(2009) 10 MAD CK 0135

Madras High Court

Case No: C.M.A. No. 1191 of 2005, C.M.P. No. 6619 of 2005 and C.V.M.P. No. 15932 of 2005

New India Assurance Company Limited, Motor Third Party Claims Cell		APPELLANT
	Vs	
V.S. Saiprabhu, P. Ramanathan and Tamil Nadu State Transport Corporation		RESPONDENT

Date of Decision: Oct. 15, 2009

Acts Referred:

- Contract Act, 1872 - Section 2
- Insurance Act, 1938 - Section 64VB
- Motor Accidents Claims Tribunal Rules - Rule 3
- Motor Vehicles Act, 1939 - Section 166, 95(1)
- Motor Vehicles Act, 1988 - Section 147(1), 147(5), 149(1), 163A

Citation: (2009) 10 MAD CK 0135

Hon'ble Judges: C.S. Karnan, J

Bench: Single Bench

Advocate: G. Muniratnam, for the Appellant;

Judgement

C.S. Karnan, J.

This civil miscellaneous appeal has been filed by the appellant/second respondent against the judgment and decree dated 13.10.2004 made in MCOP No. 4622 of 2000 on the file of Motor Accident Claims Tribunal (Small Causes Court, Chief Judge), Chennai awarding a compensation of Rs. 1,00,000/- with interest at the rate of 9% from the date of petition i.e. 01.11.2000 till date of decree on 13.10.2004.

2. Aggrieved by the above order, the second respondent/New India Assurance Company Limited, has filed the above appeal praying to set aside the order.

3. The short facts of the case are as follows;

The deceased S. Karan, is the minor son of the petitioner herein and was aged about 2 1/2 years on the date of road accident. The deceased was travelling in the minibus bearing registration No. TN-63-Y-9218 from Chennai to Karaikudi along with his parents. On 14.08.2000, at about 6.20 a.m. the mini bus was proceeding in Trichy to Pudukottai Main road next to Keeranur near Sathyamangalam Village and the mini bus was proceeding in Trichy to Pudukottai main road next to Keeranur near Sathyamangalam Village and the mini bus was driven in high speed in a rash and negligent manner from west to east direction. At the same time, the driver of the bus bearing registration No. TN-63-N-0332 drove the vehicle from the opposite direction at a very high speed in a rash and negligent manner and both the vehicles collided with each other and the minor son of the petitioner died in the accident. The driver of both the vehicles are responsible for the accident. First information Report in Cr. No. 357 of 2000 was registered with the Annavasal police station and investigated. The first respondent is the owner of the mini bus and the second respondent is the insurer. The fourth respondent, Tamil Nadu State Transport Corporation, Pudukkotai Division, is the owner of the bus. The petitioner is the only legal representative of the deceased. The petitioner claimed a total compensation of Rs. 2,00,000/- u/s 166 of Motor Vehicles Act and Rule 3 of MACT Rules from the respondents.

4. The first respondent remained exparte.

5. The second respondent has submitted a counter statement and resisted the above claim stating that the mini bus bearing registration No. TN-63-Y-9218 was not insured with the second respondent. The first respondent, owner of the bus tendered a cheque bearing No. 050185 dated 19.03.2000 on Central Bank of India, Trichy for Rs. 11,145/- towards the premium for covering the above vehicle for the period from 20.03.2000 to 19.03.2001. Subject to the realisation of the above cheque, the second respondent issued a policy bearing No. 31/720701/22006 for the above period. The cheque was sent for collection and it was returned on 23.03.2000 for the reason of ''insufficient funds''. A debit advice dated 24.03.2000 was received, confirming the dishonour of cheque. Accordingly the second respondent advised the first respondent by registered letter dated 04.04.2000 that the cheque was dishonoured and the insurance company is not on risk in respect of the above policy in the absence of valid payment of premium. The fact of dishonour of cheque and subsequent cancellation of policy was also intimated to the Regional Transport Authority, Trichy on 04.04.2000 by registered post and further informed that the first respondent has not returned the original policy of insurance. A copy of the above letter was also sent to the first respondent to return the original records, but the first respondent has not returned the original policy. The policy was cancelled on 04.04.2000, after due notice as per law. On the date of accident, there was no valid

insurance for the above vehicle and the second respondent is not liable to pay compensation. The accident happened on 14.08.2000, subsequent to the termination of the insurance policy. Without prejudice to the above objections, the driving licence of the driver of the vehicle and permit are also denied. The petitioner shall prove that the driver was having valid driving licence. The nature of injuries, period of treatment are also denied. The compensation claimed by the petitioner is highly excessive.

6. The third respondent in his counter has resisted the claim stating that the bus bearing registration No. TN-63-N-0332 does not belong to the third respondent. The third respondent is an unnecessary party and hence has prayed for dismissal of petition as against them.

7. The fourth respondent, i.e. the Tamil Nadu State Transport Corporation Limited, represented by its Managing Director, Pudukottai, (amended as per order in M.P. No. 7326 of 2003, dated 06.01.2004), in his counter has resisted the claim stating that the manner of accident as mentioned in the petition is denied. At the time of the accident, the driver of the bus drove the vehicle from Pudukottai to Keeranur in proper manner with minimum speed, observing traffic rules. At about 6.30 a.m. near Sathyamangalam, the driver of the Van bearing registration No. TN-63-Y-9218 drove the van in a rash and negligent manner, from the opposite direction. The driver of the van slow down the bus and turned extreme left side and stopped the bus. Since the van was proceeding with high speed, it dashed against the bus and caused the accident. The van driver alone is responsible for the accident. First information report was also registered against the Van driver only. The fourth respondent is only a formal party for proper adjudication. The first and second respondents are alone liable to pay the compensation. The Compensation claimed by the petitioner is highly excessive.

8. The Motor Accident Claims Tribunal framed four issued namely, 1) Whether the accident happened due to the rash and negligent driving of the driver of the minibus bearing registration No. TN-63-Y-9218? 2) Whether the second respondent is liable to pay compensation? 3) Whether the petitioner is entitled for compensation as claimed for 4) To what relief?

9. In the trial, the minor petitioner''s father, V.S. Sai Prabhu, was examined as PW1 and marked Ex.P1 to Ex.P18. The first respondent remained exparte. The second respondent examined as RW2 and marked exhibits R1 to R8. The third respondent is an unnecessary party. The fourth respondent examined as RW1. As per evidence of PW1, the accident happened on 14.08.2000 at about 06.20. a.m. while he along with other family members were travelling in the mini bus from Chennai to Karaikudi and was proceeding on the Trichy to Pudukkottai main road near Sathyamangalam Village, the driver of the bus belonging to the fourth respondent proceeded from the opposite direction and dashed against the mini bus and caused the accident. PW1 deposed that the accident happened due to the rash and negligent driving of the driver of the bus bearing registration No. TN-63-N-0332.

10. The driver of the bus examined as RW1. As per the evidence of RW1, he was driving the above bus from Pudukkottai to Keeranur. Near the place of accident, the driver of the mini bus drove the vehicle with high speed in a rash and negligent manner from the opposite direction. RW1 proceeded to the mud road and stopped the vehicle. The mini bus dashed against the bus and caused the accident. He witnessed the van at a distance of 50 feet. As per his evidence, the accident happened only due to the rash and negligent driving of the van (mini bus). First information report was registered against the driver of the mini bus and no criminal proceedings were initiated against RW1. In the cross examination, he has stated that he drove the bus at the speed of 20 km per hour and in the mud road, there was no sufficient space to further proceed to the left end. In the cross-examination, he has also deposed that the accident happened in the national highway, which is a straight road. He has also deposed that two heavy vehicles can proceed at a time in the above road.

11. As per evidence of PW1, the driver of the mini bus also died in the accident. Ex.P1-first information report was registered without any delay and in the report, PW1 has stated that the van (mini bus) was proceeding with speed and dashed against the bus, which was proceeding in the opposite direction. The front right side of the bus dashed against the right front of the mini bus and due to the heavy impact, the mini bus capsized on the eastern side of the road. The first information report is the first information given by PW1, himself, immediately after the accident. In the first information report, PW1 has not stated that the driver of the bus bearing registration No. TN-63-N-0332 drove the vehicle in a rash and negligent manner. The allegation is made only against the driver of the mini bus. Further, no criminal proceedings were initiated against the driver of the bus bearing registration No. TN-63-N-0332. In the averments of the claim petition also, it is admitted that the driver of the mini bus drove the vehicle with high speed in a rash and negligent manner. Even though, it is stated that the driver of the bus bearing reregistration No. TN-63-N-0332 also drove the vehicle with high speed in a rash and negligent manner, it appears to be an after thought of the claimant. From the averments mentioned in the first information report and also as per Ex.P2 site plan, it is concluded that the accident happened only due to the rash and negligent driving of the driver of the mini bus bearing registration No. TN-63-Y-9218.

12. In the counter filed by the first respondent it is alleged that the mini bus was insured with the second respondent for the period from 20.03.2000 to 19.03.2001 and the first respondent rendered a cheque bearing No. 050185 dated 19.03.2000 for the insurance premium. It is also admitted that the second respondent issued a policy for the above vehicle. It is stated that the second respondent tendered the cheque for collection and it was returned as "insufficient funds" in the account of the first respondent and subsequently the insurance policy was duly cancelled.

13. The learned Counsel for the claimant argued that the above policy was not duly cancelled as per law and as such it is not binding on the claimant, who is the third party. The second respondent examined RW2, senior assistant of the second respondent"s

insurance company who also stated that the mini bus was insured by the first respondent with the second respondent for a period from 20.03.2000 to 19.03.2001 and the premium was paid by cheque dated 20.03.2000. It was tendered for collection. But the cheque was returned, since there was insufficient funds in the account of the first respondent. In support of his evidence, RW1 produced Exs.R1 to Exs.R8. Ex.R1 is the insurance policy in favour of the mini bus which was involved in the accident. Ex.R2 is the cheque bearing No. 050185 dated 20.03.2000 tendered by the first respondent for Rs. 11,145/- in favour of the second respondent. As per Ex.R3, the above cheque was returned as unpaid due to insufficient funds in the account of the first respondent. Ex.R4 is the debit advice given by the bank. Ex.R5 is the copy of the letter forwarded to the first respondent regarding the dishonour of cheque. The above letter is dated 04.04.2000. In the above letter, the second respondent has stated that the cheque was returned as dishonoured and also informed the first respondent to remit the premium amount immediately in cash and they are not on risk in respect of the above policy. In Ex.R5, no time limit is mentioned to pay the premium amount by cash. Ex.R6 is the postal acknowledgment, in which the first respondent has signed dated 08.04.2000.

14. The learned Counsel for the claimant argued that as per Ex.R5, intimation was given to the first respondent to pay the premium amount in cash and it is not an intimation regarding the cancellation of the policy. RW1 also admitted in his evidence that as per procedure, a separate letter should be sent to the insured regarding the cancellation of the policy. In the present case, a separate letter stating that the insurance policy was cancelled due to the non payment of the premium by cash, is not mentioned. RW1 deposed that Ex.R5 is a common letter for the above purpose. But, on a careful perusal of Ex.R5, it is no where stated that subsequent to 04.04.2000, the first respondent failed to pay the premium amount by cash and as such, the insurance policy was cancelled. Similarly, whenever an insurance policy is cancelled, a communication shall be forwarded to the concerned Regional Transport Office. As per Ex.R7, dated 04.04.2000, it is addressed to the Regional Transport Officer, Trichy that the above policy in favour of the first respondent has been cancelled. But in the above letter, date of cancellation is left blank. Ex.R5 and Ex.R7 are dated 04.04.2000. The date of subsequent cancellation of the policy was not duly intimated to the Regional Transport Officer. As per Ex.R8, the postal acknowledgment card addressed to the Regional Transport Officer, the date, seal of the postal department is not found. The second respondent has not summoned the Regional Transport Officer, to prove that the letter of cancellation of policy was received by the Regional Transport Officer. RW1 has admitted in the evidence that there was many correspondence between the second respondent and the Regional Transport Officer. There is no proof that Ex.R8 relates to the alleged cancellation of the insurance policy. Similarly the despatch register of the letter is not produced by the second respondent. RW1 has admitted that the above despatch register is not available in the office of the second respondent.

15. The learned Counsel for the second respondent argued that on the date of accident, there was no valid insurance policy and as such the second respondent is not liable to pay compensation. The learned Counsel for the second respondent relied upon the judgment of the Division Bench of this Court in the case of National Insurance Company Limited represented by its Branch Manager, Pudukottai, v. Selvamani and Ors. in CMA No. 2524 of 2003 and C.R.P. No. 1384 to 1387 of 2003 dated 12.11.2003 (unreported judgment). In the above judgment, their Lordships have held that the insurance company has duly cancelled the policy prior to the date of accident and as such the insurance company was not liable to pay the compensation. In the above case, the appellant/insurance company has proved by positive evidence, that the insurance policy was duly cancelled prior to the date of accident. But in the present case, there is no satisfactory evidence that as per law the second respondent has duly cancelled the policy.

16. The learned Counsel for the claimant relied upon the judgment of the Division Bench of the Honourable Supreme Court reported in Oriental Insurance Co. Ltd. Vs. Inderjit Kaur and Others, . In the above case, the bus met with the accident and policy of insurance was issued by the insurance company. On 30.11.1989. The premium for the policy was paid by cheque. The cheque was dishonoured. A letter stating that it had been dishonoured, was sent by the appellant to the insured on 23.01.1990. The letter claimed that, as the cheque had not been encashed, the premium of the policy has not been received and therefore the appellant was not on risk. The premium was paid in cash on 02.05.1990. In the meantime, the accident took place on 09.04.1990 and the bus colluded with the Truck and caused the accident. In the above case, the appellant/Insurance Company argued that on the date of accident i.e. 09.04.1990 the premium was not paid and as such, there was no contract of insurance between the insurance company and the owner of the vehicle and the insurance company is not liable to pay the compensation. The Division Bench of three judges of the Honourable Supreme Court presided by the Honourable The Chief Justice have held that the insurance company has violated Section 64-VB of the insurance act by issuing the insurance policy on receipt of the cheque. The scope of Section 64-VB of the Insurance Act have been discussed by their Lordships and held that the contract of insurance is only between the insurer and insured and the legal rights of the third parties should not be affected. In the above case it has been held that the appellant/Insurance Company was liable to pay the compensation to the claimants/third parties. It has been held as follows;:

It must also be noted that it was the appellant itself, who was responsible for its predicament. It had issued the policy of insurance upon receipt only of a cheque towards the premium in contravention of the provisions of the Section 64-VB of the Insurance Act. The Public interest that a policy of insurance serves must, clearly prevail over the interest of the appellant.

17. The facts of the above case apply to the present case also. The above judgment had been followed by the Supreme Court of India in the case of New India Assurance Co. Ltd.

Vs. Rula and Others, . In the present case also, the second respondent has violated the provisions u/s 64-VB of the Insurance Act and issued the policy by receiving a cheque for premium. Similarly, the above policy was duly cancelled prior to the date of accident. Under such circumstances, the second respondent is held liable to pay compensation to the petitioner/claimant.

18. In the claim petition, the age of the minor deceased is mentioned as 2 1/2 years. As per Ex.P16, legal heirship certificate, the petitioner is the legal representative of the deceased. As per Ex.P4-postmortem certificate, the age of the deceased is 2 1/2 years. The petitioner has claimed a total compensation of Rs. 2,00,000/-. He has claimed Rs. 1,50,000/- for loss of pecuniary benefits. Considering the age of the deceased, it is not possible to asses the future prospects of the deceased and also loss of pecuniary benefits to the claimant. The Division Bench of Honourable High Court of Madras have held in the case reported in 2000 ACJ 1279 (State Express Transport Corporation v. Ponnusamy) that for a deceased girl aged about 3 years, it will be reasonable to award Rs. 1,00,000/- as compensation, including conventional damages. The facts of the above case are similar to the present case. Hence a total award of Rs. 1,00,000/- is awarded including conventional damages.

19. In the result, the award of Rs. 1,00,000/- was passed in favour of the petitioner against the respondents 1 and 2 and the respondents 1 and 2 were directed to deposit the above said award amount with interest at 9% per annum individually and collectively from the date of petition i.e. 11/11/2000 to date of deposit, with proportionate costs, within two months. The petitioner is entitled to receive the entire accrued interest and cost of the award amount at the first instance for family expenses and the remaining amount shall be deposited in any one of the nationalised bank for a period of three years in fixed deposit. Court fee for the award amount is Rs. 372.50. Excess Court fee shall be refunded to the petitioner after the appeal time. The petition against the third and fourth respondent is dismissed without cost. Advocate fees Rs. 5,000/-.

20. The learned Counsel for the appellant/New India Assurance Company Limited has argued that the accident took place, even according to the claimant, due to the rash and negligent driving of both drivers of the vehicle involved in the accident, and that the Tribunal had failed to consider the evidence of PW1 in respect of negligence aspect. The Tribunal had erred in relying on Ex.P1, the first information report and Ex.P2, plan which were marked through the claimant, without examining the author of the documents. Further, the Tribunal had erred in relying upon the evidence of RW1, the driver of the bus, who is an interested witness in shifting liability on the part of the mini bus. The Tribunal had failed to note that the mini bus bearing registration No. TN-63-Y-9218 was not insured with the appellant company. The Tribunal failed to note that the policy was cancelled on 04.04.2000 after due notice as per law. On the date of accident, there was no valid insurance and the appellant is not liable to pay compensation. The accident took place on 14.08.2000, subject to the cancellation of the insurance policy. The Tribunal erred in relying upon the judgments reported in 1998 ACJ 128 (SC) and ACJ 630 (SC)

(cited supra), wherein the insurance company was made liable to pay compensation, whereas the owner did not pay the 7 premium after cancellation of the policy and hence the appellant is not liable to pay the compensation.

21. The learned Counsel appearing for the first respondent has relied on the following judgments;

1) Oriental Insurance Co. Ltd. Vs. Inderjit Kaur and Others, wherein it is stated as follows;

Motor Vehicles Act, 1988, Section 147(5) and 149(1) and Insurance Act, 1938, Section 64-VB-Motor insurance-Policy-Dishonour of cheque - Liability of insurance company-Policy was issued but the cheque towards premium was dishonoured -Insurance company sent a letter to the insured stating that the cheque had not been encashed therefore the insurance company was not at risk-Before the premium was paid in cash the vehicle met with accident resulting in the death of driver of another vehicle-Insurance company denied the liability asserting that u/s 64-VB of the Insurance Act no risk was assumed unless the premium had been received in advance -Tribunal rejected the contention and mulcted the liability on the insurance company-High Court summarily dismissed the appeal of the insurance company-Whether the insurance company is liable for third party risk-Held: yes; despite the bar created by Section 64-VB, the insurance company issued a policy to cover the bus without receiving the premium; by reason of the provisions of Section 147(5) and 149 (1), the insurance company became liable to indemnify third party liability. 1991 ACJ 650 (SC) dose not lay down good law].

2) New India Assurance Co. Ltd. Vs. Rula and Others, wherein it is stated as follows;

Motor Vehicles Act, 1988, Section 147(5) and 149(1), Insurance Act, 1938, Section 64-VB and Contract Act, 1872, Section 2-Motor insurance - Policy- Dishonour of cheque-Liability of insurance company-Policy was issued on 8.11.1991 and cheque towards premium was dishonoured on 16.11.1991-Vehicle met with accident during midnight on 8.11.1991 resulting in death of 3 persons-Insurance company contended that policy represents a contract between insurer and insured for consideration of premium and if premium is not paid, the contract would not be valid as there cannot be any contract without consideration; and u/s 64-VB of Insurance Act, no risk would be assumed unless premium was received in advance -Contract of insurance under Chapter XI of Motor Vehicle Act contemplates a third party who is not a party to the contract but is protected by it-.Whether insurance company is exempted from third party liability if the cheque towards premium is dishonoured and policy is cancelled after accrual of liability-Held; no; payment of premium is not the concern of third party; subsequent cancellation of policy due to dishonour of cheque would not affect the rights of a third party which had accrued on the date of accident. Oriental Insurance Co. Ltd. Vs. Inderjit Kaur and Others, followed.

3. New India Assurance Co. Ltd. Vs. Prabhu Ram and Others, , wherein it is stated as follows;

Motor Vehicle Act, 1939-Section 95(1) [=Motor Vehicle Act, 1988 - Section 147(1)]-Policy of Motor Insurance: Liability of Insurer: Insurance Policy Cancelled on Ground that Cheque Through which Premium Paid, Dishonoured: Rights of Third Party not Affected which Accrued on Issuance of policy on Date of which Accident Took Place.

4. New India Assurance Company Limited Vs. Shamsed and Another, wherein it is stated as follows;

Motor Vehicle Act, 1988, Section 147(5) and 149(1) Insurance Act, 1938, Section 64-VB-Motor insurance-Dishonour of cheque-Third party risk-Liability of insurance company-Cheque given by the insured towards premium was dishonoured and the policy was cancelled-Accident after cancellation of policy-Insurance company denied its liability on the ground that at the time of accident there was no valid insurance-Whether the insurance company is liable for third party risk-Held: yes; rights between the owner and third parties had been crystallised; third parties who are entitled to get benefit out of the policy were not at all affected by dishonour of cheque; insurance company is entitled to realise from the owner the entire amount paid by it.

Motor insurance-Certificate of insurance-Issue of -Dishonour of cheque -Whether insurance company should issue certificate of insurance on receiving a cheque and subsequently cancel the certificate on dishonour of cheque-Held: no; insurance company cannot create uncertainty and indefiniteness in issuing certificate of insurance.

5. 2002(3) TAC 409 (All.) (New India Assurance Co. Ltd. Allahabad v. Raj Bahadur) wherein it is stated as follows;

Motor Vehicles Act, 1988, Section 163-A and Second Schedule-Quantum of compensation -Death of a girl aged 5 years, sustained injuries, and died-Tribunal allowed an award of Rs. 1,50,000/-Whether award of Tribunal is arbitrary-Held-(No)-Second Schedule prescribes a multiplier of 15 for person upto 15 years of age notional income of Rs. 15,000/-p.a. -Calculation of compensation comes to Rs. 2.25,000/- Award of Tribunal upheld.

22. For the foregoing reasons and on consideration of the facts and circumstances of the case and arguments of the learned Counsel for the appellant and citations submitted by the learned Counsel for the respondents and considering the counter statement of the insurance company, and judgment of the learned Tribunal, and relevant exhibits which are marked in the trial Court, the Court is of the opinion that the insurance policy bearing No. 31/720701/22006 had expired on 19.03.2000. The first respondent issued a cheque to and in favour of the second respondent/The New India Assurance Company Limited for a sum of Rs. 11,145/- towards premium for covering the first respondent''s vehicle for the period from 20.03.2000 to 19.03.2001. The said cheque was returned by the bank on

23.03.2000 for the reason of "insufficient funds". As such, the premium was not remitted to the insurance company, the second respondent herein. The accident happened on 14.08.2000. In the relevant period, the policy was not existing. As such, the insurance company is not at all liable to pay compensation. When there is no insurance policy existing, the question of liability against the insurance company does not arise. The Court can use the judicial powers only on valid documents. In this case, there is no valid policy available.

23. The Court is constrained to point out that there are many irregularities are happening in the similar accident cases. For example Driver is not having valid driving licence, vehicle is not insured or no valid permit etc., Many such vehicles are being operated without the above said valid documents on the Public Road. The Government, being vested with enormous power, can control all these irregularities easily. Innocent persons who are affected by such accidents are not aware of the irregularities present in system. At the same time, these person cannot verify vehicle particulars, driver particulars, owner particulars and insurance particulars before boarding such vehicles.

24. In this case, the Court is of the view that at the time of accident, the insurance policy was not existing/in force. Hence, the appeal has to be allowed. Accordingly, the appeal filed by the second respondent/New India Assurance Company Limited is allowed against the second respondent alone. However, the decree and judgment passed in MCOP No. 4622 of 2000 by the learned Motor Accident Claims Tribunal/Chief Small Cause Court judge is in force and executable as against the first respondent, owner of the vehicle.

25. Resultingly, the civil miscellaneous appeal is disposed of with the above observation and consequently the award passed by the Motor Accident Claims Tribunal- Small Cause Court, Judge, Chennai in MCOP No. 4622 of 2000 is in force against the first respondent only. The connected miscellaneous petitions are closed. The parties are directed to bear their own costs in the appeal.