(2009) 03 AP CK 0003

Andhra Pradesh High Court

Case No: Civil Miscellaneous Appeal No''s. 519, 682, 683, 3034, 3169 of 2002, 157 of 2003 and 990 of 2005

Munagala Srinivasa Rao and Others	APPELLANT
Vs	
S. Rajendra Singh and Others	RESPONDENT

Date of Decision: March 20, 2009

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 41 Rule 27
- General Clauses Act, 1897 - Section 27
- Insurance Act, 1938 - Section 64VB
- Motor Vehicles Act, 1988 - Section 145(1), 147, 148, 149
- Negotiable Instruments Act, 1881 (NI) - Section 138

Citation: (2010) ACJ 1107 : (2009) 4 ALD 711 : (2009) 2 APLJ 180

Hon'ble Judges: V.V.S. Rao, J

Bench: Single Bench

Advocate: N. Sriram Murthy, for the Appellant; A. Malathi, for United India Insurance Company Limited, for the Respondent

Judgement

V.V.S. Rao, J.

This batch of seven appeals are being disposed of by this common order because, though they are filed against different MVOPs before Motor Accident Claims Tribunal-cum-III Additional District Judge, Guntur, they arise out of same accident. The question involved in the accident is also the same. In addition to this, in all the cases except in one case, the claimants belong to one family.

2. The admitted as well as disputed fact of the matter is as follows. Munagala Srinivasa Rao, his wife Lakshmi, daughter Ramya, son Srikanth and nephew Satyanarayana, in all five persons, hired an ambassador car bearing No. AP 7T-6377 to go to Shirdi from Guntur. On 05.10.1998, after visiting Sainath temple at Shirdi,

they started to Hyderabad in the same car. When the car reached Anamthara garden on the outskirts of Kandi village, a lorry, bearing No. C.11-7646 insured with United India Insurance Company Limited (insurer), coming in the opposite direction dashed against the car. In the accident that occurred the driver of car and son Srikanth died instantaneously. Srinivasa Rao, his wife and daughter as well as nephew allegedly received injuries. Contending that accident occurred due to rash and negligent driving of lorry insured by insurer, O.P. No. 1149 of 1998 was filed by father and mother of the deceased Srikanth claiming an amount of Rs. 2,50,000/-. The other injured persons also filed different O.Ps., claiming damages for injuries. The owner of the lorry S.Rajendra Singh remained ex parte and mother of owner of the car denied negligence alleging that her son Madala Satyanarayana himself was driver-cum- owner of the car. The insurer filed written statement opposing claims. Oral and documentary evidence was let in before Tribunal which conducted separate enquiry/trial in each O.P. The dependents/injured were also examined. The doctor(s) who allegedly treated the injured was/were not examined. Wound certificates given by the doctor concerned were marked as Ex.A.3 in O.P.Nos.1151 and 1152 of 1998 and 318 of 1999. After considering oral and documentary evidence, learned Tribunal by separate orders partly allowed the claims, against which the insurer filed appeals. The dependents/injured also filed appeals claiming enhancement. Be it noted, O.P., filed by nephew of Srinivasa Rao was dismissed. The particulars of these O.Ps., and appeals filed by insurer as well as claims are as follows.

Sl. No.	O.P. No.	Insurer Appeal	Claimant''s appeal	Injury/ Death	Age (Yrs)	Claim Rs.	Particulars of claimants Award
1.	1149/98	3169/02	--	Death	15	2,50,000	Munagala Srinivasa Rao and Lakshmi (Father and mother of deceased)
2.	-do-	--	519/02	--	--	--	--
3.	1151/98	157/03	--	Injury	13	1,50,000	Munagala Ramya
4.	-do-	--	682/02	--	--	--	--
5.	1152/98	3034/02	--	Injury	38	1,00,000	Munagala Srinivasa Rao
6.	-do-	--	683/02	--	--	--	--
7.	318/99	--	990/05	Injury	23	7,00,000/-	Satyanarayana D

3. Along with C.M.A. No. 3169 of 2002, which is filed against O.P. No. 1149 of 1998, the insurer filed C.M.P. No. 21492 of 2002 under Order XLI Rule 27 of Code of Civil Procedure, 1908 (CPC), to receive two additional documents, namely, the original policy of insurance (certificate with cancellation endorsement) and returned postal

cover sent to Rajendra Singh, owner of the lorry. In support of the application, it is stated that owner of the lorry gave a cheque towards premium amount for obtaining a policy, the same was dishonoured on 12.11.1997. Therefore, the policy of insurance, dated 07.11.1997, to lorry No. C.11-7646 was cancelled. The cancellation was informed to the insured but the same was returned. When the claim was made, these facts were informed to learned advocate by the insurer, but relevant documents were not marked and nobody on behalf of insurer was examined. Due to this, important fact was not brought to the notice of the Court and additional evidence was required.

4. The application for additional evidence was filed on 10.07.2002 in C.M.A. No. 3169 of 2002 but no counter affidavit is filed opposing the same. Therefore, in the considered opinion of this Court, additional evidence sought to be brought on record is very much necessary to enable this Court to pronounce the Judgment. The application for additional evidence being C.M.P. No. 12958 of 2002 is, therefore, accepted. The policy No. 198200/31/021/11/003/03755/1997, dated 07.11.1997 covering the period from 05.11.1997 to 04.11.1998 with cancellation endorsement, dated 12.11.1997 is marked as Ex.B.1 and returned postal cover sent to owner of lorry with postal endorsement ''not known'' is marked as Ex.B.2.

5. Learned Counsel for Insurance Company submits that accident occurred on 05.10.1998 and the policy was cancelled on 12.11.1997, the offending vehicle was not insured with the insurer, therefore, insurance company is not liable for indemnifying owner of offending vehicle. He placed reliance on New India Assurance Co. Ltd. Vs. Rula and Others, , National Insurance Co. Ltd. Vs. Seema Malhotra and Others, , Deddappa and Others Vs. The Branch Manager, National Insurance Co. Ltd., , National Insurance Co. Ltd. Vs. Abhaysing Pratapsing Waghela and Others, and an unreported Judgment of this Court (C.M.A. No. 1580 of 2002, dated 22.08.2008).

6. Learned Counsel for claimants submits that when such plea was not taken by insurer before lower Tribunal, same cannot be allowed before appellate Court. He would therefore urge that the application for additional evidence be dismissed. According to learned Counsel, Seema Malhotra (supra) and Deddappa (supra), have no application and unless cancellation memo is received by insured, there cannot be any valid cancellation of contract of insurance in law. Insofar as the appeals by claimants for enhancement is concerned, learned Counsel submits that learned Tribunal erred in not considering appropriate multiplier while calculating loss of dependency, that the amount awarded for grievous injuries is not in accordance with decided cases and that learned Tribunal failed to appreciate evidence adduced by claimants.

7. In the light of rival submissions, prime issue to be considered is whether by reason of cancellation of policy of insurance for non-payment of premium amount, the insurer is not liable to indemnity the insured? The other question would be with

regard to enhancement of compensation in the case of death and in the case of injuries.

8. Section 64VB of the Insurance Act, 1938 prohibits an insurance company from assuming any risk in respect of any insurance business until premium payable is received or is guaranteed from the insurer. It also provides that insurer can assume risk for insurance business only when premium is paid in cash or by cheque to the insurer. In a case where premium amount is paid by cheque, but the cheque is dishonoured by the bankers, what would be its effect on the policy of insurance issued to the insurer, and what would be the effect on legal right of third party whose risk is covered by policy of insurance. This question has come up before Supreme Court in various judgments referred to hereinabove. It is appropriate to consider these authorities in some detail.

9. In Rula (supra), Supreme Court considered the position of rights of third party to get indemnified against the insurer of the vehicle when premium has not been paid and for that reason policy of insurance is cancelled. Placing reliance on Oriental Insurance Co. Ltd. Vs. Inderjit Kaur and Others, , Supreme Court answered the question in favour of third parties and held as under (para 13 of SCC). The subsequent cancellation of the insurance policy in the instant case on the ground that the cheque through which premium was paid was dishonoured, would not affect the rights of the third party which had accrued on the issuance of the policy on the date on which the accident took place. If, on the date of accident, there was a policy of insurance in respect of the vehicle in question, the third party would have a claim against the Insurance Company and the owner of the vehicle would have to be indemnified in respect of the claim of that party. Subsequent cancellation of the insurance policy on the ground of non- payment of premium would not affect the rights already accrued in favour of the third party.

10. In Seema Malhotra (supra), Yashpal Malhotra insured his Maruti car under insurance contract on 21.12.1993 by paying premium amount by way of cheque. A cover note was issued as contemplated u/s 148 of Motor Vehicles Act, 1988 (the Act, for brevity). In the accident occurred on 31.12.1993, the insured died and car was damaged. On 10.01.1994, the bankers sent intimation about dishonour of cheque, and therefore, on 20.01.1994, the insurer informed business concern of the insured that insurance policy is cancelled. The widow and children of insured moved State Consumer Forum claiming for the loss of vehicle. The claim was rejected. A Division Bench of High Court of Jammu & Kashmir, however, allowed the appeal on the ground that there was no proper communication of cancellation of insurance policy. Before Supreme Court, the question was in a case where policy of insurance is cancelled for non-payment of premium amount, insurer would be liable or not. Supreme Court referred to Inderjit Kaur (supra) and Rula (supra), and held that when premium promised is not paid, insurer cannot be held liable. It is apt to quote the following (paras 17 and 18 of SCC).

11. In a contract of insurance when the insured gives a cheque towards payment of premium or part of the premium, such a contract consists of reciprocal promise. The drawer of the cheque promises the insurer that the cheque, on presentation, would yield the amount in cash. It cannot be forgotten that a cheque is a bill of exchange drawn on a specified banker. A bill of exchange is an instrument in writing containing an unconditional order directing a certain person to pay a certain sum of money to a certain person. It involves a promise that such money would be paid. ... Thus, when the insured fails to pay the premium promised, or when the cheque issued by him towards the premium is returned dishonoured by the bank concerned the insurer need not perform his part of the promise. The corollary is that the insured cannot claim performance from the insurer in such a situation.

12. In Deddappa (supra), referring to earlier decisions, Supreme Court held (para 24 of SCC):

We are not oblivious of the distinction between the statutory liability of the insurance company vis--vis a third party in the context of Sections 147 and 149 of the Act and its liabilities in other cases. But the same liabilities arising under a contract of insurance would have to be met if the contract is valid. If the contract of insurance has been cancelled and all concerned have been intimated thereabout, we are of the opinion, the insurance company would not be liable to satisfy the claim.

13. In Abhaysing Pratapsing (supra), Supreme Court considered the effect of dishonour of cheque when subsequently amount of premium is paid in cash by the insured. Supreme Court, as summarized in head note B of SCC, held as under.

14. A bare perusal of the Motor Input Advice-cum-Receipt issued by the appellant insurer would show that not only the same contains a column relating to "class code" but also a "cover note number". Indisputably, the first respondent is a third party in relation to the contract of insurance, which had been entered into by and between the appellant and the owner of the vehicle in question. A document was produced before the Tribunal. Even according to the appellant insurer, although it was only a Motor Input Advice-cum-Receipt, it contained Cover Note No. 279106. It has to be concluded on facts that a cover note had, in fact, been issued. If a cover note had been issued which in terms of Section 145(1)(b) of the Act would come within the purview of definition of certificate of insurance; it would also come within the purview of the definition of insurance policy. If a cover note is issued, it remains valid till it is cancelled. Indisputably, the insurance policy was cancelled only after the accident took place. A finding of fact, therefore, has been arrived at that prior to the deposit of the premium of insurance in cash by the owner of the vehicle, the cover note was not cancelled. Hence, the appellant insurer cannot avoid its liability.

15. The law, therefore, may be taken as well settled that when premium amount is not paid in cash or valid cheque, the insurance company can cancel the policy of

insurance. It is also well settled that if as on the date of accident, the vehicle involved in the accident is not covered by valid policy, the insurer is not required to indemnify insured against third party risk. It is also well settled that if the insured makes up the premium even after the cheque was dishonoured but before the date of accident, insurance company would be liable to pay the compensation. What would be the position if the cancellation or cancellation endorsement is not validly communicated to the insured? As observed by Supreme Court in Deddappa (supra), if the contract of insurance is cancelled but not communicated to all concerned including the insured, the insurance company would be still liable.

16. In this case, Ex.B.2 cover containing ''cancellation endorsement'' of a policy of insurance, Ex.B.1, was sent to the insured to the address, which is found in Ex.B.1, policy. Ex.B.2 was returned by postal endorsement, ''not known''. Whether there is valid communication of cancellation of contract of insurance? In such a case, the presumption u/s 27 of General Clauses Act, 1897, can be drawn. It is rebuttable presumption unless contrary is proved. It can be presumed that a registered letter sent to the person''s last known address is deemed to have been served or communicated to him. If a communication is sent by registered post to the address given by a person or to a known place of residence, the presumption u/s 27 of General Clauses Act springs into action and it shall be deemed to have been served. In C.C. Alavi Haji Vs. Palapetty Muhammed and Another, , Supreme Court held that such a presumption would apply even in cases arising u/s 138 of Negotiable Instruments Act, 1881. When once a letter sent to person''s known address is returned with an endorsement ''not known'' due service has to be presumed. In that view of the matter, submission of learned Counsel for claimants that there was no communication of cancellation of endorsement cannot be accepted.

17. The owner of the lorry S. Rajendra Singh was arrayed as party respondent. But, he remained ex parte. Therefore, an inference can be drawn that the offending vehicle was not covered by policy of insurance as on the date of accident. In such an event, the appellant insurance company cannot be held liable to pay compensation.

18. Insofar as the appeals filed by claimants for enhancing compensation are concerned, as the insurance company is not liable to pay compensation, this Court is not inclined to go into this aspect. In all the case of injuries, the doctor, who treated the injured was not examined, and therefore, the disability certificate cannot be relied on. In Rajesh Kumar @ Raju Vs. Yudhvir Singh and Another, , dealing with this aspect, Supreme Court held (para 11 of SCC):

19. The certificate in question in this case was obtained after two years. It is not known as to whether the Civil Surgeon of the hospital treated the appellant. On what basis, such a certificate was issued two years after the accident took place is not known. The author of the said certificate had not been examined. Unless the author of the certificate examined himself, it was not admissible in evidence. Whether the disability at 60% was calculated on the basis of the provisions of the

Workmen''s Compensation Act or otherwise is not known. It is also not known as to whether he was competent to issue such a certificate. It even does not appear that the contentions raised before us had either been raised before the Tribunal or the High Court. The Tribunal as also the High Court, therefore, proceeded on the materials brought on record by the parties. In absence of any contention having been raised in regard to the applicability of the Workmen''s Compensation Act which, in our opinion, ex facie has no application, the same, in our opinion, cannot be permitted to be raised for the first time.

20. In the case of death of minor son of Srinivasa Rao, this Court, having regard to the facts and circumstances of the case, does not find any reason to enhance the compensation. However, it is made clear that awards passed by learned Tribunal can be enforced by the claimants/injured against the owner of the lorry as appellant insurer is held not liable for payment of compensation.

21. In the result, for the above reasons, the appeals being C.M.A.Nos.3034, 3169 of 2002 and 157 of 2003, filed by United India Insurance Company Limited are allowed without any order as to costs. The appeals being C.M.A.Nos.519, 682 and 683 of 2002 filed by claimants/injured for enhancing compensation are dismissed without any order as to costs. The Appeal being C.M.A. No. 990 of 2005 filed against O.P. No. 318 of 1999 is also dismissed without any order as to costs.