IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE T.R.RAMACHANDRAN NAIR
&
THE HONOURABLE MR. JUSTICE K.P.JYOTHINDRANATH

MONDAY, THE 10TH DAY OF AUGUST 2015/19TH SRAVANA, 1937

MACA.No. 874 of 2012 ()

AGAINST THE AWARD IN OPMV 766/2005 of M.A.C.T.,NEYYATTINKARA
DATED 29-07-2011

APPELLANT/2ND RESPONDENT :

UNITED INDIA INSURANCE CO. LTD.
C.M.C. BUILDING, L.M.S. COMPOUND, PALAYAM
THIRUVANANTHAPURAM.

BY ADV. SRI.P.V.JYOTHI PRASAD

RESPONDENTS/PETITIONERS & RESPONDENTS 1 AND ADDL. R3:
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1. SOMAN
S/O.GOVINDAN NADAR, MANNAKKALLU PUTHEN VEEDU, PANAVILA
MULLOOR P.O.-695 521, VIZHINJAM, THIRUVANANTHAPURAM.

2. VASANTHA @ VASANTHAKUMARI
DO.DO.

3. SHEEJA
DO.DO.

4. AUGUSTIN JOHN
THANPONNAKALA MEKKUNDA PUTHEN VEEDU
KANJIRAMKULAM-695 524, THIRUVANANTHAPURAM.

5. BIJU
S/O.KRISHNAN, THANPONNAKALA MEKKUNDA PUTHEN VEEDU
KANJIRAMKULAM-695 524, THIRUVANANTHAPURAM.

R4 BY ADV. SRI.K.P.SUDHEER
R1-R3 BY ADV. SRI.RAM MOHAN.G.
R1-R3 BY ADV. SRI.G.P.SHINOD
R1-R3 BY ADV. SRI.MANU V.

THIS MOTOR ACCIDENT CLAIMS APPEAL HAVING BEEN FINALLY HEARD ON 10-08-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

T.R.RAMACHANDRAN NAIR &
K.P.JYOTHINDRANATH, JJ.
- -
M.A.C.A.No.874 OF 2012
- -
Dated this the 10th day of August, 2015

JUDGMENT

Ramachandran Nair, J.

In this appeal filed by the Insurance Company, the main contention is that even though the injured was a third party, a cyclist, who was hit by the offending vehicle, the Insurance Company is entitled to recover the amount from the owner, since there is violation of permit. What is argued by the learned counsel for the Insurance Company is that permit was obtained for plying as a transport vehicle/commercial vehicle, whereas the policy obtained is for a private car.

2. The offending vehicle is a Mahindra jeep bearing Reg.No. KL-01- C- 1531. The policy taken is an 'Act only policy'. The vehicle hit the deceased who was riding bicycle on 22.3. 2005 at 7.30 p.m. He succumbed to the injuries on 25/03/2005. He was aged 18 years at the time of the accident. The Tribunal granted a total compensation of

Rs.3,65,500/-.

3. As far as the specific point raised herein is concerned, it was found by the Tribunal in paragraph 14 that there was absolutely no evidence to make out that at the time of accident, the vehicle was put to use for hire or reward or as a transport vehicle. Before the Tribunal, no other evidence was adduced by the Insurance Company to show that the vehicle was used for hire or reward or as a commercial vehicle. What is argued by the learned counsel is that this Court need only look into the permit and since the permit was for a different purpose, namely not for use as a private jeep, the Insurance Company is entitled to claim recovery as against the owner.

4. The learned counsel for the respondents submits that the said contention cannot be accepted in the light of the decision of the Division Bench in **Sethunath v. John Varghese (2011 (1) KLT 222)** and in the light of the decision of the Apex Court in **National Insurance Co. Ltd. v. Swaran Singh [2004 (1) KLT 781 (SC)]**. It is also submitted that the decision in **Sethunath v. John Varghese (2011**

(1) KLT 222) has been affirmed by a Full Bench of this Court in **Augustine V.M. v. Ayyappankutty @ Mani and another [2015(2) KHC 219 (F.B.)]**

5. In the case considered by the Division Bench in **Sethunath v. John Varghese (2011 (1) KLT 222)**, in a like situation, this Court took the view after considering Section 66 that even though at the time when the accident occurred permit has expired, in the absence of any evidence to show that the vehicle was used for hire or reward, such a contention cannot be accepted. There two pedestrians were knocked down by the vehicle. In paragraph 19, the Division Bench held as follows :

> ." It may be true that S.66 interdicts the owner of a vehicle from using it as a transport vehicle in any public place, whether or not such vehicle is actually carrying any passengers or goods except otherwise than in accordance with the terms and conditions stipulated in the permit. A closer look at the above provisions will show that the statutory thrust is against user of a vehicle as a "transport vehicle" without a permit. It cannot be disputed that insurance policy had been issued to cover the risk of passengers to be carried in the vehicle for hire

or reward. Therefore, expiry of validity of the permit will only mean that the vehicle cannot be used as a transport vehicle any more, unless the permit is renewed. Simultaneously operation of the policy to cover the risk of passengers being carried for hire or reward, will also cease. But in our view the policy will nevertheless cover the risk of third parties, especially if it is not established that the vehicle was being used as a transport vehicle at the time of the accident. The words "whether or not such vehicle is actually carrying any passengers or goods" in S.66 are obviously qua the permit and not the policy. Sub-r.(2) of R.82 of the Central Motor Vehicles Rules only postulates that a tourist permit shall be invalid from the date on which the motor vehicle covered by the permit completes 9 years, unless the motor vehicle is replaced. In other words, if the vehicle is replaced the validity period of the permit would continue to be operative. It may be true that the owner would not have been entitled to be indemnified, if the accident had occurred while the vehicle was being used as a transport/commercial vehicle while carrying passengers for hire or reward. In such an eventuality, the company would have been eminently justified in contending for the position that there was violation of the policy conditions."

The said dictum will apply to the facts of this case evidently.

6. The view taken therein has been approved by the Full

Bench also in **Augustine V.M. v. Ayyappankutty @ Mani and another [2015(2) KHC 219 (F.B.)]**. We find that herein unless the breach was so fundamental that it led to the accident, there cannot be an automatic direction to allow the Insurance Company to recover from the owner. The learned counsel for the claimants submits that there was no iota of evidence on the part of the Insurance Company to prove contrary. We find much force in the above contention. There is no evidence to show that any passengers were in the Mahindra jeep and therefore it cannot be legally presumed that the vehicle was used as a transport vehicle at the time of the accident. The question therefore as answered by the Tribunal does not call for any interference and therefore we refrain from issuing any direction to the effect that the Insurance Company can recover the amount from the owner of the vehicle.

7. We have perused the condition in the policy. Going by the same, the policy covers use of the vehicle for any purpose other than (a) Hire or reward. This aspect has also to be noticed. Therefore, if only there is a violation of the above aspect and there is proof of the

same, the Company can recover the amount from the owner. Even though the learned counsel for the Insurance Company submits that after taking the policy for private jeep, he has used it for a different purpose, unless there is evidence that breach was so fundamental, going by the decision of the Full Bench in **Augustine V.M. v. Ayyappankutty @ Mani and another [2015(2) KHC 219 (F.B.)]**, we cannot agree with the said contention.

Accordingly, the appeal is dismissed. There will be no order as to costs.

T.R.RAMACHANDRAN NAIR, JUDGE

K.P.JYOTHINDRANATH,JUDGE

sv.