

(2002) 10 AP CK 0032

Andhra Pradesh High Court

Case No: L.P.A. No. 114 of 1998

R. Kamala

APPELLANT

Vs

Shaik Mohd. Ghouse and
Another

RESPONDENT

Date of Decision: Oct. 11, 2002

Acts Referred:

- Motor Vehicles Act, 1988 - Section 155, 173

Citation: (2004) ACJ 2112 : (2004) 2 ALT 8

Hon'ble Judges: D.S.R. Varma, J; B.S.A. Swamy, J

Bench: Division Bench

Advocate: Kota Subba Rao, for the Appellant; M. Srinivasa Rao, for the Respondent

Final Decision: Allowed

Judgement

D.S.R. Varma, J.

The question that consideration in this appeal is whether the appeal filed by the claimants seeking enhancement of the compensation awarded by the Tribunal, is vitiated for not bringing the legal representatives of the deceased owner-insured, during the pendency of the appeal. falls for

2. The brief facts of the case are that the claimant met with an accident due to rash and negligent driving of the driver of the lorry bearing No. 9720, which resulted in multiple injuries to the claimant. Hence claimant filed the claim petition claiming an amount of Rs. 1,00,000 on all counts. The Claims Tribunal allowed the claim to the extent of Rs. 53,000 with interest at the rate of 9 per cent per annum. The Tribunal while granting the above amount, made both the owner-insured as well as insurance company jointly and severally liable and awarded proportionate costs.

3. Not being satisfied with the awarded amount, the claimant preferred an appeal before this court in C.M.A. No. 143 of 1989 for enhancement of compensation. Pending adjudication of the appeal, the owner-insured died and the claimant did not

take any steps to bring legal representatives of the insured and as such by order dated 25.7.1997, the appeal against him was dismissed.

4. While disposing of the appeal, the preliminary question framed by learned single Judge was "Whether the appeal is maintainable against the respondent No. 2 insurance company only, without bringing the legal representatives of the deceased insured, the respondent No. 1, to represent his estate"?

5. The learned single Judge dismissed the appeal as not maintainable for want of legal representatives of the deceased insured being brought on record. The learned single Judge while holding that the appeal is not maintainable referred to the relevant provisions of the Motor Vehicles Act, 1988 (for brevity "the Act") and the rules thereunder, the provisions of the CPC and also the latest decisions of this court, other High Courts and also the Supreme Court. The learned single Judge further considered the relevant provisions of Chapter XI of the Act, which underline the principle that the insurer is only bound to indemnify the liability of the insured and satisfy judgment and decree passed against the insured and held that unless the liability of the insured is found, the question of binding the insurer to indemnify the liability of the insured does not arise. Accordingly the appeal on the preliminary question without going into other merits of the case, was dismissed. Hence this L.P.A.

6. The learned counsel for the claimant-appellant contended that as per section 102 of Motor Vehicles Act, 1939, which is corresponding to section 155 of the new Act of 1988, even after the death of the insured, subsequent to the accident and pending the proceedings, the cause of action survives against the insurer and the legal representatives of the insured need not be impleaded as respondents. He further contended that the policy goes with the vehicle and the insurance company cannot take any defence for not impleading the legal representatives of the insured. With these submissions, he sought for allowing of this appeal.

7. On the other hand, learned standing counsel for the insurance company supporting the impugned judgment, submitted that the trial court on evidence, granted an amount of Rs. 53,000 as compensation and further the trial court ordered that both the respondents were jointly and severally liable to pay the amount awarded and, therefore, both the respondents, i.e., the owner of the vehicle and the insurance company are liable to pay compensation. He further submitted that section 155 of the Act of 1988 does not state that if the owner of the vehicle dies, the insurance company has to pay the entire compensation to the claimant. He submitted that the learned single Judge having considered all these aspects in proper perspective dismissed the appeal for not impleading the legal representatives of the owner of the vehicle and hence the impugned judgment does not warrant any interference.

8. From the impugned order it is clear that the learned single Judge had referred to various provisions of CPC and there is no controversy as regards the observation of the learned single Judge that the Act and the rules contain both substantive and procedural laws and he is also right in holding that the application of Order 22 of CPC is not relevant.

9. The learned single Judge discussed about sections 146, 147 and 149 of the Act with special reference to section 149 and held that "from a reading of the above provisions of law, it is evident that the primary liability is that of the insured and the insurer comes into the picture to indemnify the liability of the insurer". There cannot be any dispute on this basic proposition.

10. The act being a beneficial piece of legislation has to be read and understood basing on the facts and circumstances of the case.

11. The present question for consideration before this court is whether in the absence of the insured in the appellate proceedings or failure on the part of the appellant in bringing the legal representatives of the deceased insured during the pendency of the appeal, can the court fix the statutory liability against the insurer?

12. The learned single Judge placed reliance on *Minu B. Mehta v. Balkrishna Ramchandra Nayan*, 1977 ACJ 118 and extracted the following portion of the judgment:

"The purpose of enactment of Road Traffic Acts and making insurance compulsory is to protect the interests of the successful claimant from being defeated by the owner of the vehicle, who has not enough means to meet his liability. The safeguard is provided by imposing certain statutory duties, namely, the duty not to drive or permit a car to be driven unless the car is covered by the requisite form of third party insurance.

Under section 95 (1) (b) (i) of the Act it is required that policy of insurance must be a policy which insures the person against any liability which may be incurred by him in respect of death or bodily injury to any person or damage to any property of a third party caused by or arising out of the use of the vehicle in a public place. It may be noted that what is intended by the policy of insurance is insuring a person against any liability which may be incurred by him. The insurance policy is only to cover the liability of a person which he might have incurred in respect of death or bodily injury. The accident to which the owner or the person insuring is liable is to the extent of his liability in respect of death or bodily injury and that liability is covered by the insurance. It is, therefore, obvious that if the owner has not incurred any liability in respect of death or bodily injury to any person there is no liability and it is not intended to be covered by the insurance policy... The expression "liability" which may be incurred by him is meant as covering any liability arising out of the use of the vehicle. It will thus be seen that the person must be under a liability and that liability alone is covered by the insurance policy.

Section 96 of the Act also makes the position clear. It provides that when a judgment in respect of such a liability as is required to be covered by a policy is obtained against any person insured by the policy, then the insurer shall pay to the person entitled to the benefit of the decree as if he were a judgment debtor. The liability is thus limited to the liability as is covered by the policy."

13. As already pointed out the observations and proposition laid down by the Apex Court in the above case is unexceptionable. But while applying the above principle it is very essential to take into account the facts of each case. The learned single Judge had also referred to various judgments reported in *Natha Singh v. Gurdial Singh* 1982 ACJ 95 *New India Assurance Co. Ltd. v. H. Siddalinga Naika* 1985 ACJ 89 (Karnataka) and [Shiv Chandra and Another Vs. Jasvinder Singh and Others](#), (Rajasthan), wherein it was held that cause of action survives against the insured's estate or against the insurer and that there is no need to bring the legal representatives on record. The learned single Judge in the impugned judgment while agreeing with the view that cause of action survives in case of death of the insured as contemplated u/s 155 of the Act, held that these decisions are not applicable.

14. We deem it necessary to refer to the judgment rendered in [Shiv Chandra and Another Vs. Jasvinder Singh and Others](#), (Rajasthan), in particular wherein a learned single Judge of the Rajasthan High Court after referring to section 102 of the old Act, which is corresponding to section 155 of the new Act, held at paras 5 and 6 as under:

"...Thus on the death of the insured, the right to sue survived against the insurer. As such it was not necessary to bring the legal representatives of the deceased respondent No. 1 Jasvinder Singh (insured) on record as right to sue survived against New India Assurance Co. Ltd., respondent No. 3.

(6) Accordingly, it is held that the appeal had not abated on the failure to bring the legal representatives of the deceased respondent No. 1 Jasvinder Singh on record. The appeal will proceed. A note of death will be given in the memorandum of appeal against the name of the respondent No. 1."

Coming to the present set of facts, it is on record that the Claims Tribunal awarded compensation of an amount of Rs. 53,000 and made both the insured-owner of the vehicle as well as the insurer jointly and severally liable. Both of them did not contest the said award of the Tribunal, whereas the claimants filed the appeal seeking only enhancement of the compensation. Therefore, it is obvious that the exercise of fixing the liability of the insured and the insurer was already done by the court of first instance, i.e., the Tribunal. Hence the only question in the appeal is whether the compensation is adequate or not, as claimed by the claimants. During the pendency of the appeal, the factum of death of the insured-owner was brought to notice but the legal representatives were not brought on record, the court passed

the following order on 25.7.1997:

"The learned counsel for the appellant represents that in spite of all efforts made, the details of the legal representatives of the deceased, respondent No. 1 could not be obtained by him and in the circumstances C.M.A. No. 143 of 1989 may be treated as having abated against the respondent No. 1, i.e., the owner of the vehicle. He relies on a decision of a Division Bench of this court in *Haji Zakaria v. Naoshir Coma* 1916 ACJ 320 and contends that the appeal does not abate against the insurance company, the respondent No. 2. However, that is the matter to be gone into when the appeal comes up for final hearing. C.M.A. shall stand dismissed as against respondent No. 1.

In the circumstances, office is directed to post this C.M.A. immediately for final hearing before the appropriate bench hearing the final appeals."

15. From the above it is on record that appeal against respondent No. 1, insured was dismissed. In similar circumstances, as there are divergent views expressed by two learned single Judges of this court in C.M.A. No. 588 of 1992 dated 28.7.1999 and in C.M.A. No. 448 of 1991 dated 7.6.2000, basing on the decisions reported in [Oriental Insurance Co. Ltd. Vs. Sunita Rathi and Others](#), and [A. Robert Vs. The United Insurance Co. Ltd.](#), respectively, a learned single Judge of this court in C.M.A. No. 715 of 1992 framed the following points for reference to a Division Bench for decision:

(1) What is the effect of non-presence of the owner of a motor vehicle (insured) at the appellate stage, if the appeal against the owner has been dismissed for default for non-payment of batta or for non-compliance with the orders of the court?

(2) If the lower Tribunal records a finding that the accident had taken place due to rash and negligent driving of the motor vehicle by its driver, and if such a finding is not challenged by the insurance company in the appeal, whether there is any need for the presence of the owner of the motor vehicle?

(3) In an appeal filed by the insurance company, if the owner of the motor vehicle is not present (i.e. if the appeal as against the owner is dismissed), what is the effect of the same on the said appeal?

(4) In an appeal filed by the claimant, if the insurance company has not filed any cross-appeal, what is the need for the presence of the owner of the motor vehicle?

While dealing with the above questions, the Division Bench of this court in [Meka Chakra Rao Vs. Yelubandi Babu Rao @ Reddemma and others](#), had agreed with the view expressed by our learned brother Justice Ghulam Mohammed in C.M.A. No. 448 of 1991 dated 7.6.2000, relying on the decision of [A. Robert Vs. The United Insurance Co. Ltd.](#), wherein it was held that even if the appeal was dismissed against the owner of the motor vehicle (insured), the question of statutory liability of insurance company survives in the absence of notice on the insured. The relevant para No. 8 is

extracted as under for ready reference:

"C.M.A. No. 448 of 1991 was allowed on 7.6.2000 relying on latest judgment of the Apex Court in [A. Robert Vs. The United Insurance Co. Ltd.](#), , distinguishing the decision of the Supreme Court in [Oriental Insurance Co. Ltd. Vs. Sunita Rathi and Others](#), . Our learned brother Ghulam Mohammed, J. while rightly distinguishing the case in Sunita Rathi and relying upon the latest decision in Robert's case, considered the effect of the dismissal of the appeal for non-service of notice on the owner of the vehicle and held that there is no bar to decide the statutory liability of the insurance company under the contract of insurance."

16. The Division Bench of this court in [Meka Chakra Rao Vs. Yelubandi Babu Rao @ Reddemma and others](#), , referred to a decision of the learned single Judge of this court in [The Branch Manager, The New India Assurance Co. Ltd. Vs. Harijana Babakka and Others](#), and agreed with the said decision. The relevant portion in the judgment of the Division Bench in Chakra Rao's case (supra), is extracted as under:

"(12) The statutory liability of the insurance company, in the absence of the owner of the vehicle, in the appeal filed by the claimants, can be decided and maintainable as held in the case of [The Branch Manager, The New India Assurance Co. Ltd. Vs. Harijana Babakka and Others](#), , for fixing the statutory liability and the presence of the owner at the appellate stage is not necessary. We agree with this judgment."

In view of the judgment of the Division Bench of this court, which had discussed the effect of non-presence of the owner-insured on record or his legal representatives, relying on the decision of the Apex Court in [A. Robert Vs. The United Insurance Co. Ltd.](#), , the present controversy is no longer res Integra. Therefore, the impugned judgment of the learned single Judge dismissing the appeal as not maintainable in the absence of the legal representatives of the deceased owner-insured, is not correct and the same is liable to be set aside. Further, the Motor Vehicles Act is a beneficial legislation and technicalities should not defeat the very object of the Act and application of the provisions of law should be in furtherance of justice. Section 155 of the Act deals with the effect of death on certain causes of action and the same is extracted as under for better appreciation:

"Notwithstanding anything contained in section 306 of the Indian Succession Act, 1925 (39 of 1925), the death of a person in whose favour a certificate of insurance had been issued, if it occurs after the happening of an event which has given rise to a claim under the provisions of this Chapter, shall not be a bar to the survival of any cause of action arising out of the said event against his estate or against the insurer."

The above provisions specifically provide that cause of action in the event of death of the insured would still survive against his estate or against the insurer. The word "or" is very relevant and makes it clear that the cause of action survives either on the estate of the insured or on the insurer.

17. Since the other merits of the case were not gone into by the learned single Judge, we propose to remit the matter to the single Judge for decision on merits.

18. For the foregoing reasons, we pass the order as under:

The impugned judgment of the learned single Judge reported in [R. Kamala Vs. United India Insurance Co. Ltd.](#), is set aside and the matter is remitted back to the learned single Judge for adjudication of the case on merits. Since the original claim petition is of the year 1987, the office is directed to post the matter next week for hearing before the appropriate court.

19. Accordingly the L.P.A. is allowed. No costs.