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SooperKanoon Citation : sooperkanoon.com/727253

Court : Kerala

Decided On : Mar-19-1990

Reported in : II(1990)ACC383

Judge : Thomas and; Manoharan, JJ.

Appellant : United India Insurance Company Limited

Respondent : Gopinathan

Judgement :

Thomas, J.

1. A claim was made by an injuured person before Motor Accidents Claims Tribunal for compensation. The motor accident had occurred on 26.12.1983 at about 7.30 a.m. in which the claimant sustained fracture of tibia and fibula, besides some other injuries. He was riding a moped (KLG 8830) along the public road which lies north to south. While he was overtaking a bus which was stopped on the western side of the road, a Flat car (KLG 7905) came from opposite direction and collided with the moped. Claims Tribunal found that both the claimant and the car driver were negligent. Claims Tribuunal which assessed total compensation due to the claimant at Rs. 65,200/- deducted one half there from on account of claimant's contribution of negligence in the accident and hence awarded a sum of Rs. 32600/-. The appellant-insurance company was directed to pay the said sum, besides fixing liability with the owner and driver of the Fiat Car. One of these appeals has been filed by the insurance company, and the other appeal has been filed by the claimant challenging the quantum of compensation assessed.

2. While dealing with the insurer's appeal, the following facts are relevant: The owner and driver of the car filed a joint written statement on 27.9.84. The insurer filed written statement on 13.9.84, in which, he has stated that the car was insured on 26.12.83 at 12.30 p.m. without disclosing that it was involved in an accident earlier on the same day and that the non-disclsoure of this material fact renders the insurance policy void. In the joint written statement filed by the owner and driver of the car they have mentioned that the car was covered by a valid policy. But nothing is mentioned in their written statement whether the accident was disclosed to the insurer or not Ext. B1 is the policy of insurance and Ext. B5 is the certificate of insurance dated 26.12.83; It is evident from Ext. B5 that the policy was taken only at 12.10 p.m. on 26.12.83.

3. The decision of this Court in Oriental Insurance Co. Ltd. v. Sivan 1989 (2) K.L.T. 897 was cited in support of the contention that a policy issue deven after the time of accident will be good enough to cover the liability of the insured if the policy was issued on the same day. The point involved in the said case was whether the policy of insurance was effective from midnight on 14.7.1985 or whether it was only effective from 11 a.m. on 15.7.1985 at which time the policy was issued in the said case. The Division Bench in that decision laid stress on the words 'effective date of commencement of insurance for the purpose of the Act' in entry No. 3 in Form A of the Motor Vehicles (Third Party Insurance) Rules, 1946. Their Lordships in that context has observed thus: 'No insurance policy, within the meaning of the Motor Vehicles Act, containing a clause that the risk under the

policy would commence with effect from a specified time on a date can validly be issued'. Accordingly, the Division Bench held that the risk under the policy must have commenced with effect from midnight of 14.7.1985.

4. Learned counsel contended that the above view requires reconsideration. He invited our attention lo the corresponding Form in the Rules framed under Motor Vehicles Act, 1988 in which the time is given stress instead of dale of the policy. He contended that since the Form is only illustrative, too much stress on the literal meaning of a word in the Form need not be given so as to afford a construction which goes contrary to the very concept of contract of insurance. Learned counsel further contended that the interpretation of the Division Bench in Sivan's case would undoubtedly deprive the vehicle owners of the incentive to insure their vehicles against third party risks as they can protect themselves from liability by liking a policy of insurance even after the accident. Though the argument needs consideration, we do not think it necessary to refer this case to a larger bench since these appeals can be disposed of de hors that point.

5. Section 96 of the Motor Vehicles Act, 1939 deals with the liability of the insurer vis-a-vis the person insured in respect of third party risks. Sub-Section (2) enables the insurer to defend the action on any of the grounds enumerated in the sub-section. One of the grounds so enumerated reads thus: 'That the policy is void on the ground that it was obtained by the nondisclosure of a material fact or by a representation of fact which was false in some material particular'. Sub-Section (5) defines 'material fact' as a fact of such a nature as to influence the judgment of a prudent insurer in determining whether he will take the risk and if so, at what premium and on what conditions. We have little doubt that if a vehicle owner discloses the fact, while laking the insurance policy that the vehicle was involved in an accident which happened on the same day, on insurer would agree to cover that accident also, except perhaps on payment of a much larger premium. If the insurer is told about the accident which look place during the proceeding hours on the same day, he would normally issue a policy which would be effective from next day onwards. So, nondisclosure of the accident which is a material fact would vitiate the policy which may render the policy itself void. This question did not arise in Sivan's case (cited supra) which was decided by the Division Bench.

6. The owner of the Fiat car has no case in the written statement that the fact of accident was conveyed to the company when the policy was taken. It is true that the driver has deposed as R.W. 1 that he approached the Branch Manager of the insurance company on 24.12.83 for renewing an already expired policy and paid premium on the promise that the policy would be issued on next working day and that he went lo the office on 27.12.1983 and collected the policy. A Development Inspector of the insurance company was examined as R.W.3 only for repudiating the evidence of R.W. 1. The Branch Manager of the insurance company was not examined. Learned counsel for the appellant contended that the Branch Manager was not examined because the owner has not adopted a contention in the written statement that the accident was disclosed to the insurance company. (That written statement was filed only fourteen days after the insurer filed his written statement).

7. A plea was made on behalf of the owner of the car for one more opportunity to give evidence to establish that the accident was disclosed to the insurer before issuing the policy. In the interest of justice, we are inclined to accede to the said plea since the burden in this case is on the insured to show that material facts were disclosed at the time of taking the policy.

8. In the appeal filed by the claimant, it is not open to the owner of the car now to contend that his driver was not negligent. This is because the owner of the car did not challenge the finding arrived at by the Claims Tribunal that the driver of the car as well as the rider of moped were negligent and the collision was the result of contributory negligence of both. We have no doubt, from the broad circumstances in this case, that die rider of the moped was negligent. Since he was overtaking a vehicle, it was his duty to ensure himself that he had a clear passage to go ahead. The fact that he confronted with another vehicle which came from opposite direction is prima facie proof that the rider of the moped did not make it sure that his passage was clear. Therefore, he cannot be absolved from negligence in riding the moped.

9. The claimant has also challenged the quantum of compensation assessed by the Claims Tribunal. Since we remit the case to the Claims Tribunal for consideration of the liability of the insurance company, we direct the Claims Tribunal to fix the total quantum of compensation afresh on the evidence already on record and then deduct one half there from to fix the amount due to the claimant. The Claims Tribunal will also pass appropriate orders in the final award regarding the amount already deposited by the insurance company pursuant to the condition imposed on it by this court while granting an order of stay in this appeal. Subject to the above observations, a fresh award shall be passed by the Claims Tribunal.

10. Parties are directed to appear before the Claims Tribunal on 30.4.1990. We also direct the Claims Tribunal to dispose of the case within three months from the date of receipt of records. Office is directed to dispatch records as early as possible. Appeals are disposed of in the above terms.

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