(1996) 11 AP CK 0006

Andhra Pradesh High Court

Case No: Appeal Against Order No''s. 441 and 442 of 1990

The New India Assurance Co. Ltd.		APPELLANT
	Vs	
Koppula Nagamani and Others		RESPONDENT

Date of Decision: Nov. 5, 1996

Acts Referred:

- Motor Vehicles Act, 1939 - Section 100A, 110B, 95(2), 96(2)

Citation: (1997) 1 ALT 819

Hon'ble Judges: B.K. Somasekhara, J

Bench: Single Bench

Advocate: Kota Subba Rao, S.C, for the Appellant; Ramachandra Rao, M.S.R. Subrahmanyam, M. Balasubrahmanyam and M. Ram Mohan, for the Respondent

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

B.K. Somasekhara, J.
These two appeals are by respondent No. 3 - The New India Assurance Company Limited in O.P.Nos. 108 and 109 of 1986 challenging the award of the Motor Accidents Claims Tribunal, East Godavari, Kakinada, dt. 19-12-1989 in regard to mulcting it with the liability to satisfy the award in favour of the claimants in death claim cases filed u/s 110-A of the Motor Vehicles Act, 1939 (for short ''the Act'').

2. One Bulli Satyam and Subba Rao died in a Motor Vehicle accident which occurred on 2-3-1985 at about 9 a.m. while they were travelling in a Tractor and trailer bearing No. 4986 and A.T.P.No. 4995. It is found by the Tribunal that the accident was due to the rash and negligent driving by respondent No. 1, the driver and the vehicles belonged to respondent No. 2 and insured with respondent No. 3 and while awarding Rs. 45,000/- in O.P.No. 108/86 and Rs. 57,000/- in O.P.No. 109/86, the liability to satisfy the award was jointly and severally placed on all the respondents

including respondent No. 3, the appellant. In these two appeals, only that part of the award placing the liability on respondent No. 3, the Insurer, is challenged. In the light of the grounds of appeal which are generally raised by the appellant, Mr. Kota Subba Rao, the learned advocate for the appellant has formulated the contentions on such grounds as hereunder:

(1) The appreciation of evidence by the Tribunal regarding the reason for the deceased persons to travel in the vehicle is wrong leading to wrong inference that they were travelling in the course of the employment under respondent No. 2: (2) the Tribunal was wrong in placing the liability on respondent No. 3 to satisfy the award in spite of the alternative finding that the deceased was travelling in the vehicles as gratuitous passengers; (3) the award of the Tribunal is opposed to settled law that there is no liability on the part of the Insurer where the terms of the policy are violated and in particular when the driver was carrying the gratuitous passengers regarding which there was no coverage of the Insurance; (4) the award of the Tribunal is illegal and therefore liable to be set aside.

3. The learned counsel for the respondents Mr. Ramachandra Rao while repelling the above contentions has pointed out that the finding of facts of the Tribunal is based upon the evidence supported by reasons and cannot be interfered with in an appeal unless for strong reasons which are not established, that even assuming that the deceased were travelling in the vehicles as the employees of respondent No. 2 as per the evidence and they were not the gratuitous passengers, the driver of the lorry who allowed them to travel in the vehicles caused the accident in the course of the employment and therefore the owner of the vehicle was vicariously liable for the negligence of the driver and when there is no evidence to show that it was the owner of the vehicle who committed the breach of the terms of the policy, there was no reason to exonerate the Insurer from the liability to pay the compensation. It is also his contention that there is no proof of wilful breach of the conditions of the policy by the owner of the vehicle, neither from the plea nor from the proof, and therefore the Tribunal was justified in placing the liability on the Insurer-appellant. Mr. Ramchander Rao has also concluded in his contentions that the Insurer in this case failed to discharge the burden to prove the breach of conditions of the policy due to its unsatisfactory and unreliable evidence as pointed out by the Tribunal. As a whole, it is contended by him that the award should be maintained as it is. Thus, both the facts and law relating to such controversies warrant consideration in these appeals.

4. The finding of the Tribunal that the accident occurred while the deceased were travelling in the tractor and the trailer is not questioned. With little variations in the evidence that they were travelling either in the tractor and the trailer, the conspectus is certain that they met with the accident while travelling in the vehicles, namely the tractor connected by the trailer. It is also conclusively established that the accident was due to the negligence of respondent No. 1 who was driving the

vehicle. Further, the finding that the accident occurred in the course of the employment of respondent No.1 under respondent No. 2 also becomes unassailable in view of the reliable evidence in the case and in view of the positive sworn testimony of respondent No.1 himself as R. W. 1 which is not successfully impeached in the cross-examination. According to the claimants, the deceased persons were travelling in the vehicles as employees of respondent No. 2 to transport the bricks. It is true that P.Ws. 1 and 2 respective widows of the deceased, have no personal knowledge about either the incident or the reason for the deceased to travel in the vehicles except their knowledge that they were working as agricultural coolies. The theory of the appellant-Insurer is that the deceased persons and others were travelling in the tractor and the trailer in order to attend a political procession at the relevant time and therefore they met their destiny due to the accident. The Tribunal has rejected such a theory. Reliance is placed on Ex.A-1 a copy of the F.I.R in support of such a theory. It spells out that certain persons were going in other tractors or trailers to attend a political meeting but the deceased and some others could not catch those vehicles and therefore they stopped the present tracto and trailer and travelled in the same before the accident in order to catch others who had proceeded earlier. Patently, one Kade Satyanarayana has filed Ex.A-1 and he is not examined by anybody in the proceedings. The contents of Ex.A-1 were read over to P.W.3 who is one of the injured persons in the accident. He admitted the correctness of the contents to be true. Therefore, the theory that the deceased persons were travelling in the tractor as the employees or the workers of respondent No. 2 is false. However, P.Ws. 3 and 4 tried to maintain that they and the deceased persons were going in the tractor and trailer as the workers in regard to transportation of the bricks. The evidence is also inconsistent in regard to the loading, whether it was already there or not. In that view of the matter, the theory that the deceased were travelling as gratuitous passengers in the tractor and the trailer should be believed. In other words, the incident occurred while the deceased were travelling in the tractor or the trailer as gratuitous passengers and not as the persons working under respondent No. 2. Even the Tribunal has not rejected the theory that the deceased persons were travelling in the vehicles as gratuitous passengers although it is considered to be an alternative probability.

5. The contention of Mr. K.Subba Rao, learned advocate that the appellant-Insurer was not liable to reimburse or indemnify the owner of the vehicle in regard to gratuitous passengers by itself may not be sufficient to determine the question of liability in this case. The real question would be whether such persons were covered by the Insurance under the policy of insurance or were totally excluded from any stipulation therein. Apart from that, when the Insurer took up a specific plea that there was a breach of the terms of the policy by respondent No. 2, the owner of the vehicle, it was necessary to prove such a breach of the terms of the policy. In other words, it was incumbent on the Insurer to prove in the first place that such gratuitous passengers, namely, the deceased, were not covered by the risk under

the terms of the policy and that any or several terms of the policy were violated by respondent No. 2, the owner of the vehicle, and then only the liability can be avoided in view of Section 95 (2) of the Act. At this stage, it may be pertinent to point out that when once the coverage of the vehicle under the Insurance is either admitted or established, it is for the Insurer to prove the breach of the terms of the policy by the owner of the vehicle. Such a rule in law was settled by the Supreme Court in specific terms in Narcinva V. Kamat v. Alfredo Antonio Doe Martins and Ors. 1995 ACJ 397. Thereunder, the defence taken by the Insurer was that at the relevant time the vehicle was being driven by a person not having a valid licence. In that background the Supreme Court stated:

"The insurance company complains of breach of a term of contract which would permit it to disown its liability under the contract of insurance. If a breach of a term of contract permits a party to the contract not to perform the contract, the burden is squarely on that party which complains of breach to prove that the breach has been committed by the other party to the contract. The test in such a situation would be who would fail if no evidence is led."

Thus, the burden to prove such a defence was squarely placed on the Insurer under the circumstances. The same rule applies to this case also. Such a burden in this case was sought to be discharged by the Insurer with Exs.B-1 to B-6 the policy of Insurance and other papers connected thereto and with the testimony of R.W.2 an officer of the Insurance Company. The Tribunal has found that R.W.2 is ignorant of the breach of the particular terms of the policy by respondent No. 2. Exs.B-2 to B-5 said to be the endorsements in relation to Ex.B-1 were got marked through R.W.2 to prove the terms of the policy. R.W.2 made a general statement that the vehicle was not expected to be used for any purpose other than the purpose mentioned in the policy. He also stated that if there is any violation of the conditions by the Insured, the Insurance Company is not liable to pay the compensation. When confronted in the cross-examination he came out with a remark that there are deviations from the conditions mentioned in the policy relating to the vehicle. Such deviations were not mentioned even in the additional counter filed by R.W.2. When again confronted with such a situation, R.W.2 could not say as to which of the conditions of Ex.B-6 respondent No. 2 had violated. It is found that endorsements 16,23,26 and 57 are printed loose sheets and do not form part of Ex.B-1. Even looking into Ex.B-1 and B-6 together it is difficult to make out that they form one and the only integral document to use them together as Exs. B-2 to B-6 are printed forms. Nobody, either who dealt with the case file or issued the policy No. 2 was examined to say that these documents form part of Ex.B-1 or that respondent No. 2 knew about such documents being part of Ex.B-1. The Insurer did not choose to examine respondent No. 2 the owner of the vehicle who is a party to the insurance policy Ex.B-1. On the face of it, it was difficult to depend upon Exs.B-2 to B-5 or the terms found thereunder to make it part of the contract of insurance between the parties to test the violation of any such terms.

6. Sri Subba Rao, the learned counsel pointed out that there is a mention '' in the last below column called ''sub-clause'' saying that ''endorsement Nos.16, 23, 26 and 57 are attached'' and therefore it must be taken that Exs.B-2 to B-6 form part of this document. Patently, the Insurer did not present the entire case file relating to the Insurance of the vehicle in question. Exs.B-2 to B-6 also do not bear the signature of R.W.2 either specifically or incidentally. The typed clause in ''sub-clause'' etc., is too vague and not explained by R.W.2 as to how such clauses become part of Ex.B-1. On the other hand, R.W.2 has pleaded ignorance as to his understanding of the clauses of Ex.B-1 which are violated by respondent No. 2. A careful perusal of Ex.B-1 a copy of the insurance policy, does not indicate any reservation to carry either fare-paying passengers or non-fare paying passengers called gratuitous passengers. Furthermore, there is nothing to indicate from any of these documents that respondent No. 2 is a party to such a stipulation. Neither the proposal form nor the certificate of insurance is produced before the Tribunal by the Insurer. As can be made out from Section 95 (4) and (4-A), it is the cover note which precedes the insurance policy which is the basis to prove the finality of the insurance contract between the parties to fructify into the policy determining the rights and liabilities of the parties to the contract of insurance policy and not otherwise. Merely, by production of Exs.B-1 to B-5 without any specific proof of a particular stipulation prohibiting the carrying of gratuitous passengers in the vehicle, no such stipulation can be either believed or accepted. Therefore, in this case it is on facts the Insurer has failed to prove that the deceased persons are not covered by the risk under the insurance policy.

7. In a vehicle covered by insurance when gratuitous passengers met their destiny, the Court has to examine whether the liability of the Insurer is absolved. The law appears to have been settled by the Supreme Court in this regard the liability of the Insurer in such a situation cannot be taken as absolved or exonerated as long as the vehicle is covered by insurance and as long as there is no proof of the violation of the terms of the policy and as long as the vehicle is driven by the driver in the course of the employment before the accident. Such a legal position would dispose of the real controversy in this case about the liability. Here respondent No.1 was placed in-charge of the vehicle of respondent No. 2. Beyond that he has no knowledge as to what happened subsequently nor any such knowledge is attributed to him either he has expressly or impliedly authorised the driver to carry the gratuitous passengers in such a vehicle. In other words, respondent No. 2 only knew that respondent No.1 has caused the accident in the course of the employment. There is not even a whisper either in the counter or testimony of R.W.2 that it was respondent No. 2 who committed the breach of the terms of the policy. If the sum and total of the contention of insurer is considered in this case, it means that respondent No. 1, the driver of the vehicle has violated the terms of the policy. That is not the law which excludes the Insurer from the liability to satisfy the award. In Skandia Insurance Co. Ltd. Vs. Kokilaben Chandravadan and Others, the same question was dealt with in

relation to the matter of violation of the terms of the policy by the owner of the vehicle and the Supreme Court while considering the method of interpreting the statute on the terms of the contract stated and declared the law as below:

"What is prohibited by law must be treated as a mandate to the employee and should be considered sufficient in the eye of law for excusing non-compliance with the conditions. It cannot therefore in any case be considered as a breach on the part of the insured. To construe the provision differently would be to rewrite the provision by engrafting a rider to the effect that in the event of the motor vehicle happening to be driven by an unlicensed person, regardless of the circumstances in which such a contingency occurs, the insured will not be liable under the contract of insurance. It needs to be emphasised that it is not the contract of insurance which is being interpreted. These must, therefore be interpreted in the spirit in which the same have been enacted accompanied by an anxiety to ensure that the protection is not nullified by the backward looking interpretation which serves to defeat the provision rather than to fulfil its life-aim. To do otherwise would amount to nullifying the benevolent provision by reading it with a non-benevolent eye and with a mind not tuned to the purpose and philosophy of the legislation without being informed of the true goals sought to be achieved. What the legislature has given, the Court cannot deprive of by way of an exercise in interpretation when the view which renders the provision potent is equally plausible as the one which renders the provision impotent. In fact, it appears that the former view is more plausible apart from the fact that it is more desirable. When the option is between opting for a view which will relieve the distress and misery of the victims of accidents or their dependants on the one hand and the equally plausible view which will reduce the profitability of the insurer in regard to the occupational hazard under taken by him by way of business activity, there is hardly any choice. The Court cannot but opt for the former view. Even if one were to make a strictly doctrinaire approach, the very same conclusion would emerge in obeisance to the doctrine of ''reading down'' the exclusion clause in the light of the main purpose'' of the provision so that the ''exclusion clause'' does not cross swords with the ''main purpose'' highlighted earlier. The effort must be to harmonize the two instead of allowing the exclusion clause to snipe successfully at the main purpose."

8. This view has been approved and reiterated in a latest pronouncement in Sohan Lal Passi Vs. P. Sesh Reddy and others, wherein the interpretation of Section 96(2) was considered to conclude;

"Section 96 (2) (b) (ii) should not be interpreted in a technical manner. Sub-section (2) of Section 96 only enables the insurance company to defend itself in respect of the liability to pay compensation of any of the grounds mentioned in Sub-section (2) including that there has been a contravention of the condition excluding the vehicle being driven by any person who is not duly licensed. This bar on the face of it operates '' on the person insured. If the person who has got the vehicle insured has

allowed the vehicle to be driven by a person who is not duly licensed then only that clause shall be attracted. In a case where the person who has got insured the vehicle with the insurance company, has appointed a duly licensed driver and if the accident takes place when the vehicle is being driven by a person not duly licensed on the basis of the authority of the driver duly authorised to drive the vehicle whether the insurance company in that event shall be absolved from its liability? The expression ''breach'' occurring in Section 96 (2) (b) means infringement or violation of a promise or obligation. As such the insurance company will have to establish that the insured was guilty of an infringement or violation of a promise. The insurer has also to satisfy the Tribunal or the Court that such violation or infringement on the part of the insured was wilful. If the insured has taken all precautions by appointing a duly licensed driver to drive the vehicle in question and it has not been established that it was the insured who allowed the vehicle to be driven by a person not duly licensed, then the insurance company cannot repudiate its statutory liability under Sub-section (1) of Section 96."

9. This means that whenever the defence available u/s 96 (2) is taken up by the insurer, the burden to discharge (of) it has been on it to clear and prove (that) the violation of the terms of the policy was by the insured persons, namely, the owner of the vehicle and that it was wilful and material and not technical. A sweeping plea or evidence placing some materials before the Court or the Tribunal is not sufficient. The Insurer has to specifically plead and point out particular stipulation and prove to have been existing in the terms of the policy and that there has been a breach of the same by the Insured person with wilful conduct to defeat the obligation as a party to the contract and not otherwise. The reason for such a plea being that the moment an award is passed u/s 110-A read with Section 110-B of the Act, status of the Insurer would be that of a judgment-debtor to satisfy the award but in order to avoid it one or the other grounds of defences available u/s 95(2) should be taken and proved to the satisfaction of the Tribunal or the Courts. The mere contention de hors of any such conditions will not satisfy the requirement of law to avoid the liability by the Insurance Company. In fact the Supreme Court in B. V. Nagaraju v. Oriental Insurance Co. Ltd. 1996 SC 2054 : 1996 (2) ALT 33 dealing with a case of violation of the conditions of the policy wherein several persons were taken in a tractor or trailer beyond the permitted limits, declared the law that alleged breach of carrying humans in a goods vehicle more than the number permitted in terms of policy is not so fundamental a breach so as to afford to the insurer to eschew liability altogether and the exclusion term of insurance policy read down to serve the main purpose of policy, namely, that the vehicle had been insured as required in law to cover the risk of the victims of the accident or the legal heirs thereof. In view of the authoritative pronouncement of the Supreme Court any other view taken in another precedent cannot serve the field to pursue or bind any Tribunal or the Court. Therefore, the appellant Insurer in this case having failed to clearly plead or prove the violation of the particular terms of the policy, could not have succeeded

for avoiding the liability to satisfy the award. Particularly, in view of the half-hearted and the ignorant stature of R. W.2, the officer of the Insurer, it cannot be permitted to avoid the liability as such.

10. As a whole, the appeals lack merit and therefore dismissed. There shall be no order as to costs in these appeals.