

The Manager Vs. Bhimraj

The Manager Vs. Bhimraj

SooperKanoon Citation : sooperkanoon.com/1195511

Court : Karnataka

Decided On : Jul-22-2015

Judge : Ashok B.Hinchigeri

Appeal No. : MFA 10685/2013

Appellant : The Manager

Respondent : Bhimraj

Judgement :

1 R IN THE HIGH COURT OF KARNATAKA AT BENGALURU DATED THIS THE22D DAY OF JULY 2015 BEFORE THE HON'BLE MR. JUSTICE ASHOK B. HINCHIGERI M.F.A.No.10685/2013 (MV) C/w M.F.A.No.878/2014 M.F.A.No.10685/2013 BETWEEN: The Manager, Bajaj Allaianz General Insurance Company Limited., City Branch II, No.31, Ground Floor, T.B.R.Tower, Adjacent to Jain College, Mission Road, Bangalore - 560 027. By its Manager Appellant (By Sri O.Mahesh, Advocate) AND:

1.

2. Bhimraj, Aged 62 years, S/o late Ramaswamy, R/at No.12, 1st B Main, 13th Cross, J.C.Nagar, Bangalore - 560 086. Annapurna Beninje Major, D/o B.Sridhar Kakkillaya, No.6/23, 2nd Floor, 2 Shri Soubhagya Nilaya, Balaji Cross, Vivekananda Nagar, Kathriguppe, Bangalore - 560 085. ... Respondents (By Sri K.T.Gurudeva Prasad, Advocate for Sri C.Ramakrishna, Advocate for R1; Sri

J.Pramod, Advocate for R2) This MFA is filed under Section 173(1) of MV Act against the judgment and award dated 20.09.2013 passed in MVC No.2528/2011 on the file of the 12th Additional Small Causes Judge, Member, MACT, Bangalore, awarding a compensation of Rs.1,35,685/- with interest @ 6% p.a. from the date of petition till the date of realization. M.F.A.No.878/2014 BETWEEN: Bhimraj, S/o late Ramaswamy, Aged about 62 years, R/at No.12, 1st B Main, 13th Cross, J.C.Nagar, Bangalore - 560 086. Appellant (By Sri K.T.Gurudeva Prasad, Advocate for Sri C.Ramakrishna, Advocate) AND:

1. Smt. Annapurna Beninje D/o B.Sridhar Kakkillaya, No.6/23, 2nd Floor, Shri Soubhagya Nilaya, Balaji Cross, Vivekananda Nagar, Kathriguppe, Bangalore - 560 085.

2. 3 Bajaj Alliaanz General Insurance Company Limited., City Branch II, No.31, Ground Floor, T.B.R.Tower, Adjacent to Jain College, Mission Road, Bangalore - 560 027. ... Respondents (By Sri J.Pramod, Advocate for R1; Sri O.Mahesh, Advocate for R2) This MFA is filed under Section 173(1) of MV Act against the judgment and award dated 20.09.2013 passed in MVC No.2528/2011 on the file of the XII Additional Small Causes Judge, Member, MACT, Bangalore, partly allowing the claim petition enhancement of compensation. delivered the following: These MFAs coming on for hearing this day, the Court seeking for compensation and

JUDGMENT

Both these appeals arise from the judgment, dated 20.09.2013 passed by the Motor Accident Claims Tribunal, Bangalore in M.V.C.No.2528/2011.

2. M.V.C.No.10685/2013 is filed by the Insurance Company on the ground that it cannot be made liable to pay the compensation, as the accident is caused by somebody, who had 4 stolen the motor cycle. M.F.A.No.878/2014 is filed by the claimant seeking the enhancement of compensation.

3. The Tribunal has awarded `1,35,685/-, the break-up of which is as follows: Sl.No.1.

2.

3.

4. 5.

6. Medical expenses Total Loss of future income due to disability Loss of amenities in life, happiness & frustration For conveyance, attendant charges, food and nourishment Pain and suffering Loss of income during laid up period Amt. (₹)
43,740-00 15,000-00 10,000-00 35,000-00 18,000-00 13,945-00 1,35,685-00 4.

Sri O.Mahesh, the learned counsel for the appellant Insurance Company in M.F.A.No.10685/2013 submits that it is not in dispute that the motor cycle in question was stolen from its owner. When the owner himself is not liable for what the thief has done, the Insurance Company also cannot be held liable. He submits that as per Section 168 of the Motor Vehicles Act, 1988, the driver is to be made a party to the claim proceedings before the 5 Tribunal. The police have filed the C report in the criminal case. He submits that under these circumstances, the claimants remedy would be only to claim the compensation treating the accident as hit and run case as provided under Section 163 of the said Act.

5. He submits that under Rule 235 of the Karnataka Motor Vehicles Rules, 1989 the Tribunal has to put both the owner and the driver of the vehicle on notice. In the absence of the tort-feasor (rider of the motor cycle), the claim petition ought to have been rejected. He submits that there are glaring self-contradictions and inconsistencies in the police documents. Some documents state that the vehicle was left on the spot, other documents show something else. He submits that the mahazar witness is not even examined before the Tribunal. He also complains of the delay in getting the vehicle inspected and assessed for damages.

6. He relies on the Apex Courts judgment in the case of SITARAM MOTILAL KALAL v. SANTANUPRASAD6JAISHANKAR BHATT reported in 1966 AIR1697 wherein it is held that for the master's liability to arise, the act must be a wrongful act authorised by the master or a wrongful and unauthorised mode of doing some act authorised by the master. The portion read out by him from the said decision reads as follows: The law is settled that master is vicariously liable for the acts of

his servants acting in the course of his employment. Unless the act is done in the course of employment, the servant's act does not make the employer liable. In other words, for the master's liability to arise, the act must be a wrongful act authorised by the master or a wrongful and unauthorised mode of doing some act authorised by the master. The driver of a car taking the car on the master's business makes him vicariously liable if he commits an accident. But it is equally well-settled that if the servant, at the time of the accident, is not acting within the course of his employment but is doing something for himself the master is not liable. There is a presumption that a vehicle is driven on the master's, business and by his authorised agent or servant but the presumption can be met. It was negated in this case, because the vehicle was proved to be driven by an unauthorised person and on his own business. The de facto driver was not the driver or the agent of the owner but one who had obtained the car for his own business not even from the master but from a servant of the master. Prima facie, the owner would not be liable in such circumstances.

7. Sri K.T.Gurudeva Prasad, the learned counsel for the first respondent claimant in M.F.A.No.10685/2013 submits that the breach of terms of the policy is not germane in case of theft of vehicle. To support his submission he read out the head note from the Honble Supreme Courts decision in the case of NATIONAL INSURANCE CO. LTD. v. NITIN KHANDELWAL reported in 2008 ACJ2035 Motor insurance - Theft of vehicle - Comprehensive policy - Repudiation of claim - Some unknown persons stopped the vehicle, tied the driver and took the vehicle which could not be recovered - Insurance company repudiated the claim on the ground that vehicle was insured for personal use but it was being used as a taxi for carrying passengers - Owner filed complaint in the District Forum under Consumer Protection Act which held that insurance company was justified in rejecting the claim as the owner had violated terms and conditions of policy - State Commission observed that theft of vehicle has not been denied by insurance company and directed it to settle the claim on non-standard basis by paying 75 per cent of the amount - National Commission confirmed the order - Whether the insurance company is liable to indemnify the insured for his loss when he has taken comprehensive policy - Held: yes; breach of terms of policy is not germane in case of theft of vehicle.

8. Next, he brings to my notice the Division Bench judgment of

Kerala High Court in the case of SASIDHARAN NAIR v. ALI AND OTHERS reported in 2010 ACJ1061 The head note read out by the learned counsel is as follows: Motor Vehicles Act, 1988, sections 147(1), 147(5) and 149(1) - Motor insurance - Stolen vehicle - Liability of insurance company - Person A who was driving a stolen motor cycle caused accident and another motor-cyclist sustained injuries - Insurance company of stolen vehicle seeks to avoid its liability on the plea that A was not authorized by owner of vehicle, there is no vicarious liability on the part of owner which insurance company is liable to indemnify - Tribunal found that offending vehicle was not under the custody or control of owner, person A was not a servant or authorized person of the owner, owner is not liable and exonerated insurance company - Vehicle was insured at the time of accident and insurance company is statutorily liable to cover the risk of the injured who is a third party - Whether the insurance company is liable - Held: yes; theft of vehicle and unauthorized use by the person who had stolen the vehicle cannot be termed as a breach committed by the insured; insurance company is at liberty to recover the amount from the person who was driving the motor cycle. 9. He has also relied on the Apex Courts judgment in the case of UNITED INDIA INSURANCE CO. LTD. v. LEHRU AND OTHERS reported in (2003) 3 SCC338 Paragraph No.18 of the said decision reads as follows: 18. Now let us consider Section 149(2). Reliance has been placed on Section 149(2)(a)(ii). As seen, in order to avoid liability under this provision it must be shown that there is a "breach". As held in Skandia and Sohan Lal Passi cases the breach must be on the part of the insured. We are in full agreement with that. To hold otherwise would lead to absurd results. Just to take an example, suppose a vehicle is stolen. Whilst it is being driven by the thief there is an accident. The thief is caught and it is ascertained that he had no license. Can the insurance company disown liability?. The answer has to be an emphatic "No". To hold otherwise would be to negate the very purpose of compulsory insurance. The injured or relatives of 10 person killed in the accident may find that the decree obtained by them is only a paper decree as the owner is a man of straw. The owner himself would be an innocent sufferer. It is for this reason that the legislature, in its wisdom, has made insurance, at least third-party insurance, compulsory. The aim and purpose being that an insurance company would be available to pay. The business of the company is insurance. In all

businesses there is an element of risk. All persons carrying on business must take risks associated with that business. Thus it is equitable that the business which is run for making profits also bears the risk associated with it. At the same time innocent parties must not be made to suffer or loss. These provisions meet these requirements. We are thus in agreement with what is laid down in the aforementioned cases viz. that in order to avoid liability it is not sufficient to show that the person driving at the time of accident was not duly licensed. The insurance company must establish that the breach was on the part of the insured.

10. He submits that there is no serious cross-examination of PW1 by the Insurance Company.

11. Sri J.Pramod, the learned counsel for the second respondent owner submits that the insurance policy (Ex.R7) is 11 comprehensive covering the risk of the third parties. He would therefore contend that the Insurance Company is liable to satisfy the award. He has also relied on the Division Bench judgment of this Court, dated 26.7.2011 passed in M.F.A.No.8746/2004, which was disposed of following the Apex Courts judgment in the case of Lehru (supra).

12. In the course of rejoinder, Sri Mahesh submits that the facts of the reported case and of the instant case are entirely different. He submits that the decision in the case of Nitin Khandelwal (supra) is in the context of Consumer Protection Act, 1986. In the other two reported decisions relied upon by the claimants, there was no evidence. But in the instance case, elaborate evidence is placed on record which should come to the rescue of the Insurance Company in contending that neither the owner nor the Insurance Company is liable to pay the compensation.

13. Sri K.T.Gurudeva Prasad, the learned counsel appearing for the claimant - appellant in M.F.A.No.878/2014 submits that the 12 Tribunal has erred in taking the income of the claimant as `4,500/- per month. His income ought to have been taken as atleast `5,500/- per month.

14. Sri Mahesh submits that the amounts awarded under various heads are fair and proper.

15. The submissions of the learned counsel have received my thoughtful consideration. The following questions fall for my consideration: (i) Whether the Tribunal is justified in holding that the owner and Insurance Company are jointly and severally liable to pay the compensation to the claimant?. (ii) Whether the amounts awarded by the Tribunal under various heads are fair and proper?. In Re. Question No.(i):

16. The facts of the case are not in dispute. It is the case of all the three parties that at the material point of time of the occurrence of the accident, the motor cycle was in the custody of a 13 thief. Further, it is also not in dispute that he was riding the motor cycle in a negligent and over-speeding manner. As his whereabouts themselves are not traceable, his possessing or not possessing the driving licence has remained unascertainable.

17. It is nobodys case that the owner has left the vehicle to be driven by an unlicensed person. On the lifting of the vehicle by the thief, the owner has promptly lodged the police complaint. The owner has not committed the breach of any terms of the insurance policy (Ex.R7). In the case of Nitin Khandelwal (supra), the Apex Court has expressed the considered view that in the case of theft of vehicle, the breach of terms of policy is not germane. The Insurance Company cannot repudiate the claim in a case of loss of vehicle due to theft. The appellant Insurance Company is liable to indemnify the owner of the vehicle when the insured has obtained comprehensive policy for the loss caused to the insured.

18. In the case of Sasidharan Nair (supra) the Insurance Company sought to avoid its liability on the plea that the 14 vehicle was stolen and that therefore it was being driven by somebody, who was not authorized to drive the vehicle. The Division Bench of Kerala High Court held that the theft of vehicle and its unauthorized use by the thief cannot be termed as a breach committed by the insured; insurance company is at liberty to recover the amount from the person, who was driving the motor cycle. The insurer cannot be exempted from the liability to satisfy the award in favour of a third person when the insured is not at fault and is not guilty of a breach of promise.

19. In the case of Leheru (supra), it is held to be equitable that if a loss has to fall on someone, then it should fall on the insurer, as the insurer is carrying on this business. The business of the Company is insurance. In all business there is an element of risk. In order to avoid the liability under Section 149(2)(a)(ii) of the said Act, it must be shown that there was a breach on the part of the insured. To hold otherwise would lead to absurd results. The aim and purpose of the provision for compulsory third party risk is 15 that an insurance company would be available to pay the compensation.

20. It is also profitable to refer to the Honble Supreme Courts decision in the case of SKANDIA INSURANCE CO. LTD. v. KOKILABEN CHANDRAVADAN AND OTHERS reported in (1987) 2 SCC654 The relevant portions of the said decision are extracted hereinbelow: 14. It is the statutory provision defining the conditions of exemption which is being interpreted. These must therefore be interpreted in the spirit in which the same have been enacted accompanied by an anxiety to ensure that the protection is not nullified by the backward looking interpretation which serves to defeat the provision rather than to fulfil its life-aim. To do otherwise would amount to nullifying the benevolent provision by reading it with a non-benevolent eye and with a mind not tuned to the purpose and philosophy of the legislation without being informed of the true goals sought to be achieved 21. Following the ratio laid down in the afore-mentioned decisions of the Honble Supreme Court, I answer the first question to the effect that the Tribunal is fully justified in holding that the 16 owner and the Insurance Company are jointly and severally liable to pay the compensation. It is only required to be clarified that the Insurance Company has the liberty of recovering the amounts from the person, who has caused the accident.

22. In the result, I dismiss M.F.A.No.10685/2013 but subject to the liberty reserved hereinabove. In Re. Question No.(ii):

23. Now I am left with the examination of the claimants appeal - M.F.A.No.878/2014 for the enhancement of compensation. Admittedly, the claimant has been doing the milk vending business. He had suffered the fracture of both the bones (tibia and fibula) of left leg. Dr. B.R.Venkateshaiah (PW2) has

admitted in the course of his cross-examination that the fractures are well-united and that the claimant has attained the maximum recovery and that his limping is mild to moderate. He has further said that the shortening of the leg is by half a centimeter, which is just negligible. His opinion is that it can be corrected even by 17 wearing the shoes. In view of these admissions made by the doctor, it is hard to believe that the claimant has suffered any permanent physical disability, which comes in the way of his milk vending business. In a case of this nature, the awarding of the amounts towards the loss of future income is not warranted. Some realistic amount can at the most be awarded towards temporary and minor disability. The awarding of about `43,000/- by the Tribunal towards the loss of income can be taken as the amounts awarded towards the temporary and minor disability. I find that the amounts awarded by the Tribunal under the other heads is fair, proper and realistic. I therefore dismiss M.F.A.No.878/2014.

24. The amounts deposited by the Insurance Company in this Court are ordered to be transferred to the Tribunal for being disbursed to the claimant in accordance with law. Sd/- JUDGE Cm/MD

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com