IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.N.RAVINDRAN
&
THE HONOURABLE MRS. JUSTICE ANU SIVARAMAN

TUESDAY, THE 21ST DAY OF JULY 2015/30TH ASHADHA, 1937

MACA.No. 2517 of 2014 ()

AGAINST THE AWARD IN OPMV 115/2006 of ADDL.MACT, ALAPPUZHA DATED

APPELLANT/1ST RESPONDENT:

SHIBU, S/O.PARAMESWARAN
EDATHIPARAMBIL HOUSE, VETTACKAL P.O, CHERTHALA TALUK
PIN CODE-688 529

BY ADV. SRI.P.K.SAJEEV

RESPONDENTS/PETITIONERS & 2ND RESPONDENT:
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1. PRIYAMMA, W/O.BABU, AGED 46 YEARS
KURUPPUPARAMBIL, PATTANAKKAD, VETTACKAL P.O
CHERTHALA, PIN CODE - 688 529

2. AKIL BABU, AGED 16 YEARS (MINOR), REP.BY HIS MOTHER PRIYAMMA,
S/O.BABU, KURUPPUPARAMBIL, PATTANAKKAD
VETTACKAL P.O, CHERTHALA
PIN CODE - 688 529

3. ARYA PRIYA, AGED 11 YEARS (MINOR), REP.BY HER MOTHER PRIYAMMA,
D/O.PRIYAMMA, KURUPPUPARAMBIL, PATTANAKKAD
VETTACKAL P.O, CHERTHALA, PIN CODE - 688 529.

4. KAMALAKSHI, W/O.PADMANABHAN, AGED 90 YEARS
KURUPPUPARAMBIL, PATTANAKKAD, VETTACKAL P.O
CHERTHALA, PIN CODE - 688 529

5. THE UNITED INDIA INSURANCE CO. LTD.
BRANCH OFFICE, CHERTHALA, 688529, REP.BY BRANCH MANAGER.

R1-R4 BY ADV. SRI.DARSAN SOMANATH
R5 BY ADV. SRI.THOMAS MATHEW NELLIMOOTTIL
R BY SRI.JOHN JOSEPH VETTIKAD

THIS MOTOR ACCIDENT CLAIMS APPEAL HAVING BEEN FINALLY HEARD ON 21-07-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:
VPV

P.N.RAVINDRAN & ANU SIVARAMAN, JJ.
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M.A.C.A.No.2517 of 2014
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Dated this the 21st day of July, 2015

JUDGMENT

P.N.Ravindran, J.

The appellant is the first respondent in O.P.(M.V.)No.115 of 2006 on the file of the Additional Motor Accidents Claims Tribunal, Alappuzha. Respondents 1 to 4 are the claimants and the fifth respondent is the second respondent therein. The brief facts of the case are as follows:-

2. Respondents 1 to 4 as claimants instituted O.P.(M.V.)No.115 of 2006 before the Additional Motor Accidents Claims Tribunal, Alappuzha on 17.2.2006 claiming the sum of Rs.8,00,000/- as compensation consequent on the death of Babu, S/o.Padmanabhan (husband of the first claimant, father of claimants 2 and 3 and son of the fourth claimant) on account of the injuries sustained by him in a motor accident that took place at about 11.30 p.m. on 14.9.2005. They contended that while the deceased was cycling along the road, a motor bike bearing registration No.KL-04/L-5416 owned by the appellant herein and driven by Manoj, S/o.Gopi, collided with the cycle and in that accident, the cyclist Babu as well as the rider of the motor bike Manoj sustained injuries. Babu, the predecessor-in-interest of the

claimants passed away on 16.9.2005 and Manoj, driver of the motor bike passed away on 21.9.2005. The claimants contended that the accident took place on account of the rash and negligent driving of the motor bike by its driver late Manoj. Consequent on the death of Babu, the cyclist on 16.9.2005, on information lodged by his cousin Thilakaraj, Ext.A4 FIR in Crime No.186 of 2005 of Pattanakkad Police Station was registered on 16.9.2005 alleging commission of offences punishable under sections 279 and 304(A) IPC. After investigation, the Police filed Ext.A5 charge sheet to the effect that the charge has abated on account of the death of the accused.

3. Upon receipt of summons, the second respondent insurer entered appearance and filed a written statement dated 21.10.2008. Though the second respondent insurer admitted the existence of a valid policy of insurance on the relevant date in respect of the motor bike bearing registration No.KL-04/L-5416 owned by the appellant, the insurer contended that the accident has not been reported nor the documents relating to the motor bike produced before it. The insurer contended that it is therefore not liable to indemnify the insured. The insurer also contended that the driver of the vehicle had no licence at the time of the accident and it amounts to a willful violation of the policy conditions and therefore, for that reason also, it is not liable to

indemnify the insured.

4. The first respondent, the appellant herein was not served at that point of time. He was served only later after fresh steps and he entered appearance through counsel on 24.3.2011. The appellant filed a written statement wherein he admitted the fact that he is the owner of the motor bike involved in the accident. He also contended that he possessed a valid driving licence at the time of the accident and that on the date of the accident the motor bike was covered by a valid policy of insurance issued by the second respondent. In paragraph 4 of the written statement he contended that the deceased was working as a baker in a bakery at Thiruvalla, that he used to come home from Thiruvalla by the middle of every month on three or four days of leave and on those days he used to work for him as a helper-cum-bill collector on a nominal wage of Rs.100/- per day. He also contended that as usual he gave him the motor bike on his behalf to contact his customers and to collect the balance amount due from them. He admitted the fact that the deceased was driving the motor bike at his instance and on his instructions at the time of the accident. The reference evidently was to Manoj and not to Babu, the predecessor-in-interest of the claimants.

5. Before the Motor Accidents Claims Tribunal, the first claimant

was examined as PW2; the Village Officer who issued Ext.A1 income certificate was examined as PW1; the proprietor of the establishment where the victim of the accident (the predecessor-in-interest of the claimants) was working, was examined as PW3 and two eye-witnesses to prove the allegation that the accident took place on account of the rash and negligent driving of the motor bike were examined as PW4 and PW5. The claimants also produced and marked Exts.A1 to A11. Though no oral evidence was adduced on the side of the respondents, the second respondent insurer produced and marked Ext.B1 certificate of insurance.

6. The Motor Accidents Claims Tribunal considered the rival contentions and the evidence on record and held that the accident took place on account of the rash and negligent driving of the motor bike by Manoj who passed away on 21.9.2005 as a result of the injuries sustained by him in the accident. The Tribunal thereafter proceeded to award the sum of Rs.6,86,500/- as compensation to the claimants and directed the insurer to deposit the said amount together with interest and costs. However on the ground that notwithstanding the direction issued by the Tribunal by order passed on I.A.No.57 of 2012, the driving licence of the person who was driving the motor bike was not produced, the Motor Accidents Claims Tribunal permitted the insurer to

recover the amount paid by it under the award from the first respondent before it namely the appellant herein. The first respondent before the Tribunal has, aggrieved by the said finding, filed this appeal.

7. We heard Sri.P.K.Sajeev, learned counsel appearing for the appellant and Sri.Thomas Mathew Nellimoottil, learned counsel appearing for the fifth respondent insurer. Though respondents 1 to 4 had also appeared through counsel, learned counsel appearing for respondents 1 to 4 was not present when the appeal was called on for hearing today. There was also no representation on his behalf. Sri.P.K.Sajeev, learned counsel appearing for the appellant contended that the Tribunal has while passing the impugned award proceeded on the erroneous assumption that the appellant has not entered appearance and filed a written statement and that the appellant had been called upon to produce the particulars of the driving licence held by Manoj, who was admittedly riding the motor bike. Inviting our attention to Ext.A4 F.I.R. and Ext.A5 charge sheet, learned counsel for the appellant contended that the Police had no case that Manoj, who was driving the motor bike, did not possess a valid driving licence, that Crime No.186/2005 of Pattanakkad Police Station was registered for the offences punishable under sections 279 and 304(A) IPC, that there was no allegation against the accused namely Manoj, that he was

guilty of having committed the offence punishable under section 3(1) of the Motor Vehicles Act, 1988 and therefore, the Motor Accidents Claims Tribunal erred in permitting the insurer to recover the compensation amount payable by it under the award from the owner of the motor bike on the ground that the driver of the motor bike did not possess a valid driving licence. Inviting our attention to the decision of a learned single Judge of this court in **Santhosh v. Binu** (2014 (1) KLT 479), learned counsel for the appellant contended that an adverse inference drawn for non-compliance with the order of the Tribunal calling upon the owner of the motor vehicle or the driver of the motor vehicle to produce the licence, cannot supplement the place of evidence, that the burden is on the insurer to prove that there was a breach of the policy conditions, that in the instant case the burden of proving the said plea has not been discharged and therefore, the Motor Accidents Claims Tribunal erred in drawing an adverse inference against the appellant. Learned counsel for the appellant contended that on the evidence before the Tribunal a conclusion to the effect that the driver of the motor bike (late Manoj) did not possess a valid driving licence could not have been arrived at and therefore, the impugned award to the extent it permits the insurer to realise the amount of compensation paid by it under the award from the insured, is liable to be set aside.

8. Per contra, Sri.Thomas Mathew Nellimoottil, learned counsel appearing for the fifth respondent insurer contended that the appellant had admitted the fact that late Manoj had driven the motor bike on his instructions and in the course of his employment under the appellant and therefore, the appellant was bound to prove that Manoj was duly licensed to drive the motor bike. Learned counsel for the insurer contended that as the appellant has failed to plead or prove that the driver of the motor bike possessed a valid driving licence, no exception can be taken to the impugned award.

9. We have considered the submissions made at the Bar by the learned counsel appearing on either side. We have also gone through the pleadings and the materials on record. A reading of the impugned award discloses that the Tribunal has permitted the insurer to recover the compensation amount paid by it under the award from the appellant herein on the short ground that the direction issued by the Tribunal on I.A.No.57 of 2011 to produce the driving licence held by Manoj has not been complied with. The relevant portion of the award reads as follows:-

> *"10. In spite of the direction issued to the petitioner as per Order in I.A.No.57/2011 from the Tribunal to produce driving licence of the rider of*

> *the Motor cycle, it was not produced. Therefore adverse inference is taken against the petitioner. So R2 is liable to recover the award amount from the owner of the Motor Cycle/the first respondent. Issue Nos. 1 and 2 are answered accordingly."*

10. The records disclose that the second respondent insurer had filed two applications before the Tribunal seeking almost identical reliefs. Before the appellant had entered appearance in the Tribunal through counsel, the second respondent had on 2.12.2010 filed I.A.No.1316 of 2010 for an order directing counter petitioners 1 and 2 therein to produce the driving licence of the second counter petitioner. The affidavit filed in support of the said application was sworn to by the then Divisional Manager of the insurance company. The affidavit filed in support of I.A.No.1316 of 2010 and the accompanying application are extracted below:-

"<u>O.P.(M.V.)No. 115/2006</u>

<u>Petitioner</u>	*<u>Respondents</u>*
Anil Rao	*K.G.Ashokkumar and others 2*

<u>A F F I D A V I T</u>

> *I, K.S. George, aged 51, S/o K.K. Devassy, Divisional Manager, United India Insurance Co. Ltd., Divisional Office, Alappuzha do hereby solemnly affirm and swear as follows:-*
>
> *1. I am the Divisional Manager of the 3rd respondent Insurance Company. I am competent to represent the Company. I am swearing this affidavit for and on behalf of the Company.*

2. The Company filed Written Statement admitting the Policy and disputing the liability and contended that the Driver had no valid and effective driving licence to drive the class of vehicle. The driving licence of the driver is a material document to fix the liability of the Company. Hence for the interest of justice, it is humbly prayed that the driver and owner may be directed to produce the Driving Licence of the driver of the vehicle, otherwise the company will be put to irreparable injury and loss.

A separate petition for the same is filed herewith."

"I.A.No.1316 of 2010
<u>O.P.(M.V.)No. 115/2006</u>

Petitioner:- United India Insurance Co. Ltd.
Reptd. by its Divisional Manager,
Divisional Office, Alappuzha.

Cr. Petitioners:- 1) K.S. Ashok Kumar,
Kovilekathu Puthen Purayil,
Madakkathanam P.O., Ernakulam.

2) Shahul, S/o.Abdul Rahman,
Punnakkattu Parambil,
Mannur, Palakkad.

PETITION FILED U/S.151, O.XI R. 14 OF C.P.C. AND SEC. 169 OF M.V. ACT 1988 AND RULE 395 OF <u>THE K.M.V. RULES OF 1989.</u>

For the reasons stated in the accompanying affidavit, it is humbly prayed that the counter petitioner 1 and 2 may be directed to produce Driving Licence of 2nd counter petitioner."

11. A mere look at the cause title of I.A.No.1316 of 2010 would disclose that none of the parties to O.P.(M.V.)No.115 of 2006 were

made parties to the said application. As a matter of fact, the cause title of the said application would show that the claimant in the case was one Anil Rao and that the respondents therein are K.S.Ashok Kumar and Shahul. Without noticing the fact that I.A.No.1316 of 2010 did not relate to O.P.(M.V.)No.115 of 2006, the Tribunal allowed that application by order passed on 2.12.2010. It is relevant in this context to note that apart from the fact that the appellant herein was not a party to I.A.No.1316 of 2010, the said application did not at all relate to the case on hand but to some other case wherein the claimant was Anil Rao and the party respondents were K.S.Ashok Kumar and Shahul.

12. The insurer thereafter filed I.A.No.57 of 2011 on 3.1.2011. The affidavit filed in support of I.A.No.57 of 2011 was sworn to by Sri.C.Muraleedharan, learned counsel appearing for the insurer. The said affidavit is extracted below in full:

> *"AFFIDAVIT*
>
> *I, C. Muraleedharan, S/o K.C. Chellappan, aged 51, Advocate, Alappuzha do hereby solemnly affirm and swear as follows:*
>
> *1. I am the Counsel for the 3rd respondent Insurance Company. I am swearing this affidavit for and on behalf of the company.*
>
> *2. The Company filed Written Statement admitting the Policy and disputing the liability and contended that the Driver had no valid and effective driving licence to drive the class of vehicle. The*

> *driving licence of the Driver is a material document to fix the liability of the Company. Hence for the interest of justice, it is humbly prayed that the counter petitioners 1 and 2 who are the legal heirs of deceased driver and the owner the 3rd counter petitioner may be directed to produce the Driving Licence of the driver, Manoj, of the vehicle, otherwise the Company will be put to irreparable loss and injury.*
>
> *3. A separate petition for the same is filed herewith."*

13. It is clear from the averments in paragraph 2 of the above affidavit that counter petitioners 1 and 2 in I.A.No.57 of 2011 are the legal heirs of the deceased driver Manoj. Counter petitioners 1 and 2 in I.A.No.57 of 2011 are not parties to O.P.(M.V.)No.115 of 2006. Though the appellant herein was joined as the third respondent in I.A.No.57 of 2011 which was filed on 3.1.2011, he had not been served by then. The appellant was served and he entered appearance through counsel only on 24.3.2011. Notice in I.A.No.57 of 2011 was not issued to the legal heirs of the driver of the motor bike who were joined as counter petitioners 1 and 2 therein. However, I.A.No.57 of 2011 was allowed by order passed on 11.2.2011 without notice to the appellant and the legal heirs of the driver who were made parties to the application, after serving a copy thereof on the learned counsel appearing for the claimants. It is relying on the aforesaid order allowing I.A.No.57 of 2011 that the Tribunal has drawn an adverse

inference against the appellant.

14. It is thus evident from the materials before us that an adverse inference as drawn by the Tribunal could not have been drawn in the instant case for the reason that no notice has been served on the legal heirs of late Manoj, the driver of the motor bike, calling upon them to produce the driving licence held by late Manoj. The legal heirs of the driver were not on the party array. The appellant had also not been served with a copy of I.A.No.57 of 2011. We are therefore of the considered opinion that an adverse inference could not have been drawn against the appellant for not complying with the order allowing I.A.No.57 of 2011. The Police records, more particularly Exts.A4 and A5 show that the deceased driver was not charge sheeted for the offence punishable under section 3(1) of the Motor Vehicles Act, 1988. Apart from merely alleging that the deceased driver did not possess a valid driving licence, the insurer has not proved the said fact. In such circumstances, we are of the considered opinion that the Motor Accidents Claims Tribunal erred in permitting the insurer to recover the amount of compensation paid by it under the award from the insured. The impugned award to that extent cannot in our opinion be sustained.

We accordingly allow the appeal and set aside the award passed the Motor Accidents Claims Tribunal, Alappuzha in O.P.(M.V.)No.115 of

2006 to the extent it permits the insurer to recover the amount of compensation paid by it under the award from the appellant. The award shall stand in all other respects. Consequently, the sum of Rs.25,000/- deposited by the appellant in terms of the first proviso to sub-section (1) of section 173 of the Act shall be refunded to him. No costs.

Sd/-
P.N.RAVINDRAN
JUDGE

Sd/-
ANU SIVARAMAN
JUDGE

/TRUE COPY/

P.A. TO JUDGE

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