The Divisional Manager Vs. Kumar Shivanand

The Divisional Manager Vs. Kumar Shivanand

SooperKanoon Citation : sooperkanoon.com/1194747

Court : Karnataka Dharwad

Decided On : Apr-13-2017

Judge : Dr.H.B.Prabhakara Sastry

Appeal No. : MFA 21560/2009

Appellant : The Divisional Manager

Respondent : Kumar Shivanand

Judgement :

Date of Judgment 13.04.2017 MFA No.21560/2009 C/w. MFA No.20762/2009 The Divisional Manager, The National Insurance Co. Ltd., Vs. Kumar Shivanand S/o. Netaji Mohite and Another 1 IN THE HIGH COURT OF KARNATAKA DHARWAD BENCH DATED THIS THE13H DAY OF APRIL2017R BEFORE THE HONBLE DR. JUSTICE H. B. PRABHAKARA SASTRY M.F.A.NO.21560/2009 (MV) C/W. M.F.A.NO.20762/2009 (MV) IN MFA NO.21560/2009 BETWEEN: THE DIVISIONAL MANAGER THE NATIONAL INSURANCE CO. LTD., DIVISIONAL OFFICE, SUJATA TALKIES COMPLEX NEAR OLD BUS STAND, P. B. ROAD, HUBLI (BY SRI. RAJASHEKHAR S. ARANI, ADVOCATE) ... APPELLANT AND:

1. KUMAR SHIVANAND, S/O. NETAJI MOHITE AGE:

9. YEARS, OCC: STUDENT R/O. POST:NIGADI, TQ. & DIST. DHARWAD REP. BY HIS NATURAL GUARDIAN FATHER NETAJI, S/O. TANAJI MOHITE AGE:

43. YEARS, OCC: BUSINESS R/O. NIGADI, TQ. & DIST. DHARWAD Date of Judgment 13.04.2017 MFA No.21560/2009 C/w. MFA No.20762/2009 The Divisional Manager, The National Insurance Co. Ltd., Vs. Kumar Shivanand S/o. Netaji Mohite and Another 2 2. KANYAPPA, S/O. VITAPPA CHANDRAGI AGE:

55. YEARS, OCC:OWNER OF DELIVERY VAN BEARING NO KA25A1983R/O. HALLIKERI, TQ. & DIST. DHARWAD ... RESPONDENTS (BY SRI. V. S. KALASURMATH FOR SRI.ANIL KALE, ADVOCATE FOR R1; R2 - SERVED) THIS MFA IS FILED UNDER SECTION1731) OF THE MOTOR VEHICLES ACT,1988 AGAINST THE

JUDGMENT
AND AWARD DATED:27/09/2008 PASSED IN M.V.C.NO.343/2004 ON THE FILE OF THE I ADDL. CIVIL JUDGE (SD.) AND MOTOR ACCIDENTS CLAIMS TRIBUNAL, DHARWAD, AWARDING A COMPENSATION OF RS.1,20,000/- WITH INTEREST AT6 P.A.. IN MFA No.20762/2009 BETWEEN: SHIVANAND S/O NETAJI MOHITE AGE:

8. YEARS, OCC: STUDENT R/O. NIGADI, TQ/DIST: DHARWAD THROUGH HIS FATHER SRI. NETAJI MOHITE AGE:

42. YEARS, OCC: BUSINESS R/O. NGADI, TQ/DIST. DHARWAD AS A MINOR GUARDIAN (BY SRI. V. S. KALASURMATH FOR SRI. ANIL KALE, ADVOCATE) ... APPELLANT Date of Judgment 13.04.2017 MFA No.21560/2009 C/w. MFA No.20762/2009 The Divisional Manager, The National Insurance Co. Ltd., Vs. Kumar Shivanand S/o. Netaji Mohite and Another 3 AND:

1. KANYAPPA S/O VITHAPPA CHANDARIGI AGE:

54. YEARS, OCC: OWNER OF DELIVERY VAN BEARING No.KA-25/A-1983, R/O.HALLIGERI TQ. & DIST: DHARWAD.

2. THE DIVISIONAL MANAGER THE NATIONAL INSURANCE CO. LTD., DIVISIONAL OFFICE, SUJATA TALKIES COMPLEX NEAR OLD BUS STAND, P.B.ROAD,HUBLI ... RESPONDENTS (BY SRI. RAJASHEKAR S. ARANI, ADVOCATE FOR R2; R1 - SERVED) THIS MFA IS FILED UNDER

SECTION1731) OF THE MOTOR VEHICLES ACT, AGAINST THE

JUDGMENT

AND AWARD DATED:27/09/2008 PASSED IN M.V.C.NO.343/2004 ON THE FILE OF THE MACT NO.2 DHARWAD, PARTLY ALLOWING THE CLAIM PETITION FOR COMPENSATION AND SEEKING ENHANCEMENT OF COMPENSATION. THESE APPEALS HAVING BEEN HEARD AND RESERVED FOR

JUDGMENT

ON0604.2017 AND COMING ON FOR PRONOUNCEMENT OF

JUDGMENT

THIS DAY, THE COURT DELIVERED THE FOLLOWING: Date of Judgment 13.04.2017 MFA No.21560/2009 C/w. MFA No.20762/2009 The Divisional Manager, The National Insurance Co. Ltd., Vs. Kumar Shivanand S/o. Netaji Mohite and Another 4 COMMON

JUDGMENT

In MFA No.21560/2009 Mr.Rajashekhar S. Arani, Advocate for appellant Mr.V. S. Kalasurmath for Mr.Anil Kale, Advocate for respondent No.1 In MFA No.20762/2009 Mr.V. S. Kalasurmath for Mr.Anil Kale, Advocate for appellant. Mr.Rajashekar S. Arani, Advocate for respondent R2.

1. The appellants have filed these appeals under Section 173(1) of the Motor Vehicles Act, challenging the judgment and award passed by the Court of I Addl. Civil Judge (Sr.Dn.) and M.A.C.T. No.2, Dharwad (hereinafter referred to as the Tribunal, for short), in MVC No.343/2004 on 27.09.2008.

2. The appellant in MFA No.21560/2009 has prayed for allowing the appeal by setting aside the judgment and award under appeal, whereas the appellant in MFA No.20762/2009 has prayed for Date of Judgment 13.04.2017 MFA No.21560/2009 C/w. MFA No.20762/2009 The Divisional Manager, The National Insurance Co. Ltd., Vs. Kumar Shivanand S/o. Netaji Mohite and Another 5 enhancement of the compensation by modifying the judgment and award under appeal.

3. The appellant/Insurance Company in MFA No.21560/2009, in its appeal has stated that the Insurance Policy which was extended to the owner of the vehicle was cancelled for non-payment of the premium amount. As such, as on the date of the accident, there was no insurance coverage by it to the said vehicle. Still, the Tribunal below has erroneously held the insurer as liable to pay the compensation and subsequently to recover the same from the owner of the vehicle. Stating that the said finding is an erroneous finding, the appellant/Insurance Company has prayed for setting aside the judgment and award under appeal.

4. The appellant in MFA No.20762/2009, who was the claimant before the Tribunal below, in the present appeal has contended that the Tribunal below failed to Date of Judgment 13.04.2017 MFA No.21560/2009 C/w. MFA No.20762/2009 The Divisional Manager, The National Insurance Co. Ltd., Vs. Kumar Shivanand S/o. Netaji Mohite and Another 6 appreciate the gravity of the pain and suffering sustained by a boy of tender age of 4 years. The injury has left him to limp for the rest of his life. The Tribunal below did not appreciate the evidence of the doctor in its proper perspective. Shortening of the right limb by 1 inch, thus restricting the movement of the injured was also not appreciated by the Tribunal below. With this, he has prayed for enhancement of the compensation awarded by the Tribunal below.

5. On notice being issued, respondent No.1 in MFA No.21560/2009 and respondent No.2 in MFA No.20762/2009 are served and appeared through their learned Counsels. Respondent No.2 in MFA No.21560/2009 and respondent No.1 in MFA No.20762/2009, who was placed ex-parte before the Tribunal, was served and unrepresented. The lower Date of Judgment 13.04.2017 MFA No.21560/2009 C/w. MFA No.20762/2009 The Divisional Manager, The National Insurance Co. Ltd., Vs. Kumar Shivanand S/o. Netaji Mohite and Another 7 courts records were called for and the same are placed before me.

6. Heard the arguments from both sides and perused the memorandum of appeal, impugned judgment and the entire materials placed before this Court.

7. The points that arise for my consideration are: i. Whether the appellant has made out grounds to allow MFA No.21560/2009?. ii. Whether the appellant has

made out grounds to allow MFA No.20762/2009?. Since these points are interrelated to each other, in order to avoid repetition of analysis of facts, both the points are taken up together for analysis. For the sake of convenience, the parties would be referred to with the rankings they were holding in the Tribunal below. Date of Judgment 13.04.2017 MFA No.21560/2009 C/w. MFA No.20762/2009 The Divisional Manager, The National Insurance Co. Ltd., Vs. Kumar Shivanand S/o. Netaji Mohite and Another 8 8. The summary of the case of the claimant in the Tribunal below is that on 16.08.2003 at 9.15 am, when the claimant was sitting near his house in a place near Nigadi in Dharwad Taluka, on the side of the road of kachcha portion, a delivery van bearing registration No.KA-25/A-1983, being driven by its driver in a rash and negligent manner and in a high speed, came and dashed to him, due to which he sustained crush injury to his leg and was shifted to the District Hospital, Dharwad. Later, for further treatment, he was also taken to KIMS Hospital at Hubli. He was treated as an inpatient and surgically operated and skin grafting was done. Due to the injuries sustained by him in the accident, he is suffering with permanent disability, holding the owner and alleged insurer of the vehicle, as jointly and severely responsible to pay him the compensation, the claimant claimed a total compensation of `3,50,000/- Date of Judgment 13.04.2017 MFA No.21560/2009 C/w. MFA No.20762/2009 The Divisional Manager, The National Insurance Co. Ltd., Vs. Kumar Shivanand S/o. Netaji Mohite and Another 9 from them. Showing that the injured claimant was of the age of 4 years at the time of accident, one Sri. Netaji Mohite, said to be the father and natural guardian of the minor claimant, has preferred the claim petition. Both in the Tribunal below as well as in this Court, the alleged owner of the vehicle i.e., respondent No.1, did not choose to appear even after service of notice upon him. As such, the Tribunal placed him ex-parte and proceeded further in the matter. The 2nd respondent i.e., the Insurance Company, though appeared and contested the matter, its main objection to the claim petition was that it was no more an insurer of the vehicle, as such, it was not liable to pay compensation. However, the Tribunal below, after recording the evidence led before it and going through the documents produced and marked as exhibits and hearing the arguments, came to a conclusion that the claimant was Date of Judgment 13.04.2017 MFA No.21560/2009 C/w. MFA No.20762/2009 The Divisional Manager, The National

Insurance Co. Ltd., Vs. Kumar Shivanand S/o. Netaji Mohite and Another 10 entitled for a total compensation of `1,20,000/- with interest thereupon. Even after giving a finding that there was no valid insurance policy covering the vehicle at the time of accident, the Tribunal below directed the 2nd respondent i.e., the insurer as liable to deposit the awarded amount and then to recover the same from the owner of the vehicle.

9. Thus, the happening of the road traffic accident as alleged by the claimant on the date, time and place mentioned in the claim petition and the rash and negligent driving of the driver of the said vehicle are not in dispute. The Insurance Company in its appeal has disputed affixing liability upon it and not the other aspects. So also was the argument of the learned counsel appearing for the Insurance Company. Therefore, the question of occurrence of accident and Date of Judgment 13.04.2017 MFA No.21560/2009 C/w. MFA No.20762/2009 The Divisional Manager, The National Insurance Co. Ltd., Vs. Kumar Shivanand S/o. Netaji Mohite and Another 11 the claimant sustaining injury being not in dispute, those facts need not be analysed again.

10. The claimant in his appeal, through his father cum natural guardian, has contended that the Tribunal below did not appreciate the gravity of the pain and suffering sustained by him and also the permanent disability he is suffering with, due to the accident and injury. The Tribunal below has awarded the compensation under the following heads: Pain and Suffering Loss of amenities Medical and incidental expenses Loss of education at the time of treatment Amount (````) 40,000.00 30,000.00 30,000.00 20,000.00 Total 1,20,000.00 11. The father of the claimant, who got examined as PW1, in his evidence, apart from reiterating the Date of Judgment 13.04.2017 MFA No.21560/2009 C/w. MFA No.20762/2009 The Divisional Manager, The National Insurance Co. Ltd., Vs. Kumar Shivanand S/o. Netaji Mohite and Another 12 contention taken up in the claim petition, has also stated that, due to the accident, his minor son has suffered with permanent disability and that he can neither sit independently, nor walk without difficulty. He is permanently disabled and has become physically handicapped. He got produced and marked a copy of the Wound Certificate at exhibit P4, Medical Certificate at exhibit P6 and X-ray film at exhibit P8. The Wound Certificate at exhibit P4 shows

that the injured sustained a crush injury to the right leg. Exhibit P6, which is another certificate issued by Shreyas Orthopedics and Trauma Centre, Hubli, more specifically says that the crush injury was to the right foot of the injured.

12. The details of the injury sustained by the claimant can be found in the evidence of PW2 - Dr.Mrutyunjaya, who is an Orthopedic Surgeon. Though he is not a treating doctor, but after clinically examining Date of Judgment 13.04.2017 MFA No.21560/2009 C/w. MFA No.20762/2009 The Divisional Manager, The National Insurance Co. Ltd., Vs. Kumar Shivanand S/o. Netaji Mohite and Another 13 the injured and going through the entire medical records pertaining to the injured and the treatment given to him, he has given his evidence. In his evidence, he has clearly stated that the injured was treated in his hospital as an inpatient, where the injured underwent debrivment and skin grafting. Even after his discharge, he was under continuous treatment. Due to the injury, there is deformation of the right foot, for which he has to walk with palgus foot. Multiple skin were grafted over the right foot. By surgery, his right lower limb was shortened by 1 inch. The boy is suffering with functional disability of 45% to his right lower limb. In his support, he has also referred to exhibits P7 and P8, which are disability certificate and X-rays film. Nothing could be elicited in his cross-examination to distrust the statement of the said doctor. When compared to the whole body, the disability percentage is 22.5% Date of Judgment 13.04.2017 MFA No.21560/2009 C/w. MFA No.20762/2009 The Divisional Manager, The National Insurance Co. Ltd., Vs. Kumar Shivanand S/o. Netaji Mohite and Another 14 according to PW2. These aspects very clearly establish that a small boy of 4 years old has for lifetime became a permanent partially disabled and his appearance, beauty and form has been disfigured.

13. As could be seen from the wound certificate at exhibit P4, at the initial stage, the injured was inpatient in the hospital for about three months. Thus, the injured has undergone a serious trauma and good medical treatment also could not cure him completely. The Tribunal below, without appreciating the circumstances of the case, the age of the injured and future impossibility of complete cure, and without noticing that deformation in the body is a permanent feature, with which the boy has to manage throughout his life, has awarded a meager sum of `40,000/-

towards pain and suffering. At this stage, it is also pertinent to note that no separate compensation Date of Judgment 13.04.2017 MFA No.21560/2009 C/w. MFA No.20762/2009 The Divisional Manager, The National Insurance Co. Ltd., Vs. Kumar Shivanand S/o. Netaji Mohite and Another 15 towards the future loss of income, if any, and future prospects, has been awarded. As such, I am of the view that the said compensation requires to be enhanced reasonably, so as to include the loss of future prospects, income etc. Thus, I intend to modify the compensation awarded by the Tribunal below and to enhance it to ````1,50,000/-.

14. Towards loss of amenities, the Tribunal has awarded a compensation of `30,000/-. As already observed above, due to the injury, which has resulted in deformation of the right limb, the boy has lost a considerable amenity in his life. As such, I intend to enhance the said compensation to ````60,000/-.

15. Towards the medical reimbursement and incidental charges, the Tribunal has awarded a compensation of `30,000/-. The claimants have produced medical bills at exhibit P7. A total of the same Date of Judgment 13.04.2017 MFA No.21560/2009 C/w. MFA No.20762/2009 The Divisional Manager, The National Insurance Co. Ltd., Vs. Kumar Shivanand S/o. Netaji Mohite and Another 16 would come to little bit lower than ````30,000/-. As such, I retain the said compensation awarded by the Tribunal.

16. Towards the loss of education during the period of treatment, the Tribunal has awarded a sum of ````20,000/-. PW2 - doctor in his cross-examination has stated that there is no problem for the injured to prosecute his studies. Considering the aspect that the injury would not come in the way of the boy pursuing his further studies, I do not find any reason to enhance the compensation awarded under the head loss of education during the period of treatment.

17. Barring the above, the claimant is not entitled for compensation under any other head. Thus, the claimant is entitled for compensation as shown in the table below: Date of Judgment 13.04.2017 MFA No.21560/2009 C/w. MFA No.20762/2009 The Divisional Manager, The National Insurance Co. Ltd., Vs. Kumar Shivanand S/o. Netaji Mohite and Another 17 Pain and Suffering Loss of amenities Medical and incidental expenses Loss of education at the time of

treatment Amount (````) 1,50,000.00 60,000.00 30,000.00 20,000.00 Total 2,60,000.00 18. The next question would be about the liability of the respondents to pay the said compensation amount to the claimant. Undisputedly, respondent No.1 is the owner of the vehicle and the respondent No.2 is the insurer of the vehicle. As observed above, the said owner has remained ex-parte in the Tribunal below. Even in these appeals also, he has remained unrepresented even after service of notice upon him.

19. The Tribunal below has fixed the liability as against the owner of the vehicle i.e., respondent No.1 after noticing that the premium amount paid by the Date of Judgment 13.04.2017 MFA No.21560/2009 C/w. MFA No.20762/2009 The Divisional Manager, The National Insurance Co. Ltd., Vs. Kumar Shivanand S/o. Netaji Mohite and Another 18 owner for renewal of the policy through cheque got dishonoured. However, it directed the 2nd respondent- insurer to pay the awarded amount to the injured and then to recover the same from the owner of the vehicle. It is the said finding and award of the Tribunal, the appellant in MFA No.21560/2009 has objected to.

20. According to the learned counsel for the Insurance Company, as on the date of accident, there was no policy in force. The said policy covering the vehicle was cancelled and a notice to that effect was duly served upon the owner of the vehicle. In his support, he relied upon a decision of the Division Bench of this Court in MFA No.840/2001 dated 02.03.2010, which will be analysed at the later stage of this judgment. On the other hand, the learned counsel for the claimant in his arguments submitted that in view of the Date of Judgment 13.04.2017 MFA No.21560/2009 C/w. MFA No.20762/2009 The Divisional Manager, The National Insurance Co. Ltd., Vs. Kumar Shivanand S/o. Netaji Mohite and Another 19 case reported in (2013) 7 SCC62in the case of S. Iyyapan Vs. United India Insurance Company Limited and Another, the insurer is liable to deposit and pay the awarded amount to the claimant and then to recover the same from the owner of the vehicle.

21. A careful perusal of the Tribunal records and the materials placed before this Court go to show that, undisputedly the vehicle involved in this case, which is

owned by the respondent No.1 was originally insured with the 2nd respondent - Insurance Company. Neither of the parties have produced the Insurance Policy copy. The respondent - Insurance Company, which has filed its statement of objection to the main petition in the Tribunal below, except making general denials, has not taken specific contention that, prior to the date of accident, the Insurance Company had cancelled the policy and the same was duly intimated to the Date of Judgment 13.04.2017 MFA No.21560/2009 C/w. MFA No.20762/2009 The Divisional Manager, The National Insurance Co. Ltd., Vs. Kumar Shivanand S/o. Netaji Mohite and Another 20 insured/owner of the vehicle. The said contention in paragraph No.6 of its statement of objection has stated as below: For the present, this respondent deny the policy coverage as the particulars furnished do not appear to be correct It does not mean that the Insurance Policy was cancelled prior to the date of accident under due intimation to the insured/owner of the vehicle. On its behalf, the respondent - Insurance Company examined one Sri. Allamaprabhu, its Senior Assistant as RW1. The said witness in his examination-in-chief, in the form of affidavit, has stated that originally the policy was issued covering a period from 13.03.2003 to 12.03.2004, which period includes the date of accident in the case on hand. For the said Insurance Policy, the owner of the vehicle had issued a cheque for an amount of `2,312/-. According to the Date of Judgment 13.04.2017 MFA No.21560/2009 C/w. MFA No.20762/2009 The Divisional Manager, The National Insurance Co. Ltd., Vs. Kumar Shivanand S/o. Netaji Mohite and Another 21 witness, when presented in the bank for realisation, the said cheque got dishonoured. The same was intimated to the owner of the vehicle by registered post acknowledgement due. Despite the same, he did not bother to pay premium of the policy. Then the policy automatically stood cancelled. As such, as on the date of accident, the policy was not in force. In his support, he got marked documents at exhibits R1 to R5. The denial suggestion made to him in his cross-examination were not admitted as true by the said witness.

22. In the above background, the appreciation of evidence of RW1 had to be necessarily made in the light of the documents produced by him from exhibits R1 to R5. Exhibit R1 is a postal acknowledgement card, which shows that some letter must have been sent to the owner of the vehicle (his name is shown in the Date of Judgment 13.04.2017 MFA No.21560/2009 C/w. MFA No.20762/2009 The

Divisional Manager, The National Insurance Co. Ltd., Vs. Kumar Shivanand S/o. Netaji Mohite and Another 22 shorter form). The said acknowledgement bears a postal seal dated 27.03.2003 and the date mentioned near the signature of the addressee is 29.03.2003. As such, it can be inferred that what was sent along with the said acknowledgement was received by the addressee on 29.03.2003. However, what cannot be unnoticed is the fact that the Insurance Company nowhere produced a copy of the letter or document or notice said to have been sent along with the said postal acknowledgement at exhibit R1 to the addressee. Therefore, merely by looking at exhibit R1, it cannot be inferred that the respondent - Insurance Company had intimated the owner of the vehicle about the cancellation of the policy on 29.03.2003 itself, which was prior to the date of accident. It is not the case of the Insurance Company also that cancellation was duly intimated to the owner of the vehicle through the said letter said to Date of Judgment 13.04.2017 MFA No.21560/2009 C/w. MFA No.20762/2009 The Divisional Manager, The National Insurance Co. Ltd., Vs. Kumar Shivanand S/o. Netaji Mohite and Another 23 have accompanied the acknowledgement. It is because no such statement is made in the examination-in-chief by RW1, nor he has produced the document said to have been sent under registered post. On the other hand, RW1 has only stated that dishonour of cheque was intimated to Respondent No.1 / owner of the vehicle. Exhibit R2 is a bankers memo intimating the beneficiary of the cheque i.e., Insurance Company about the dishonour of cheque. It is dated 18.03.2003. From a conjoint reading of exhibits R1, R2 and evidence of RW1, it can only be inferred that the letter or the document sent along with exhibit R1 to the addressee was only an intimation bringing to the notice of the owner of the vehicle about the dishonour of cheque issued by him and it did not contend that the Insurance Policy has stood cancelled. This inference gains support by the evidence of RW1 itself since in his Date of Judgment 13.04.2017 MFA No.21560/2009 C/w. MFA No.20762/2009 The Divisional Manager, The National Insurance Co. Ltd., Vs. Kumar Shivanand S/o. Netaji Mohite and Another 24 examination-in-chief, he has categorically stated as below: Even after receipt of the notice, respondent No.1 - owner of the vehicle, not bothered to pay the premium of the policy Which means, the alleged notice said to have been sent along with the acknowledgement card nowhere stated that his policy stood cancelled. On the other hand, even after receipt of the said notice, the owner of the vehicle had an opportunity to see that the policy continues to be in force, probably by paying the premium amount afresh. Though RW1 in the same examination-in-chief has further stated that the policy automatically stood cancelled, but it is a mere statement without any corroboration. Had there been any clause about automatic cancellation of the policy for dishonour of cheque, in the policy or agreement entered into between the parties, nothing had prevented the insurer, Date of Judgment 13.04.2017 MFA No.21560/2009 C/w. MFA No.20762/2009 The Divisional Manager, The National Insurance Co. Ltd., Vs. Kumar Shivanand S/o. Netaji Mohite and Another 25 who is the custodian of the documents, to produce the Insurance Policy copy or the terms of the policy to prove that clause. This effort the respondent - Insurance Company has not made in order to prove its case.

23. Secondly, Exhibits P3 and P4 are said to be the notices intimating the Regional Transport Officer and the owner of the vehicle respectively, intimating them about the cancellation of the policy. Interestingly, both these documents have come into existence only on 18.02.2005, i.e., nearly 1 years after the accident and subsequent to the date of filing of claim petition in the Tribunal by the claimant. Thus, it can be inferred that it is only after the filing of claim petition and service of summons upon the Insurance Company, it woke up and issued a notice of cancellation of the policy. Till then, no document appears to have been in existence showing cancellation of policy by the insurer. Date of Judgment 13.04.2017 MFA No.21560/2009 C/w. MFA No.20762/2009 The Divisional Manager, The National Insurance Co. Ltd., Vs. Kumar Shivanand S/o. Netaji Mohite and Another 26 24. Exhibit P5 is another document shown to be an endorsement schedule, which is produced by the Insurance Company. Admittedly, it is a document of the Insurance Company. The said document at its bottom, though mentions endorsement is Cancelled Due to Cheque Dishonour, but in its body it clearly mentions date of expiry of policy as 12.03.2004. That document does not bear the date of its creation. Therefore, it is not clear as to when said document came into existence.

25. Therefore, in all probability, the benefit must be given to the insured i.e., owner of the vehicle and the only conclusion that can be arrived at is, though the owner might have been intimated by the Insurance Company about the dishonour of the cheque, but he was not intimated about the cancellation of the Insurance Policy till service of the letter dated 18.02.2005 to him, which is at exhibit R4. Therefore, only if the Insurance Date of Judgment 13.04.2017 MFA No.21560/2009 C/w. MFA No.20762/2009 The Divisional Manager, The National Insurance Co. Ltd., Vs. Kumar Shivanand S/o. Netaji Mohite and Another 27 Company could prove that the said letter dated 18.02.2005 was duly served upon the owner of the vehicle, then from the said date of the service alone, it can be inferred that the Insurance Policy has stood cancelled.

26. As such, by any unilateral act on the part of the Insurance Company without the support of any terms of the policy, it cannot be inferred that the policy had stood cancelled much before the date of accident. Had it really been cancelled much before the date of accident, then definitely there ought to be necessarily some documents with the Insurance Company, which it should have necessarily produced in the Tribunal below to substantiate its defence.

27. Insurance of the motor vehicle is a contract between the insurer and the insured. The Insurance Policy would be issued as a proof of Insurance Contract Date of Judgment 13.04.2017 MFA No.21560/2009 C/w. MFA No.20762/2009 The Divisional Manager, The National Insurance Co. Ltd., Vs. Kumar Shivanand S/o. Netaji Mohite and Another 28 with the terms and conditions stipulated therein, or attached to it or referred therein. As such, if any terms were to be there in the Insurance Contract or in the Policy regarding automatic cancellation or deemed cancellation of the policy, then by producing the said documents, the respondent insurer would have corroborated his evidence. The respondent-insurer being the custodian of those documents, could have easily produce all necessary papers pertaining to the insurance in this case and also the copy of notice said to have been sent by it to the respondent No.1 / owner of the vehicle. No such effort was made by the insurer. Except making a stray statement in his examination-in- chief that the Insurance Policy had stood cancelled, the insurer had not taken any steps to corroborate such statement. Therefore, the insurer, who was expected to have

custody of the relevant documents, without Date of Judgment 13.04.2017 MFA No.21560/2009 C/w. MFA No.20762/2009 The Divisional Manager, The National Insurance Co. Ltd., Vs. Kumar Shivanand S/o. Netaji Mohite and Another 29 producing them, has enabled to draw adverse inference to the effect that there was no such clause of automatic cancellation of policy. Admittedly, when the letter mentioning the cancellation of policy is prepared and sent to the Regional Transport Officer as well to the insured - owner of the vehicle, long after the occurrence of the road traffic accident in question, it cannot be presumed that the owner of the vehicle was notified about the cancellation of the policy much prior to the date of accident. Therefore, it is to be inferred that the owner of the vehicle, who was also a policyholder, was not intimated by the Insurance Company about the cancellation of the policy. As such, the only main argument of the learned counsel for the respondent - Insurance Company, that the Insurance Policy was cancelled even prior to the date of accident and the same was duly intimated to the insured, cannot be Date of Judgment 13.04.2017 MFA No.21560/2009 C/w. MFA No.20762/2009 The Divisional Manager, The National Insurance Co. Ltd., Vs. Kumar Shivanand S/o. Netaji Mohite and Another 30 accepted.

28. The learned counsel for the claimant in his argument relied upon the judgment of the Honble Apex Court delivered the case of S. Iyyapan Vs. United India Insurance Company Limited and Another reported in (2013) 7 SCC62and contended that, in view of the said judgment, the insurer should pay the awarded amount and later he can recover the same from the owner of the vehicle.

29. In the said case, with respect to Sections 146, 147 and 149 of the Motor Vehicles Act, 1988, the Honble Apex Court was pleased to discuss the consequence of breach of condition of the Insurance Policy with respect to third party insurance and was pleased to hold that, mere absence of an endorsement in the driving licence, to the effect that the licence holder was licensed to drive commercial light motor Date of Judgment 13.04.2017 MFA No.21560/2009 C/w. MFA No.20762/2009 The Divisional Manager, The National Insurance Co. Ltd., Vs. Kumar Shivanand S/o. Netaji Mohite and Another 31 vehicle, could not be a ground for the insurer to disown its liability to pay compensation to third party, more so, when third party has statutory right to recover the compensation from the

insurer and it was for the insurer to proceed against the insured to recover the amount paid to third party in case there was any breach of condition of Insurance Policy.

30. The learned counsel for the insurer in his argument tried to differentiate the said case from its application to the case on hand, stating that the said case is with respect to the possession of driving licence by the driver of the offending vehicle and consequently, the liability of the Insurance Company. Whereas, the case on hand is regarding the existence of the policy as on the date of accident. The learned counsel relied upon the judgment of a Division Bench of this Court in the Oriental Insurance Date of Judgment 13.04.2017 MFA No.21560/2009 C/w. MFA No.20762/2009 The Divisional Manager, The National Insurance Co. Ltd., Vs. Kumar Shivanand S/o. Netaji Mohite and Another 32 Co.Ltd., Vs. K. Shivarao and Another in MFA No.840/2001 dated 02.03.2010, wherein this Court was pleased to observe that the Honble Apex Court has discretion under Article 142 of the Constitution to direct the insurer to make the payment and to recover the same from the owner. High Court cannot exercise the discretion vested with the Apex Court under Article 142 of the Constitution.

31. No doubt, it is the Honble Apex Court only, which can exercise its power and discretion under Article 142 of the Constitution of India and such power cannot be exercised by this High Court. Further, the Apex Court in the case of S. Iyyapan (supra) was not inclined to exonerate the insurer from its liability towards third party, on the premise that there was Insurance Policy in force as on the date of the accident.

32. In the instant case, though it is the Date of Judgment 13.04.2017 MFA No.21560/2009 C/w. MFA No.20762/2009 The Divisional Manager, The National Insurance Co. Ltd., Vs. Kumar Shivanand S/o. Netaji Mohite and Another 33 contention of the insurer that as on the date of accident, the alleged Insurance Policy has already stood cancelled, but as observed above, the said contention of the insurer, due to lack of corroboration, could not be established. As such, it cannot be taken as proved. Therefore, for all practical purposes, it has to be taken that, even though the insurer had sent a notice (as observed above, the contents

of the said notice is not brought to the notice of the Court) immediately after dishonour of the cheque towards payment of premium amount, however, the evidence of RW1 has shown that opportunity was kept open for the insured to pay the premium amount and to let the policy to continue in force. As observed above, till 18.02.2005, there was no cancellation of policy. As such, as on the said date, the policy is required to be deemed in force from the view point of a third person, who gets an advantage under Date of Judgment 13.04.2017 MFA No.21560/2009 C/w. MFA No.20762/2009 The Divisional Manager, The National Insurance Co. Ltd., Vs. Kumar Shivanand S/o. Netaji Mohite and Another 34 the policy.

33. The learned counsel for the claimant relied upon a judgment of this Court in the case of Oriental Insurance Co.Ltd. Vs. Kashamma and Others reported in 2008 ACJ222 wherein, even after noticing that a cheque issued by the owner of the vehicle-insured towards premium was dishonoured and Insurance Company cancelled the policy under intimation to the insured before the occurrence of the accident, even after holding that the insurer was not liable, still the Court held that, since the Insurance Company without waiting for encashment of cheque, issued the policy, it has to make payment to the third party and then recover the same from the owner of the vehicle.

34. The case on hand slightly varies from this fact. As already observed, no document is produced by the insurer to show that the policy was cancelled prior to Date of Judgment 13.04.2017 MFA No.21560/2009 C/w. MFA No.20762/2009 The Divisional Manager, The National Insurance Co. Ltd., Vs. Kumar Shivanand S/o. Netaji Mohite and Another 35 the date of accident and to show that the said cancellation intimation was given to the insured-owner of the vehicle. As such, without relying upon the said case of Kashamma(supra) also, it can be held that the Insurance Company cannot be exonerated from its liability to pay compensation to the claimant. As such also, the contention taken up by the insurer in its memorandum of appeal and the argument of its learned counsel cannot be accepted.

35. As a result of the above discussion, I answer point No.1 in the negative and point No.2 partly in the affirmative and proceed to pass the following:

ORDER

MFA No.21560/2009 is dismissed. MFA No.20762/2009 is allowed in part. The judgment and award passed by Civil Judge (Sr.Dn.) and MACT No.2, Dharwad, in MVC No.343/2004 is modified Date of Judgment 13.04.2017 MFA No.21560/2009 C/w. MFA No.20762/2009 The Divisional Manager, The National Insurance Co. Ltd., Vs. Kumar Shivanand S/o. Netaji Mohite and Another 36 and the compensation awarded therein, which is at `1,20,000/- is enhanced to ````2,60,000/- (Rupees Two Lakhs Sixty Thousand Only). The other terms of the order of the Tribunal with respect to fixation of liability upon the respondents, rate of interest, deposit, mode and manner of disbursement of the awarded amount, remains unaltered. There is no order as to cost. Sd/- JUDGE gab