant shall be payable by respondents 1 to 3 jointly and severally, with interest at 6 per cent from the date of

petition till the date of payment.

3. The facts for the purpose of the case are that on 11.2.1983, the claimant Kempamma and her brother Siddaramegowda with their Maternal

uncle Honnagangappa were travelling in K.S.R.T.C. Bus from Bhadravathi to Machenahalli. At 1.30 p.m. the bus reached Machenahalli and they

got down from the bus. After that the bus proceeded towards Shimoga. Honnagangappa was on the left side of the road and Kempamma was

holding her brother - one year old child, who was standing on the foot path. At that time all of a sudden a motorcycle bearing Registration No.

MEW-2005, belonging to respondent No. 1 and driven by respondent No. 2 came in a rash and negligent manner from the opposite direction and

dashed against petitioner Kempamma and caused injuries to Kempamma as well as to the child Siddaramegowda. Both of them fell down and

Siddaramegowda had died. The claimant asserted that she got injuries in her chin and left leg and was admitted to Mc.Gann Hospital, Shimoga for

treatment and was an inpatient therein for one month 15 days. The claimant further asserted in the claim petition that the claimant underwent

operation in the Hospital and there was a permanent scar on her chin and so claimed compensation to the tune of Rs. 11,000/-.

4. The claim was contested by third respondent in the claim petition that is the present appellant - the Oriental Insurance Co., The present

appellant that is the third respondent in the claim petition denied the averments that has been made in the claim petition. Third respondent in the

claim petition that is the present appellant in its statement of objections averred and stated that the vehicle was not covered with insurance on the

date of occurrence or incidence and therefore it denied its liability to pay any amount and asserted that third respondent has not been liable to pay

any amount. The copy of respondent No. 3"s objection to the claim petition is on the record of the Trial Court. It appears therefrom that plea of

limitation was also raised. There appears to be a counter of respondent No. 3. In that in para-4, it has been very dearly stated by respondent No.

3 that is the present appellant as under-

This respondent has been made an un-necessary party in this case. This respondent has not issued any Insurance cover to this vehicle. Hence, it is

prayed this Hon"ble Court may be pleased to dismiss the above petition against this respondent.

5. In paragraph-5 it has been further stated that without prejudice to the above contentions, the liability if any is established, it is further subject to

the terms, conditions, stipulations and exceptions stipulated in the Insurance Policy.

6. From the perusal of the record it appears that no written statement or written objections was filed by respondents 1 and 2 that is the owner and

rider of the motorcycle.

7. On the basis of the pleadings of the parties, the Tribunal framed the following issues:-

1. Whether the petitioner proves that the accident in question is the result of rashness and negligence on the part of the driver of the vehicle in

question?

2. Whether the petitioner is entitled to any compensation, and if so, to what amount and from which of the Respondents?

3. What order?

4. Whether the petitioner has shown sufficient cause to condone the delay?

8. On behalf of the claimant petitioner 4 witnesses had been examined as P.Ws., 1 to 4 and 3 documents were filed, which were marked as

Exhibits P1 to P3. Respondent did not choose to examine any witness. The Tribunal held that sufficient cause has been shown for condonation of

delay and the delay has been condoned by the Tribunal. The Tribunal has further held that the accident in question was on account of the rash and

negligent driving of the driver. It has also held that in another case M.V.C.No. 30/83, that the finding has been recorded and as the occurrence is

the same, the finding recorded in that case also material and binding and so held that the incident was the result of rash and negligent driving of the

motorcycle. A total sum of Rs. 10,000/- has been awarded as compensation. The bifurcation which appears from the judgment is that a sum of Rs.

1,000/- towards medical expenses as claimed in the petition was allowed. In the earlier part of the judgment, the Judge has taken note that the

permanent scar left behind on the face of the girl and she being of marriageable age and this scar will reflect on her entire life, the Judge considered

it proper to award compensation for this scar and he awarded Rs. 4,000/-, though it appears by mistake he instead of using the expression "for

injury and scar", used the expression "medical expenses" and it should be read as Rs. 4,000/-has been awarded for injury and the scar on the

face, which is a permanent disability on her face particularly on the face of an young girl of a marriageable age. The Court Tribunal also awarded

Rs. 5,000/- for pain and suffering and thus the Court totally granted Rs. 10,000/ - as compensation and thereafter the operative portion of the

order has been passed awarding Rs. 10,000/- as compensation with interest at 6 per cent till its payment and in the operative portion the Tribunal

says it shall be payable by the three respondent jointly and severally.

9. The Learned Counsel for the appellant in this appeal Sri H.G. Ramesh contended that in his objection and the counter which is at page-15 on

the record of the Tribunal, in para-4 it has been very, clearly asserted that respondent has been unnecessarily made party in the case and

respondent No. 3 had not issued any insurance cover to this vehicle, hence the claim against respondent No. 3 may be dismissed. But the Tribunal

has not applied its mind to this aspect of the matter and has not decided this count as to whether the vehicle was insured one or not as on the date

of the accident. Learned Counsel for the appellant also tried to invite my attention to Exh.P1 which is the judgment given by the then District and

Sessions Judge, who was the Member of the Motor Accidents Claims Sri N.D.V. Bhat and pointed out that in that case it has been found that

vehicle that is the motor cycle was not insured one. Learned Counsel for the appellant submitted that the case also related to this very accident or

occurrence, which occurred on 11.2.83, in this, claimant of this claim petition being the injured, was, earlier made a party, though later on she

withdrew that application with a prayer that she may be allowed to file a separate claim petition and thereafter M.V.C.No. 77/87 was filed.

Learned Counsel submitted that Exh.P1 itself proves that the vehicle in question was not insured and this finding may be said to be prejudice and

binding. In alternative applicant''s counsel submitted that the burden of proving that the vehicle in question was insured one, did lay on the claimant

as well as on the owner of the vehicle. When the third respondent insurance company has denied that the vehicle was not insured one and that

there was no responsibility on respondent No. 3 to pay any compensation and the issue was there covered by issue No. 2, say later part of issue

No. 2, and it was the duty of the Tribunal to decide this question and to hold that insurance company was not liable. As the claimant and the owner

failed to prove that on the date of concurrence or accident, the vehicle in question was not insured one and when the claimant and the owner failed

to discharge the burden, the finding should have been in negative holding that only respondents 1 and 2 that is the owner and the Diver of the

vehicle were only liable to pay. Learned Counsel submitted that as such the Tribunal committed legal error in observing in the operative part of the

order that compensation was payable jointly and severally by respondents 1 to 3 without applying its mind to this pleading and without deciding

this issue.

10. On behalf of the respondents nobody is appeared and no counsel appears to have been engaged. Fortunately enough Sri G. Lingappa is

present, as he had appeared on behalf of these very respondents - owner and the driver in connection with M.V.C. No. 756/ 92, which Sri.

Lingappa after arguing for some time thought that it is in the best interest of his client that appeal No. 756/92 be not pressed, I called upon him,

though in this appeal Sri Lingappa has not been given power to argue, though he has been given power to file an appeal with reference to this

matter, while hearing that appeal, I called upon Sri Lingappa to assist the Court in deciding the appeal and the question involved. Sri Lingappa as

such submitted that firstly Exh.P1 cannot be taken to be admissible piece of evidence for the purpose of establishing the fact that the vehicle was

not insured one. He submitted that Kempamma was not a party in M.V.C.No. 30/83 and as she was not a party, the judgment cannot be said to

be binding or finding cannot be said to be binding on Kempamma and as such the said judgment could not be taken to be relevant for the purpose

of establishing the fact that the vehicle was or was insured, nor any observation should be taken into consideration for that purpose. Learned

Counsel further submitted that the burden was on the insurance company that is the present appellant to have proved the allegations which has

been made in the objection that the vehicle was not insured on that date and that insurance company was not liable to pay and that insurance

company did not produce any evidence to prove the finding cannot be said to be vitiated by error of law.

I have applied my mind to the contentions made by Learned Counsel for the parties. The first question which I put to myself is had the parties not

led any evidence in the case what would have been the consequence that may indicate the burden of proof. If none of the parties would have led

the evidence to prove the case, the claim would have had to be dismissed. If the claimant wanted a decree against all the respondents'' that is the

owner as well as the insurance company, then firstly the burden was on the claimant to prove that the vehicle in question was insured, then he could

have got a decree against respondent-No.3. If the claimant would have failed to prove, but has established the occurrence and succeeds in proving

the negligence of the driver of the vehicle and causing injury because of rash and negligent driving, then the claimant may be entitled to get

compensation and decree for compensation against the owner of the vehicle, and against the driver of the vehicle, but if the owner of the vehicle

denies and wants that for whatever he has to pay, he has got to be indemnified or whatever liability is fastened on him should be borne by the

insurance company, then the burden apart from on being the claimant, the burden did lay on the owner of the vehicle to have produced the

evidence and the fact that the vehicle in question was insured one and was covered by the insurance policy on the date of the incidence or

occurrence.

11. When I so observe, with reference to the doctrine of burden of proof, I find support from the Division Bench Decision of this Court in NEW

INDIA ASSURANCE COMPANY LTD., v. NARAYAN BALAJI KULKARNI AND ORS *MFA No. 282/1983 dt. 11.1.1990 decided on

11th January 1990 by Division Bench consisting of Hon''ble Mr. Justice M. Rama Jois and Hon''ble Mr. Justice S.R. Rajasekhara Murthy. In that

case, the Tribunal had observed as under:

Although respondent No. 3 contended in the objection statement that the vehicle is not insured with the company, that contention does not appear

to have been pursued during the enquiry because no questions are put to the petitioner in that regard much less none on behalf of the respondents

has entered the witness box to deny that the vehicle is not insured. Therefore, the respondent No. 3 is liable to reimburse the respondent No. 2

regarding the payment of compensation.

12. The Division Bench disapproved such an approach of the Tribunal in that case and it observed as under:

In our opinion the approach made by the Tribunal is totally erroneous. The Insurance Company cannot be expected to prove the negative. When

the Insurance Company stated in its objection statement that the vehicle was not insured with the Insurance Company, the burden of proving that

the vehicle was insured with the appellant insurance company lay either on the petitioner- claimant or on the owner of the vehicle. If really the

insurance policy was in existence nothing prevented the owner of the vehicle to"" produce a copy of the insurance policy. It was also open for the

petitioner to secure information from the Motor Vehicles Department as to whether the vehicle had been insured and placed it before the Tribunal.

In the absence of any such evidence adduced either on behalf of the claimant-petitioner or on behalf of the owner of the vehicle, the Tribunal

should have proceeded on the basis that the plea taken by the insurance company in the objections statement was correct.

13. These observations and the principles laid down by the Division Bench in this above M.F.A.No. 282/83, are complete reply to the contention

made by Sri G. Lingappa in this regard.

14. In the present case a plea had been taken in the counter or statement of objection at paper No. 15 of the record and insurance company

asserted that the vehicle in question was not insured and therefore it has been wrongly impleaded, that it was not liable to anything and therefore

claim against it deserve to dismissed. The insurance policy has not been filed. Neither the claimant nor the owner of the vehicle did come in witness

box to state that the vehicle was insured one on the date of occurrence with insurance policy Number such and such and he could not explain

where was the policy on that date when the evidence was being recorded. As the burden did lay on the claimant as well as on the owner of the

vehicle to have proved that the vehicle was insured one on the date of accident, the Tribunal should have applied its mind to this aspect and should

have recorded a finding on the question when it had to consider the question by whom the compensation is payable and when it was going to

observe in the operative part of the order as if it was joint and several liability of respondents 1 to 3 in the claim petition that is of the present

appellant and respondents 1 and 2. The Hon''ble Member of the Tribunal failed to apply its mind to that aspect of issue No. 2, when the Tribunal

recorded its finding that the claimant petitioner was entitled to total sum of compensation to the tune of Rs. 10,000/- really it ought to have at that

place discussed this question and decided this question, because issue No. 2 in itself included this material question in view of this part of issue

''that if so to what amount and from which of the respondents''. I may take it that as the issue was framed in the compound language by the

Member of the Tribunal, it escaped notice of the member of the Tribunal, to record a finding on the latter part of issue No. 2 as to by and from

which of the respondents, the petitioner was entitled to compensation. Therefore it is proper to invite the attention of the members of the Tribunal,

keeping in view that they are the persons the stature and standing of District Judge or Civil Judge and that Order-14 Rule(3) provides that each

material proposition affirmed by one party and denied by the other shall form the subject of a distinct issue. In the present case, the claimant made

the claim for compensation against respondents 1, 2 and 3, therefore, distinct and dear cut issue should have been made separately as to whether

petitioner is entitled to get compensation from all the respondents 1 to 3 joint or not or the issue should have been - whether the petitioner-claimant

is entitled to get the claim decreed against the insurance company partly, whether insurance company has denied its liability or issue could have

been whether the vehicle has been insured one as asserted by respondent No. 3 and if not its effect. In issue No. 3, no doubt this issue was

included as part of that issue, but this issue has not been decided. The finding of the Tribunal that respondents 1 to 3 are jointly and severally

responsible, as such appears to be erroneous in law and it suffers from legal error in exercise of jurisdiction. As the claimant has failed to prove that

vehicle was insured on that date, he cannot claim to be entitled to get the claim decreed against respondent No. 3 no doubt this claim could be

decreed and award could be passed against respondents 1 and 2 the owner and rider of the vehicle. The respondents have also not adduced any

evidence nor have produced any material before this Court. It cannot be urged on behalf of respondents 1 and 2 that the policy was not available.

In view of the provisions of Section 11 of the Evidence Act, which provides, facts not otherwise relevant may become relevant - if they are

inconsistent with any fact in issue or relevant fact; or if by themselves or in connection with other facts they make the existence or non-existence of

any fact in issue or relevant fact highly probable or improbable. Then those facts may be said to be relevant facts. The fact that in M.V.C. No.

30/83 in which this very vehicle was involved and in which Kempamma was also a party originally, later on withdrawn from that case. The

insurance policy was filed as Exh.D-1. The Tribunal in case No. 30/ 83 had the occasion to see and to have a glance of that document and in

para-16 of that judgment, it has dearly observed:-

In this context, Exh.D-1, the Insurance cover-note would throw some light. It would go to show that the vehicle bearing registration No. MEW-

2005 was insured with the Oriental Fire and General Insurance Company, i.e., respondent No. 3, It is further seen that the insurance was there

only from 14.2.1983 to 13.2.1984. It is, therefore, clear that there was no insurance on the date of the accident which took place on 11.2.1983.

15. This judgment may be taken to consideration because it is relevant to throw light about the existence of relevant fact and it shows that the

vehicle was covered by insurance, but not on the date of occurrence. The insurance covering the vehicle was covering it for the period from

14.2.1983 to 13.2.1984 and so far as 11.2.83 is concerned that document did not show that it was covered on that date. Apart from this

document in this case, the claimant as well as the owner of the vehicle on whom the burden to lay any order to claim any relief against respondent

No. 3, that is the present appellant insurance company, by way of award against respondent No. 3 or by way of claim being indemnified for the

amount which the owner of the vehicle may pay as, damages to the claimant to prove that the vehicle in question on the date of occurrence or

incident was insured, has not been discharged and they failed to establish it.

This being the position, in my opinion, an appeal filed by the appellant deserves to be allowed and the order of the Tribunal or award of the

Tribunal is partly modified. It is modified as under:-

That the award drawn for Rs. 10,000/- shall be payable by respondents 1 and 2, jointly and severally with interest at the rate of 6 per cent per

annum from the date of petition till payment and the petitioner will be entitled to costs as well against respondents 1 and 2 in the claim petition that

is against respondents 1 and 2 in the appeal. Respondents No. 3 is entitled to get and realise the amount under the award from respondents 1 and

2 only and not from the present appellant that is insurance company who was respondent No. 3 in the claim petition. The appeal as such is hereby

allowed. Costs made easy.