

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE T.R.RAMACHANDRAN NAIR

&

THE HONOURABLE MR. JUSTICE K.P.JYOTHINDRANATH

FRIDAY, THE 17TH DAY OF JULY 2015/26TH ASHADHA, 1937

MACA.No. 118 of 2007 ()

AGAINST THE AWARD IN OPMV 51/2003 of M.A.C.T OTTAPPALAM
APPELLANT(S)/1ST RESPONDENT:

SURESH KUMAR, S/O. RAMASWAMY,
AMBAZHAKKODE VEEDU, ANCHUMURTHIMANGALAM POST
VADAKKANCHERRY, ALATHUR TALUK, PALAKKAD DISTRICT.

BY ADVS.SRI.T.K.KOSHY
SRI.RAJESH SIVARAMANKUTTY

RESPONDENT(S)/SECOND RESPONDENT AND PETITIONER:

1. ORIENTAL INSURANCE CO. LTD.,
MANJERI.

2. K.SEKHARAN, S/O. C.V.KUTTIYAPPU,
DHANYA HOUSE, KAMALALAYAM ROAD, OTTAPPALAM
PALAKKAD DISTRICT.

R,R1 BY ADV. SRI.MATHEWS JACOB (SR.)
R,R1 BY ADV. SRI.P.JACOB MATHEW
R,R-2 BY ADV. SRI.JACOB SEBASTIAN

THIS MOTOR ACCIDENT CLAIMS APPEAL HAVING BEEN FINALLY HEARD ON
1-07-2015, THE COURT ON 17.7.2015 DELIVERED THE FOLLOWING:

**T.R. RAMACHANDRAN NAIR &
K.P. JYOTHINDRANATH, JJ.**

M.A.C.A.No.118 of 2007

Dated this the 17th day of July, 2015

JUDGMENT

Ramachandran Nair, J.

This appeal is filed by the owner of the vehicle involved in the accident, viz. an autorickshaw. He was driving the vehicle also. The second respondent herein is the injured claimant before the Tribunal and the Tribunal has awarded a total compensation of Rs.1,26,571/- with interest at 6%. The insurance company was directed to deposit the amount and the Tribunal further directed that the insurance company can recover the amount from the appellant herein. The said part of the award is under challenge in this appeal.

2. Heard learned counsel for the appellant, Shri T.K. Koshy and learned Senior Counsel for the insurance company, Shri Mathews Jacob.

3. Learned counsel for the appellant submitted that the finding by the Tribunal is that there was no permit for the vehicle as on the date

of accident and hence there is violation of the conditions of the policy. It is submitted that the said finding is not correct. It is highlighted that the accident occurred when the autorickshaw collided with a motor cycle driven by the second respondent. The case of the appellant is that the vehicle, viz. the autorickshaw was not being plied as a transport vehicle. The appellant had driven the autorickshaw for his own use and it was returning after taking one Shri Sivakumar who is the son of his mother's sister, to the hospital. The child was admitted in the hospital and the appellant was returning from the hospital. There was only one relative of the appellant, Shri Ramachandran, in the autorickshaw. It was not being used for any hire or reward and it was not plied for taking passengers. On these premises, it was contended that there was no violation of the conditions of the policy.

4. Learned Senior Counsel for the insurance company Shri Mathews Jacob submitted that what is relevant to note is that there was no permit for plying the vehicle as a transport vehicle. Autorickshaw will come within the definition of a “transport vehicle”. Plying of the same without the permit amounts to violation of the conditions in the

policy. The explanation offered by the appellant, therefore, cannot be accepted.

5. Both sides relied upon various decisions of the Apex Court and this Court. In this context, we will refer to the pleadings of the parties. In the written statement filed by the appellant, he has stated that in the autorickshaw, the son of his mother's sister, Shri Sivakumar was taken to Thrissur Mission Hospital along with his uncle's son Shri Ramachandran. Therefore, the autorickshaw was being plied for own purposes. After admitting Shri Sivakumar in the hospital, they were returning and then the accident occurred. In the autorickshaw, only Shri Ramachandran, his uncle's son alone was sitting. It was not plied for any hire, but only for own purposes and therefore there is no violation of the permit. The appellant was examined before the Tribunal as R.W.1. He reiterated his stand in the written statement while being examined. According to him, since the autorickshaw was being plied for own purposes and only a relative was there in the autorickshaw, the insurer is liable. In cross examination, he has deposed that the vehicle was purchased 2-3 months back and since the permit was yet to be

obtained, it was plied only for own purposes. The application for permit was also pending and it was expected to be issued within one or two weeks of the accident. The person who was in the autorickshaw is the son of his uncle.

6. The Police records have been produced and marked in this case on the side of the claimant. Exts.A1 to A7 are the said documents. In the final report given by the Police, the offences alleged are under Sections 279 and 338 IPC. The second witness named in the Police charge is the said Ramachandran, the uncle's son of the appellant. It is clear from the charge-sheet itself that the appellant was carrying witness No.2 in the autorickshaw when the accident occurred. Therefore, it is clear from the Police charge also that the appellant was carrying Shri Ramachandran in the autorickshaw at the time of accident. Hence, his plea that he was carrying a relative, stands proved.

7. Then the further question is whether the said explanation could be accepted and what will be the liability of the insurance company in such a case.

8. Shri T.K. Koshy, learned counsel for the appellant highlighted

the fact that there is no prohibition under the Motor Vehicles Act to use a vehicle in a public place for own purposes and such a use cannot make the use of the vehicle as a transport vehicle, viz. for carrying passengers for hire or reward. It is submitted that when such a restriction is not there, in a case like this where the vehicle was used only for the purpose of the owner for taking a relative to the hospital, it cannot be said that the insurance company is not liable.

9. In this context, learned counsel relied upon a decision of the Apex Court in **State of Orissa and others v. Bijaya C. Tripathy** (AIR 2005 SC 1431). The Apex Court in paragraph 10 considered the effect of Section 66 of the Motor Vehicles Act and the prohibition therein that the vehicle cannot be used as a transport vehicle in a public place without a permit. We extract paragraph 10 of the judgment hereinbelow:

“10. The High Court also appears to have been misread Section 66 of the Motor Vehicles Act. All that Section 66 of the Motor Vehicles Act provides is that the owner of a motor vehicle cannot use the vehicle as a transport vehicle in any public place without a permit. Section 66 therefore, merely prevents use of

the vehicle as a transport vehicle without a permit. It does not prohibit driving of such a vehicle on a public road. The vehicle can be driven on a public road so long as it is not used as a transport vehicle. To take an extreme example the owner of such a vehicle may use that vehicle for taking his family out for a picnic. Section 66 will not bar such a use. It is thus clear that even in the absence of a permit the vehicle remains a transport vehicle which is capable of being used on a road so long as the vehicle has a valid certificate of fitness and a valid registration certificate. In such cases it has to be presumed that such a vehicle has been "kept for use" irrespective of whether or not it was actually used on the road."

The view taken by the Apex Court is that the prohibition is not there for driving of such a vehicle on a public road so long as it is not used as a transport vehicle. It was held, as an example, that the owner of such a vehicle may use such vehicle for taking his family out for a picnic and Section 66 will not bar such a use. What is required is that the vehicle should have a valid certificate of fitness and valid registration certificate. Of course, the interpretation was one in relation to Section 3 of Orissa Motor Vehicles Taxation Act.

10. Learned counsel for the appellant, therefore, highlighted the fact that all that is prohibited under Section 66 of the Act is use of the vehicle as a transport vehicle. Herein, the appellant has not used the vehicle in such a manner as to take passengers.

11. In this context, learned counsel for the appellant relied upon the decision of a three Judge Bench of the Apex Court in **Fahim Ahmad & others v. United India Insurance Co. Ltd.**(AIR 2014 SC 2187). The question arose under Section 149(2)(a)(i)(a) of the Motor Vehicles Act. The vehicle involved was a tractor. At the time of accident, a trolley attached to the tractor was carrying sand for the purpose of construction of underground tank near the farm land for irrigation purpose. The said vehicle hit the deceased from behind which caused the accident. The insurance company alleged that there is violation of the conditions of the policy and therefore right of recovery should be given. The Apex Court held that merely because it was carrying sand, would not mean that the tractor was being used for commercial purpose and consequently, there was a breach of the condition of policy on the part of the insured. It was held that there is

no evidence to show that it was being used for commercial purposes other than agricultural purpose, i.e. for hire or reward, as contemplated under Section 149(2)(a)(i)(a) of the Act. It was held that it was mandatory for the insurance company not only to plead the said breach, but also substantiate the same by adducing positive evidence in respect of the same and in the absence of any such evidence, it cannot be presumed that there was breach of the conditions of policy. According to us, the said judgment also will support the case of the appellant herein that he did not use the vehicle for carrying passengers for hire or reward.

12. Learned counsel for the appellant further relied upon a decision of a Division Bench of this Court in **Sethunath v. John Varghese** (2011 (1) KLT 222). Therein also, a similar question was considered. That was a case where there was valid permit which had expired and the question was whether there is violation of the conditions of Section 66 of the Act.

13. Learned Senior Counsel for the insurance company relied upon a decision of the Apex Court in **National Insurance Co. Ltd. v.**

Challa Bharathamma and others {(2004) 8 SCC 517}. The facts of the case show that three persons were travelling in an autorickshaw which met with an accident and two persons died and one was seriously injured. The insurer contended that the insured had to obtain the permit to ply the vehicle and therefore in terms of the policy there is no liability. The Apex Court examined Section 66 of the Motor Vehicles Act. After referring to Section 66 of the Act and the defences available under Section 149(2) of the Act, the Apex Court, in paragraph 12 held as follows:

“.....A person without permit to ply a vehicle cannot be placed at a better pedestal *vis-a-vis* one who has a permit, but has violated any condition thereof. Plying of a vehicle without a permit is an infraction. Therefore, in terms of S.149(2) defence is available to the insurer on that aspect. The acceptability of the stand is a matter of adjudication. The question of policy being operative had no relevance for the issue regarding liability of insurer.”

It was held that plying of a vehicle without a permit is an infraction which is a defence available to the insurance company. Importantly, it was held that the acceptability of the stand is a matter for adjudication.

It is emphasised by Shri Mathews Jacob, learned Senior Counsel, that the infraction of the policy conditions alone need be examined. As far as violation of the conditions of policy is concerned, it is a defence available for the insurance company under Section 149(2)(a)(i)(a). The question will be with regard to the acceptability of the said argument.

14. A somewhat similar issue was considered by a Division Bench of this Court in **Sethunath's case** (2011(1) KLT 222). There, the vehicle had a valid permit as a transport vehicle itself which had expired on the date of the accident. The question was whether the liability of the insurance company is co-terminus with the period of validity of the permit. The car involved in the accident knocked down two pedestrians. Therefore, actually they were third parties. This Court considered the question whether there can be any sustainability of the contentions of the insurance company that the vehicle was used as a transport vehicle/commercial vehicle for carrying any passengers for hire or reward. The provision under Section 66 of the Act and the rules were examined by the Bench. This Court also noticed that the insurance company did not have a case that at the time of the accident,

any passengers were being carried for hire or reward. After examining the provisions under Section 66 of the Act, the view of this Court is that the 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. By the expiry of the permit, the operation of the policy to cover the risk of passengers being carried for hire or reward, will also cease. But it was held that 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. We extract paragraphs 19 and 20 of the judgment hereinbelow:

“19. 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.

20. There is yet another aspect of the matter. 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.”** (emphasis supplied by us)

15. This Court ultimately found in favour of the owner and driver and vacated the award of the Tribunal to the extent it gave liberty to the

insurance company to recover the amount of compensation from the owner and driver of the vehicle. In the course of discussion, it was also held by this Court in paragraph 21 that the company did not have a case that at the time of the accident the vehicle was being used for transportation of any passengers for hire or reward. It was also observed that nobody could point out any provision in the Act or rules which interdict the owner to put the vehicle on the road on expiry of the permit. The question, therefore, will be whether, going by the proved facts of the case, the company is liable.

16. We have already referred to the pleadings of the owner and the evidence. The owner had a definite case that the vehicle was not used as a transport vehicle for carrying passengers for hire or reward. It was plied to take a relative to the hospital and the person in the autorickshaw was the son of his uncle. His name was also mentioned in the written statement. We have already noticed that in the Police charge also the occupant's name is shown as Ramachandran. In the oral evidence before the Tribunal, the owner again reiterated that he

had taken the vehicle only for the purpose of the family and not to carry any passengers. In cross examination, there is no challenge against the version given by the owner that he had taken the vehicle only to take a relative to the hospital. There is no suggestion that the occupant in the vehicle was a passenger who had hired the vehicle. Therefore, as far as the plea of the owner is concerned, the same stands proved in evidence and there is no evidence to show that it was used for transportation of passengers for hire or reward.

17. The definition of transport vehicle under Section 2(47) shows that it means “a public vehicle, a goods carriage, an educational institution bus or a private service vehicle.” The definition of public service vehicle in Section 2(35) shows that it means “any motor vehicle used or adapted to be used for the carriage of passengers for hire or reward, and includes a maxi cab, a motor cab, contract carriage and a stage carriage.” The definition of Autorickshaw under the Kerala Motor Vehicles Rules, 1989, Rule 2(c) is the following:

“(c) “Autorickshaw” means motor vehicle constructed, adapted or used to carry not more than three passengers excluding the driver for hire or reward and having less than four wheels.”

Therefore, going by these two definitions, it can be seen that a permit will be required for transportation of passengers for hire or reward. The policy contains such a provision also. Hence, if it is not used for transportation of passengers for hire or reward and it is used only for the purpose of the owner, in an event similar to the one covered by this case, it cannot be said that the vehicle has been used as a transport vehicle at the relevant time. If that be so, the insurance company cannot wriggle out of the liability.

18. As the Apex Court, in **Bijaya C. Tripathy's case** (AIR 2005 SC 1431), was of the view that what is prevented under Section 66 of the Act is the use of the vehicle as a transport vehicle without a permit and it does not prohibit plying of such a vehicle on public road, the same principle will apply herein also. It was also held therein that the vehicle can be driven in a public road so long as it is not used as a transport vehicle. The Apex Court categorically held that an owner of such a vehicle may use the vehicle for taking his family out for a picnic, etc. and Section 66 will not bar such a use.

19. Judged in the light of the above principle, we are of the view

that the facts proved in this case will definitely show that the vehicle was not used as a transport vehicle. Therefore, the absence of permit will not result in any violation of the conditions of policy, as contended by the learned Senior Counsel for the insurance company. As held by this Court in **Sethunath's case** (2011 (1) KLT 222) also, the prohibition is limited to the use of the vehicle as a transport vehicle without a valid permit.

For all these reasons, the appellant is entitled to succeed in this appeal. The direction by the Tribunal that the insurance company can recover the amount from the appellant, is vacated and the appeal is allowed to that extent.

The parties will suffer their costs in the appeal.

(T.R. RAMACHANDRAN NAIR, JUDGE.)

(K.P. JYOTHINDRANATH,, JUDGE.)

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