

**Dharmalinga Mudaliar Vs. N. Mohamed Ebrahim and anr.**

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**SooperKanoon Citation :** [sooperkanoon.com/796818](http://sooperkanoon.com/796818)

**Court :** Chennai

**Decided On :** Jan-30-1976

**Reported in :** AIR1977Mad117

**Judge :** N.S. Ramaswami, J.

**Acts :** [Motor Vehicles Act, 1939](#) - Sections 96(2)

**Appeal No. :** Appeal No. 348 of 1972 and C.R.P. Nos. 851 to 854 of 1972

**Appellant :** Dharmalinga Mudaliar

**Respondent :** N. Mohamed Ebrahim and anr.

**Judgement :**

1. This appeal and the revision petitions arise out of the claims made regarding a motor accident. The accident took place on 21-12-1967, the motor car bearing registration No. MSY 6929, belonging to Mohamed Ebrahim, the plaintiff in O. S. No. 73 of j1969, was being run as a taxi. The bus MDO 5783 belonging to the first defendant in that suit was the other motor vehicle involved in the accident. It was a head on collision between the two vehicles in which the motor car (MSY 6929) came to be badly damaged. The occupants of the car had been injured. The claim in the suit, out of which A. S. No. 348 of 1972 arises, is made by the owner of the car (taxi) regarding the damage to the vehicle on the ground that the accident was due to negligence on the part of the driver of the bus. The four revision petitions arise out of four different claim petitions filed by the injured in the

said accident.

2. The owner of the bus and the insurer thereof who were made parties to the suit as well as claim petitions contested the claims. The court below held that the accident was due to the negligence on the part of the driver of the bus and that therefore, the owner of the car as well as injured are entitled to compensation. It fixed the compensation payable to the owner of the car (plaintiff in O. S. 73 of 1969) towards the damage to the vehicle at Rs. 9000 and further added a sum of Rs. 2000 as the amount that the owner of the car lost as a result of the accident, inasmuch as the car which was running as a taxi was not able to be put on the road for a long period. Regarding the four injured, the court below fixed certain amounts as compensation.

3. It held that the owner of the bus alone liable to pay the damages to the owner of the car as well as the compensation payable to the injured, exonerating the insured.

4. The case of the insurer has been that the bus was driven at the time of the accident by a person who had no licence to drive a vehicle of that type and that, therefore, as per the conditions of the policy, the accident is not covered by the same. This contention of the insurer has been accepted by the court below and hence the owner of the bus alone has been made liable. Hence the appeal and the revision petitions by the owner of the bus.

5. Regarding the question of negligence, there is not much to be said in favour of the owner of the bus. A rough plan prepared by the police officer who investigated the accident has been exhibited in the case and the correctness of the same is not questioned. That plan itself shows the position of two vehicles when the head on collision took place. The car was going on its proper track and it was the bus which swerved from its track and came to the wrong side and attacked the car. Kalipullah who was the driver of the car gave evidence to the effect that he was driving the car keeping to the proper side and the bus, all of a sudden swerved from its path and attacked the car. As against this, one Swaminathan, claiming to be the driver of the bus, has been examined as D.W. 2. He said that he drove the bus in the proper track and the taxi was driven in a zig-zag way and that, that was the cause

for the accident. There are sufficient grounds to hold that Swaminathan, D.W. 2, is a put up witness and that he was not the driver of the bus at the relevant time, though he might be the authorised person to drive the said vehicle. It is in evidence that one Murrugayyan, a mechanic, was the person who drove the bus at the relevant time. It was the said Murrugayyan who had been prosecuted by the police for rash and negligent driving regarding the accident and he had been convicted by the criminal court. Under such circumstance, it is not seriously contended before me that it was Swaminathan, D.W. 2, who actually drove the bus. That means, D.W. 2 is not a competent witness to speak about the manner in which the accident took place. The evidence of P.W. 4, driver of the car, is in accordance with other circumstance and probabilities of the case. As already indicated, the rough plan prepared by the police officer, the correctness of which is not questioned, itself indicates that it was the bus which went to its wrong side and attacked the car. Therefore, the conclusion of the court below that the accident was due to the negligence on the part of the driver of the bus has to be accepted.

6. Regarding the question of quantum, it is not contended, as far as the injured are concerned, that the court below erred in fixing the compensation. Small amounts have been awarded to the four injured and they have not been questioned.

7. However, as far as the damage to the car is concerned, the contention of the owner of the bus is that the claim is a very exaggerated one and the court below has decreed the entire claim without proper scrutiny. The car is said to be 1955 year model Studebaker. The owner of the car claimed that he purchased the car in the year 1966, for a sum of Rs. 10000. Ex. A-3 dated 1-11-196 is said to be the receipt given by one M. A. Hayum, the previous owner of the car for a sum of Rs. 10000. Admittedly, the care had passed several hands before it came to the present owner. The owner of the car has not placed the best evidence in respect of the price that he has actually paid for the same. Significantly, the previous owner of the car who is said to have passed the receipt Ex. A-3 has not been examined. The matter rests only on the evidence of the owner himself as P.W. 1. When the best evidence that should be available has not been placed, I think it is not safe to accept the evidence of P.W. 1, regarding the price for which he had purchased the car.

8. Assuming that he had paid a sum of Rs. 10000 for the car on 1-11-1966, the question is whether he is entitled to a compensation of a total sum of Rupees 11000. It is claimed that if the car is to be repaired, a sum of Rs. 9000 is required and that as the vehicle had been immobilised due to the accident, there was loss incurred (as the car had been run as a taxi) to the extent of Rs. 2000. That is how the total claim of Rs. 11000 is made up. It is not the case of the owner of the car that he actually repaired the vehicle. He has only produced certain papers said to be estimates for the repair of the car given by two workshops. Ex. A-10 dated 29-3-1968 is said to be an estimate given by Raman and Raman (P.) Ltd., Thanjavur. Ex. A-11 dated 10-4-1968, is said to be an estimate given by Akbar Automobiles, Madurai. In Ex. A-11, it is stated that the spare parts to be used for repairing the car would cost Rs. 5000 and the labour charges would be Rs. 4000. In Ex. A-10, only the labour charges are indicated as Rs. 4500; but no estimate regarding the cost of the spare parts to be used for repairing the car is given. The court below has rejected the evidence of the owner of the car regarding Ex. A-11 said to be the estimate given by Akbar Automobiles, Madurai. It has given sufficient reasons to hold that Ex. A-11 is not a genuine document and no reliance can be placed on the same. That view of the court below is not questioned before me.

9. So, one is left with Ex. A-10 the estimate given by Raman and Raman (P.) Ltd., Thanjavur. The significant factor is that none from Raman and Raman (P.) Ltd., has been examined to prove Ex. A-10. The same has been produced only by the owner of the car (P.W. 1) As none from Raman and Raman (P.) Ltd., has been called as a witness, I do not think the figure in Ex. A-10 can be accepted ipso facto. Even otherwise, as it is not claimed by P.W. 1 the owner of the bus, that he actually repaired the car and spent the sum as indicated in Ex. A-10. All that on record is that P.W. 1 got an estimate as per Ex. A-10 for repairing the car. As the car itself has not been repaired, I do not think it is proper to hold that the owner of the car is entitled to sum of Rs. 9000 as compensation for the damages to the car, especially when Ex. A-10 itself gives the estimate only regarding labour charges of Rs. 4500 and nothing is mentioned about the value of the spare parts to be used.

10. However, it cannot be gain said that the car had been badly damaged. The accident being a head on collision, the front part of the car had been very much

damaged--bumper, grill radiator, mud-guards and head lights had been smashed. The position of the engine has also changed though there is nothing to show that the engine itself had been otherwise damaged.

11. Whatever that be, as the owner of the car has not given evidence of having repaired the car and spent any amount in that respect, the proper compensation payable would be the difference between the value of the car as on the date of the accident and the scrap value of the vehicle after the accident. As the car is said to have been purchased, even as per P.W. 1, for a sum of Rs. 10000 in 1966, it cannot be worth anything more than Rs. 8000 as on the date of the accident, the date being 21-12-1967, more than one year after the purchase of the car. The car having been used as a taxi should have worn out very much after it was purchased by P.W. 1. Therefore, even accepting the case of P.W. 1 that he paid a sum of Rs. 10000 for the car, as on the date of the accident the value of the same cannot exceed a sum of Rs. 8000. Considering the fact that only the front part of the car had been damaged, and that too there is no evidence to show that the engine itself had been damaged, I believe, even as a scrap, the vehicle would be worth Rs. 3000. I say so because the several other parts of the car which had not been affected, can be sold for a reasonable price. Under such circumstances, I think the proper compensation payable for the damages to the car itself is only Rs. 5000.

12. Regarding the loss of income, the claim is exaggerated. As already seen, the claim is for a sum of Rs. 2000. On the evidence before the court, I think it is safe to hold that the loss of income was only Rs. 1000. Therefore, the total compensation payable to the owner of the car is only Rs. 6000.

13. The only remaining question is whether the court is right in exonerating the insurer. Now, it is not disputed that the person who drove the bus was only Murugayyan. It is further not in dispute that the said Murugayyan did not have a licence to drive a heavy motor vehicle. Undoubtedly, the bus in question is a heavy motor vehicle. That means the person who drove the bus did not have a licence to drive the said vehicle. In the policy issued by the insurer, there is a condition that the policy would cover an accident only if the person who drives the vehicle holds

a licence to drive the same. I will extract the very words and they are as follows:--

'Provided that the person driving holds a licence to drive the motor vehicle or has held and is not disqualified for holding or obtaining such a licence.'

As it is not in dispute that Murugayyan did not hold a licence to drive a heavy motor vehicle, such as the bus which was covered by the said policy, as per the above condition of the policy, the insurer cannot be made liable.

14. It is contended on behalf of the owner of the vehicle that in view of the decision of the Supreme Court in *New Asiatic Insurance Co. Ltd. v. Pessumal Dhanamal Aswani*. : [1964]7SCR867 the above said condition in the policy cannot be taken advantage of by the insurer to shove off its liability. In that case, the car belonging to one Aswani was given to one Pesumal who drove the car. One of the conditions in the policy was that if the driver of the car was entitled to benefits under any other policy, the policy issued in favour of Aswani would not be available. Pasumal had the benefit of some other policy. The Supreme Court held that such a condition would not debar the third party claimant from claiming compensation from the insurer. At page 1741, the Supreme Court observed--

'Thus the contract between the insured and the company may not provide for all the liabilities which the company has to undertake vis-a-vis the third parties, in view of the provisions of the Act. We are of opinion that once the Company had undertaken liability to third parties incurred by the persons specified in the policy, the third parties' right to recover any amount under or by virtue of the provisions of the Act is not affected by any conditions in the policy. Considering this aspect of the terms of the policy, it is reasonable to conclude that proviso (a) of para 3 of Section II is a mere condition affecting the policy and the persons to whom the cover of the policy was extended by the company, and does not come in the way of third parties' claim against the company on account of its claim against a person specified in para 3 or one to whom cover of the policy was extended.'

This decision has no application to the facts of the present case because the condition in the policy covering the vehicle in the present case is a statutory condition. In other words, the Motor Vehicle Act contemplates the insurer to

exclude the cover of the policy in case the vehicle is driven by a person who does not hold a licence to drive the particular vehicle.

15. In Section 96(2)(b)(ii) of the [Motor Vehicles Act, 1939](#), it is provided that the insurer can issue a policy subject to a condition excluding driving by a named person or persons or by any person who is not duly licenced, or by any person who had been disqualified for holding or obtaining a driving licence during the period of disqualification. The insurer in this case has availed of this statutory provision and inserted the particular condition in the policy. Therefore it is not open to contend that the insurer should not have been exonerated, even if the third party claimants press the claim against the insurer.

16. But, in the case before the Supreme Court, the condition, as seen above, is not one contemplated under the statute. It is under such circumstances, the Supreme Court held that it is not open to the insurer as against the claims by third parties to contend that because of the said condition between it and the insured, it is exonerated regarding the claims made by the third parties.

17. Further, in the present case, the third parties claimants do not press their claim against the insurer. It is the owner of the bus who is a party to the contract of insurance, who says that the insurer should be made liable for the compensation payable to the third party claimants. Whether the condition in the policy is one contemplated in the statute or not, the insured being a party to the contract cannot be heard, to say that the terms of the contract are not to govern the rights of the parties.

18. Chanchallben v. Shailesh Kumar Pandurao Thakore, : AIR1974 Guj145 is a decision by the Gujarat High Court and that was a case where the driver held a licence to drive the vehicle in question though it was a learner's licence. Therefore, that decision has no application to the present case. In the decisions in Appa Rao v. Dunna Mukundarao, 1973 ACJ 222 and the New India Assurance Co. Ltd. v. Srikanta Ghose, 1972 ACJ 153 (Ori) on facts it had been found that it had not been established that the person who drove the vehicle did not have a licence to drive that vehicle. Therefore these cases are also of no help in deciding the present case.

19. The result is that the revision petitions are dismissed. But the appeal A. S. No. 348 of 1972 is partly allowed in that the total compensation payable to Mohammed Ibrahim, the plaintiff in O. S. No. 73 of 1969 is only Rs. 6000. I direct the parties to bear their respective costs in this court.

20. Revision dismissed.

21. Appeal partly allowed.

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