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**Thyagaraj Vs. Siddamma and Others**

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**Court** : Karnataka

**Decided On :** Jan-30-2014

**Judge** : The Honourable Mrs. Justice B.S. Indrakala

**Appeal No.** : Miscellaneous First Appeal No. 1599 of 2010 c/w M.F.A.No.1600 of 2010 (MV)

**Appellant** : Thyagaraj

**Respondent** : Siddamma and Others

**Judgement** :

(Prayer: These Miscellaneous First Appeals is filed under Section 173(1) of MV Act against the judgment and award dated:31.10.2009 passed in MVC Nos.231/2008 and 265/2008 respectively, on the file of the Civil Judge (Sr.Dn.) and MACT, Harihar, awarding a compensation of Rs.2,59,000/- and Rs.20,000/- respectively, with interest at 6% p.a. from the date of petition till realisation.)

1. These appeals are preferred challenging the common judgment and award dated 31.10.2009 passed in MVC No.231/2008 and MVC No.265/2008 on the file of the Civil Judge (Sr.Dn.) and Addl. MACT, Harihar.

2. It is the case of the claimant that on 28.08.2007 while the son of petitioner in MVC No.231/2008 along with others was going in the bullock cart belonging to the petitioner in MVC No.265/2008 near Bannikodu cross on Harihar - Shimoga Road, Harihar, the car bearing registration No.KA-i4/M-5878 being driven by its driver in

rash manner, came from Harihar side with high speed and dashed against the bullock cart, a motor cycle, an autorickshaw and also a canter lorry jn serie s causing the accident and in the said accident, the son of the petitioner in MVC No.23i/2008 sustained grievuus injuries to which he succumbed on the next day. Likewise bullock died and bullock cart belonging to the petitioner in MVC No.265/2008 was also damaged. In the circumstances, the legal representatives of the victim who died in the said accident and the insurer of the bullock cart along with other injured claimants in other two cases filed their respective claim petition seeking compensation from the owner and insurer of the said car, which was involved in the accident.

3. The Tribunal considering the evidence placed on record deemed it fit to award a sum of Rs.2,59,000/- to claimant in MVC No.231/2008 and Rs.20,000/'- no the claimant in MVC No.265/'2008 with interest at the rate of 6% p.a. from the date of petition till realisation against the owner of the vehicle viz., the 1st respondent herein and absolved the liability of the insurance company to indemnify the owner, on the ground that there exists no policy of in surance coverage as on the date of accident on account of dishonour of cheque issued by the 1st respondent/owner towards the premium of the policy by observing that the dishonour was also duly communicated to the owner of the vehicle.

4. Being aggrieved by the said judgment and award, the owner of the vehicle is in appeal interalia contending amongst other grounds that the amount awarded is too excessive and further contended that the exonerating the insurance company of ins liability to indemnify the owner is not proper and also contended that dishonour of cheque and cancellation of policy was not communicated to him.

5. Thus the cause of accident, death of the victim in the accident, the relationship of the claimant in MVC No.231/2008, with that of the deceased, damage caused to the bullock cart and death of bullock in the accident are not in dispute.

6. Wilh regard to the liability of the insurance company to indemnify the owner of the vehicle it is contended by the learned Counsel, that, issuance of policy by respondent No.3/insurance company covering the date of accident is not in dispute as evidenced by Ex.R.2. Further he submits that there was a contract of

insurance between the insurer and insured and even the covering note is sufficient to establish the same. Learned Counsel for the owner further submitted that with regard to cancellation of the policy as urged by the insurer gives a communication whatsoever so received by the insurer a presumptory value to be attached to Ex.R.8. As observed by the Tribunal with regard to certificate got marked as Ex.R.8 by the insurance company is not proper and it is bounden duly of the respondent/insurer to communicate such dishonour of cheque as well as cancellation of the policy under due process, in as much as, the insurance company ought to have issued such communication of cancellation of policy under registered post acknowledgement due and no presumpiory value whatsoever can be attached to certificate of posting got marked by the company. Non production of the register maintained by the insurance company for dispatching letters shall give room for adverse inference against the insurer.

7. Thus he concludes that there is no communication of service of cancellation of policy and as such, there is no valid cancellation of the policy. Hence the liability of the insurance company cannot be exonerated. Further he submits that if at all the cheque is dishonoured, the course open to the insurer is to proceed in accordance with law to recover the amount due under the said cheque and there cannot be cancellation of policy suo motu on its own.

8. Per contra, learned Counsel for the insurer submitted that it is in evidence of the appellant herein that if he paid the amount towards the policy by cash and if that be so, it is his duty to produce the receipt for having paid the said sum which he failed to do so. In the circumstances, the burden regarding entering into valid contract under due consideration is not established. Even otherwise, if the cheque is to be taken as the consideration for the policy and as the cheque is dishonoured and also the same is duly communicated under certificate of posting to the address as furnished by the owner which address even now holds good as the same is mentioned in the memorandum of appeal, service of notice/intimation with regard to cancellation of policy is duly effected. In the circumstances, it cannot be said that the cancellation is not within the knowledge of the owner/appellant in which event the insurance company is not liable to indemnify the owner of the vehicle.

9. Learned Counsel for the appellant relied upon the decision in the case of GUJARATH ELECTRICITY BOARD -vs- ATMARAM rendered in AIR 1989 SC 1433 wherein it is observed as hereunder:

"(C) General Clauses Act (10 of 1987), S.27 - Service of letter under registered cover - Presumption, as to - Rebuttal of - Endorsement that addressee refused to accept letter under registered cover - No material to show that endorsement was wrong - Presumption nor rebutted."

and submits the mode of communication in these type of cases is only through registered post acknowledgement due and not under certificate of posting. Further he submits no presumptory value of due communication or service of intimation can be attributed to the post dispatched under certificate of posting. He also relied upon the decision in the case of ORIENTAL INSURANCE CO. LTD. -vs- INDERJIT KAURreported in AIR 1998 SC 588 wherein at paras-7 and 10 it is observed as hereunder:

"7. We have, therefore, this position Despite the bar created by Section 54-VB of the Insurance Act, the appellant, an authorised insurer, issued a policy of insurance to cover the bus with out receiving the premium therefor. By reason of the provisions of Section 147(5) and 149(1) of the Motor Vehicles Act , the appellant became liable to identify third parties in respect of the liability which that policy covered and to satisfy awards of compensation in respect thereof notwithstanding its entitlement (upon which we do not express any opinion) to avoid or cancel the policy for the reason that the cheque issued in payment of the premium thereon had net been honoured.

10. It must also be noted that is 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 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."

10. Learned Counsel for the insurer in support of his contentions relied upon the decision of the Apex Court rendered in the case of DADDAPPA -vs- BRANCH

MANAGER, NATIONAL INSURANCE CO. LTD reported in 2008 ACJ 581 wherein it is held as hereunder:

"Motor Vehicles Act, 1988, section 147(1) and Insurance Act, 1938, section 64-VB-Motor insurance-Dishonour of cheque-Policy- Cancellation of Liability of insurance company-Cheque issued towards premium was dishonoured and insurance company cancelled the policy, information was communicated to the insured and intimation was also giver. to the R.T.O.-Postal acknowledgement produced before Tribunal to prove cancellation-Accident much after the communication of cancellation of policy- Section *54-VB of the Insurance Act provides for issuance of a valid, policy only on receipt of payment of premium and no risk is to be assumed unless premium is received-A contract is based on reciprocal promise, reciprocal promises by the parties are conditions precedent for a valid contract-'Tribunal held that insurance company was liable despite cancellation of contract of insurance-High Court held that insurance company was not liable-Whether the insurance company is liable-Held: no; but as the claimants hail from the lowest strata of society, Apex Court in exercise of its extraordinary jurisdiction under Article 142 of the Constitution directed the insurance company to pay the amount of compensation awarded and recover the same from owner of the vehicle, particularly in view of the fact that no appeal was preferred by him."

Further he submitted that under Section 64-VB of the Insurance Act, 1938 unless the premium is received in advance, the contract cannot be implemented. He also relied upon another decision of the Apex Court in the case of NATIONAL INSURANCE CO. LTD., -vs- YELLAMMA reported in 2008 ACJ 1906 wherein it is held as hereunder:

"Motor Vehicles; Act, 1988, section 147(1) and Insurance Act, 1938, section 64-VB-Motor insurance-cover note-Cancellation of-Liability of insurance company-Insured gave cheque towards premium issued by a third party-Development Officer of the insurance company inadvertently issued the cover note but when the mistake was noticed the cheque was not got encashed-Insured was asked to pay the amount of premium which was not tendered-Insured took back the cheque and returned the original cover note-Insurance company cancelled the cover note and

it was produced before the Tribunal by the insurance company-Insured before returning original cover note had kept photocopy thereof which was produced by the claimants-Whether insurance company is liable-Held: no: no premium had been paid by the insured; there was no privity of contract between insurance company and the insured; Apex Court in exercise of its extraordinary jurisdiction under Article 142 of the Constitution directed the insurance company to pay the amount of compensation awarded and recover the same from the owner-insured [2008 ACJ 581 9SC0 followed: 2006 ACJ 2173 (Karnataka) reversed]," He also relied upon the unreported decision rendered in the case of TATA AIG GENERAL INSURANCE CO. LTD. - vs- BALAGURUVAIAH AND OTHERS vide JVIFA No. 9795/2010 disposed of on 15th March, 2013 wherein in the said judgment it is observed as hereunder:

"In a decision reported in 2008 ACJ 581 (in the case of Daddappa and others -vs- Branch Manager, National Insurance Co. Ltd.), the Supreme Court has held, that when cheque issued towards premium was dishonoured and Insurance Company cancelled policy, information was communicated to insured and intimation was also given to the R.T.O. The insurance Company is not liable to pay compensation. The Supreme Court in exercise of its extraordinary jurisdiction under Article 142 of the Constitution of India has directed Insurance Company to pay amount of compensation and to recover the same from owner."

arid thus submits that there is due communication of the cancellation of policy and the company is not liable to indemnify the owner of the vehicle.

11. Thus on facts it is seen that the appellant/owner entered into a contract of insurance vide cover note marked as Ex.R.2 with regard to the vehicle which is involved in the accident, for a period from 20.12.2006 to 19.12.2007; on perusal of the said Ex.R.2, it is further seen that the amount was paid through the cheque bearing No. 8558014 dated 18.12.2006 issued on Dena Bank. Further it is also seen that in pursuance of such cover note the company also issued policy of insurance as per Ex.R.3. However, on perusal of Ex.R.3, it is seen that there is also an endorsement in the policy as cancelled. It is to be noted that the cancellation date is not forthcoming in Ex.R.3 and also it is not known as to under

what circumstances the said policy was cancelled.

12. With regard to cheque which is subject matter of the cover note, the insurance company/insurer has filed the dishonoured cheque with an endorsement issued by the bank on presentation of the cheque, that it was bounced with an endorsement 'funds insufficient'.

13. Further it is the case of the insurer that on such bouncing of the cheque, they cancelled the policy as per Ex.R.7 which was also duly communicated to the insured as per Ex.R.8 under certificate of posting. In other words Ex.R.7 is the office copy of the intimation sent to the insured under certificate of posting as per Ex.R.8.

14. Thus the fact remains that the cheque which was issued while entering into contract with the insurance company by the owner of the vehicle was bounced and accordingly, the insurance company has cancelled the policy on 09.01.2007.

15. Under Section 147(4) of the Motor Vehicles Act, 1938 where a cover note issued by the insurer under the provisions of the Motor Vehicles Act and Rules, when once such a cover note is not followed by issue of a policy of insurance within the prescribed time, the insurer shall, within seven days of the expiry of the period of the validity of the cover note, notify the fact to the registering authority about such cancellation or non following of the policy of insurance.

16. In this regard, it is specifically contended by the appellant that though a copy of the policy of insurance is marked as Ex.R.3 as it possess an endorsement as cancelled, it should be presumed that the cover note issued was never followed by a policy issued in which event, the respondent/insurer was duty bound to intimate to the R.T.O., with regard to non issuance of the policy which the respondent has failed to comply with.

17. Further it is seen that Rule 10 of the Motor Vehicles (Third Party Insurance) Rules, 1946 is not followed. For the sake of convenience the said Rule 10 is excerpted hereunder:

"10. Cancellation or suspension of certificate or cover note:- When a policy of insurance or cover note is cancelled or suspended by an insurer, the insurer shall forthwith inform the policy-holder of such cancellation or suspension, by post to the latest address of the policy-holder recorded in the records of the insurer."

18. Thus when the cover note is cancelled or suspended by the insurer, the insurer is duty bound to post to the policy holder or intimate him with regard to such cancellation or suspension.

19. Further it is to be seen that Section 27 of the General Clauses Act, 1897 reads as hereunder:

"27. Meaning of service by post- Where any Central Act or Regulation made after the commencement of this Act authorizes or requires any document to be served by post, whether the expression "serve" or either of the expressions "give" or "send" or any other expression is used, then, unless a different intention appears, the service shall be deemed to be effected by properly addressing, pre-paying and posting by registered post, a letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post."

In the circumstances, when the cover note is cancelled as per Rule 10 of the Motor Vehicles (Third-Party Insurance) Rules, 1946 the insurance company was supposed to intimate the same under registered post under Section 27 of the General Clauses Act, 1897 which is not being complied with by the insurer.

20. Now Section 64-VB of the Insurance Act, 1938 stipulates that no risk to be assumed unless premium is received in advance as observed in the case of ORIENTAL INSURANCE COMPANY LTD. -vs- INDERJIT KAUR (supra), Sections 147(5) and 149(1) of the Motor Vehicles Act, 1988 the insurer becomes liable to indemnify third parties in respect of the liability which the policy covered and to satisfy the award of compensation in respect thereto, notwithstanding its entitlement to avoid or cancel the policy for the reason that the cheque issued in payment of the premium was dishonoured.

21. Thus it is seen that though the company cancelled the policy, it has not followed the proper procedure of communication, as acceptable under the provisions of the Motor Vehicles (Third Party Insurance) Rules, 1946, read with provisions of the General Clauses Act, 1897. Hence it is to be held that there is no proper cancellation of the policy and in the circumstances, the course open to the insurance company is to proceed for recovery of consideration due under the cheque in accordance with law In the circumstances, the impugned judgment and award exonerating the liability of the insurance company from indemnifying the owner of the vehicle is liable to be set aside,

22. Learned Counsel for the insurer further submits that there were four cases filed against the appellant with regard to one and same accident and in all the four cases the liability was fastened on the owner and the insurance company was exonerated from the liability. However, the owner of the vehicle did not choose to contest the said judgment and award passed in respect of two other cases and only in respect of two of the cases out of 4 has chosen to prefer these appeals. In other two cases, because he has failed to challenge the award, it has to be presumed that he has accepted the judgment and award passed by the Tribunal and he cannot blow hot and cold simultaneously arid he is estopped from preferring these two appeals questioning the liability.

23. Under Section 173(2) of the Motor Vehicles Act, no appeal shall lie against any award of the Claims Tribunal where the amount involved is less than Rs. 10,000/-. In the circumstances, in view of the bar imposed therein, the other two awards wherein a sum of Rs.6,000/- and Rs. 10,000/- was awarded, the aggrieved persons were precluded from preferring any appeal and did not contest the same. In the circumstances, the reasons assigned by the owner for non-preferring the appeals in the said cases cannot be brushed aside and it cannot also be said that he is estopped from preferring the appeals against other two cases where the right of appeal was permissible.

24. With regard to quantum of compensation, on perusal of the impugned judgment and award, it is seen the Tribunal has deemed it fit to award the compensation by considering all the facts available on record which is just and

reasonable. In the circumstances, the compensation awarded is just and reasonable and does not call for any enhancement. Hence the following:

## ORDER

Both the appeals are partly allowed while upholding the quantum of compensation awarded by the Tribunal in both cases under appeal exonerating the liability of the insurance company is hereby set aside and the liability to satisfy the award is made joint and several between the owner and the insurer.

However, the insurer is directed to indemnify the owner of the vehicle and satisfy the award as ordered within 8 weeks from the date of receipt of the copy of this judgment and award.

The amount deposited by the appellant is ordered to be refunded.

Draw the award accordingly.

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