THE HON'BLE SRI JUSTICE N.BALAYOGI

M.A.C.M.A. No.2418 of 2008

JUDGMENT:

The appellant-claimant, aggrieved by the award and decree dated 26.06.2008 in M.V.O.P.No.682 of 2006 on the file of the Chairman, Motor Vehicle Accident Claims Tribunal-cum-Principal District Judge, Kadapa (for short, 'the Tribunal'), preferred this appeal, besides other grounds, on the ground that the Tribunal absolved respondent No.2 from its liability in spite of the contention of respondent No.1 that the offending vehicle, which was insured with respondent No.2, was involved in the accident and that once the cover note was issued the policy later stood cancelled with effect from 16.09.2004 for want of premium, the Insurance Company is liable to the claim of third-party in view of the terms and conditions of the policy despite the cheque issued towards premium was dishonoured.

2. The appellant-claimant further contended that the insurer is liable to pay the compensation and recover the same, since it (Insurance Company) did not take steps under Section 138 of the Negotiable Instruments Act against the insured for dishonour of cheque.

3. The claim of the appellant, in brief, is as follows:

On 07.10.2004, when the petitioner along with his friends went to Saneswara temple situated on Kadapa-Rajampet main road, while they were waiting for the bus to return to Kadapa, meanwhile the driver of Indica Car, bearing registration No.AP 10 AUT/R 2834 drove with high speed, in a rash and negligent manner without blowing the horn and in the process dashed the petitioner and his friends. The Car went further and dashed against the tree and fell in a pit. The appellant-claimant sustained fracture of his right thigh (femur) apart from receiving other injuries. Immediately, the petitioner was shifted to the Government Hospital, Kadapa and there he took treatment as an inpatient for a period of one month and later he underwent operation under Dr. G.Venkata Subbaiah, Orthopaedic Surgeon at Kadapa. The petitioner incurred Rs.40,000/- towards medical expenses and Rs.5,000/- towards transport charges. The appellant-claimant was 19 years old student and was used to earn Rs.6,000/- per month.

4. After the death of respondent No.1, respondents 3 and 4 were brought on record as the legal representatives. The contention of respondent No.1 was that since the offending vehicle was insured with respondent No.2, it has to indemnify the liability. The contention of respondent No.2 is that the policy was not in existence as on the date of accident. After the cheque dated 10.09.2004 issued by respondent No.1, respondent No.2 issued a cover note. However, the said cheque was dishonoured on 16.09.2004. Immediately thereafter respondent No.2 promptly cancelled the policy and intimated to respondent No.1 requesting to return the policy, which was cancelled with effect from 16.09.2004. The petitioner therefore contended that as the accident occurred on 07.10.2004, respondent No.2 is liable to pay the compensation.

5. In view of the rival contentions, the Tribunal has framed the following issues for trial:

(1) Whether the accident did not occur due to the rash and negligent driving of Car bearing No.AP 10AU T/R 2834 belonging to the 1st respondent and insured with 2nd respondent by its driver?

(2) Whether the petitioner is entitled for compensation for the injuries sustained by him in the accident, if so, to what amount and from whom?

(3) To what relief?

6. In support of the appellant-claimant claim, PWs 1 and 2 were examined and exhibits A1 to A9 were got marked. On behalf of the respondents, RWs 1 and 2 were examined and exhibits B1 to B8 were got marked.

7. Now, the point that arises for determination is "Whether the finding of Tribunal absolving the liability of respondent No.2 is sustainable".

8. Learned counsel for the appellant contended that respondent No.2 having received the cheque issued Ex.B1-policy. However, the cheque was dishonoured and the policy was cancelled, and therefore, respondent No.2 is liable to pay the compensation and recover the same. On the other hand, respondent No.2 contended that since the policy was cancelled, there is no existence of policy as on the date of accident, and therefore, the Insurance Company is not liable to pay any compensation. The findings of Tribunal are legal and valid.

9. The claimant-appellant himself was examined as PW1 besides examining the Doctor as PW2. The unimpeachable evidence of PW1 is that on 07.10.2004 at 1.00 P.M., the driver of Indica Car bearing registration No.AP-10-AUT/R-2834 drove the Car with high speed in a rash and negligent manner without blowing the horn dashed him and his friends, later dashed against the tree and fell into the ditch. Ex.A1 is the certified copy of F.I.R., wherein it was clearly asserted that the driver drove the offending Indica Car with high speed and in a rash and negligent manner without blowing the horn and dashed PW1 and others. In Ex.A3, the Investigating Officer clearly found that the negligence is on the part of the driver of Indica Car. Except the suggestion to PW1 that there is no negligence on the part of the driver of Indica Car and the accident was purely due to the negligence of PW1 himself, nothing adverse was elicited.

10. The settled law is that when the claimant by adducing the oral and documentary evidence established the negligence on the part of the driver of the offending Car, the burden shifts to the respondents to produce the oral and documentary rebuttal evidence. Respondent No.1 himself was examined as RW1, whose evidence is that the claimant did not sustain any injuries and his name is not found in the F.I.R and charge sheet. After the accident, he has intimated the same to respondent No.2 over telephone for claiming vehicle damages, but respondent No.2 kept quite till month end; so, he approached the office of respondent No.2, by that time he was informed that the cheque issued by him was dishonoured. In fact, no notice was issued by respondent No.2 about the dishonour of cheque. So, his evidence is that respondent No.2 manipulated the alleged document to avoid its liability. RW1 is not a witness to the accident.

11. Now, come to the evidence of RW2. He is also not a direct witness to the accident and his evidence is of no use to decide the rash and negligence of driver of the offending vehicle. In such circumstances, the Tribunal, having considered the unimpeachable evidence of PW1 and the documentary evidence of Exs.A1 and A3, held that the accident was occurred due to rash and negligent driving of the driver of Indica Car bearing registration No.AP 10 AUT/R 2834, which finding is not challenged by the respondents by filing any Cross Appeal.

12. The appeal turned around the issue of the existing of policy. The consistent evidence of RW1 was that he insured the offending Indica Car with respondent No.2 under the policy bearing No.550215/31/04/6102166 and respondent No.2 issued the policy on 10.09.2004, which was in force till 09.09.2005. The accident, admittedly as per the evidence of PW1 and also exhibits A1 and A3, occurred on 07.10.2004. The evidence of RW1 that after the accident he informed the fact to respondent No.2 over telephone for claiming the damages, but respondent No.2 kept quite till month end; so, RW1 approached the office of respondent No.2, at that time he was informed that the cheque issued by him was dishonoured. In fact, respondent No.2 did not issue any notice to RW1 about the dishonour of cheque and respondent No.2 manipulated the alleged document for the purpose of avoiding the indemnity. With regard to the claim, there is evidence of PW1 that he undergone practical training in the trade of Electrical House Wiring and he also undergone training in the trade of Electrician from August 2001 to July 2003 in Navodaya Industrial Training Centre, Kadapa and that if the accident would not have occurred he will be earning more than Rs.6,000/- per month by doing electrical work and will get job in A.P. Transco and due to the accident he lost bright future as skilled worker.

13. Basing on the evidence of PW1 and the cost of living, the Tribunal considered and fixed the notional income of petitioner at Rs.3,000/- per month. The evidence of PW1 is that in the accident, his right femur is fractured and he was admitted in the Government Hospital, Kadapa. After taking first aid, he was shifted to the Hospital of Dr. G.Venkata Subbaiah, where he undergone surgery for fracture of right femur on 09.10.2004 by fixing rods. In spite of taking better treatment his right leg was softened by one inch and movements of right hip were restricted and now he is limping and suffering with 30% disability. Further, he incurred Rs.40,000/- towards treatment, medicines and extra nourishment. The evidence of PW2-Doctor, who treated PW1 in the Hospital, is that he examined PW1 on 07.05.2007 and he certifies that the disability corresponds to the injuries described in the Wound Certificate-ExA2. PW2 corroborated PW1 that there is shortening of one inch present right leg. In 2004, he conducted an operation intramedellary nail inserted, muscle weakness present in the right thigh and abduction of the right hip restricted. X-ray to the right thigh under Ex.A7 was taken on 07.05.2007 shows malalinment of fracture femur right with rod present. He has to undergo another operation, which approximately costs Rs.20,000/-. The permanent disability is 30%. Though PW2 was cross examined at length, nothing was elicited to describe the evidence of PW2 except to state that there is no mention of injury to right hip in Ex.A2 and he denied the suggestion that he issued exhibits A5 and A6 to help the petitioner. Further, he confronted that he issued Ex.A4-Disability Certificate and according to which, the disability was 30%. The Tribunal, having corroborated the evidence of PWs 1 and 2 and the documentary evidence under exhibits A4 to A7, finds that there is disability of 30% shortening to right leg of one inch and the disability is permanent and awarded the compensation of Rs.47,000/- towards medical expenses.

14. Taking into consideration the evidence of PW1 with regard to his income at Rs.3,000/- per month, the Tribunal took his notional annual income at Rs.36,000/- and applied the multiplier '16' by taking the age of petitioner as 19 years, calculated the compensation, which was arrived at Rs.1,25,000/-, but restricted the same to Rs.1,00,000/- and awarded the total compensation of Rs.1,00,000/- with interest @ 6% per annum from the date of petition till deposit and costs. While dismissing the claim against respondent No.2, the Tribunal held that respondents 3 and 4 are jointly and severally liable to answer the claim and accordingly, allowed the claim petition.

15. Now, the further contention of petitioner is that by virtue of Ex.B1-policy respondent No.2 has to indemnify the liability. The owner of vehicle, who was examined as RW1, deposed that the offending vehicle was insured with respondent No.2 under Ex.B1-policy. After the accident, the same was intimated to respondent No.2. As there is no response from respondent No.2, he also visited its office and then he came to know through respondent No.2 that the cheque issued by him was dishonoured. In fact, respondent No.2 did not issue any notice about the dishonour of cheque and he might have manipulated the same.

16. Respondent No.3 was examined as RW2, whose evidence is that they have issued Ex.B1-letter dated 16.09.2004, intimating the dishonour of cheque, issued by RW1 towards the premium, with the correct address of respondent No.1. In Ex.B2-Duplicate Schedule, there is a specific mention that the policy/endorsement is cancelled due to cheque dishonour. Ex.B4 is the copy of cheque bearing No.685837 for Rs.12,935/- issued in the name of National Insurance Company Limited, signed by respondent No.1. There is an endorsement across Ex.B3-policy dated 16.09.2004 to the effect that the cheque was dishonoured. Ex.B4-copy of cheque contains the endorsement, which bears the stamp of ING Vysya Bank dated 14.09.2004. Ex.B5 is the written endorsement of Andhra Bank to the Vysya Bank Limited with the endorsement "Funds insufficient" for honouring the cheque bearing No.0685837. The evidence of RW2 coupled with evidence of RW1 show that the copy of cheque-Ex.B4 towards premium for Rs.12,935/- was dishonoured as per Ex.B5 endorsement that "Funds insufficient". Ex.B6, which is the endorsement for receipt of Ex.B4-copy of cheque, is the RCS return investment advice of ING Vysya Bank to respondent No.2 when respondent No.2 presented Ex.B4.

17. To substantiate the service of notice, respondent No.2 sent Ex.B1 notice to respondent No.1 and filed Ex.B7-Postal receipt sending exhibiting Ex.B1 to respondent No.1 through RPAD. A close perusal of Ex.B7 shows that Ex.B1 notice was sent to respondent No.1. The general presumption is that when the notice was sent to the correct address, if it is not returned within fifteen days, the notice should have been presumed to be served. Further, to substantiate the service, respondent No.2 also filed Ex.B8-certificate from the Customer Care Centre, Hyderabad, which shows that the letter sent to respondent No.1, covered by Ex.B7-postal receipt, was delivered to the addressee on 20.09.2004.

18. The evidence of RW2 supported by exhibits B1 to B8 and the admission of RW1 that he got knowledge only when he visited the office of respondent No.2 goes to suggest that the notice sent under Ex.B1 was received by RW1 as per Ex.B8-certificate. In fact, when the notice was sent through postal authorities, the Government concern, there is no need to examine the postal authorities unless rebutted by respondent No.1 by producing any rebuttal evidence. In the absence of any such proof, the Tribunal, having considered the evidence of RW2 supported by exhibits B7 and B8, found that respondent No.2 had intimated the dishonour of cheque to respondent No.1 under Ex.B1 and cancelled the Ex.B1-policy. The facts and circumstances go to show that Ex.B1-policy was cancelled on account of cheque issued by respondent No.1 towards premium as it was dishonoured and consequently respondent No.2 cancelled the policy with effect from

16.09.2004 and intimated to respondent No.1, whereas the accident occurred on 07.10.2004, by which date the policy stands cancelled.

19. In the case of **Oriental Insurance Company Limited v. Sivankutty**[1], it was held that even if the insurer cancelled the policy for non-payment of premium on account of dishonour cheque, the insurer nevertheless would be liable to answer the claim of a motor accident occurred subsequent to the cancellation of policy, but within the period originally specified in the policy. The Court further held that the insurer then would be entitled to reimbursement from the insured. Similarly, in the case of **Pranab Kumar Mitra v. Oriental Insurance Company Limited**[2]**,** the Division Bench of the Calcutta High Court considered that the revocation of contract by cancelling the policy without taking action for recovery of the amount covered by the dishonored cheque would be an illegal revocation so far as the third party is concerned and that the policy should be deemed to be subsisting for the entire period of the policy although there was dishonour of the cheque. Similarly, in the present case also the admitted fact is that after dishonor of the cheque, respondent No.2 did not file any case under Section 138 of the Negotiable Instruments Act against respondent No.1 for dishonour of the cheque or instituted any suit for recovery of the amount.

20. In the case of **Deddeppa v. National Insurance Company Limited**[3] the Apex Court held that the insurer would not be liable to satisfy the claim if the insurer cancelled the contract of insurance and intimated all concerned and further the Apex Court, considering the fact that the claimant hailed from a lowest strata of society, directed the insurer to pay compensation to

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[1] **2006 ACJ 106**
[2] **2007 ACJ 1467**
[3] **2008 AILD 71 SC**

the claimants and recover the same later from the insured. In the instant case also, the evidence of PW1 is that he was the student and the claim is only Rs.1,00,000/-, from which it can be inferred that the petitioner hails from the lowest strata of society.

21. The Tribunal, having considered the facts in issue and the evidence of PW1 and considering the decisions in **Sivankutty**'s case **(Supra 1), Pranab Kumar Mitra**'s case (Supra 2) and **Deddappa**'s case (Supra 3), and of **Deddappa**'s case (Supra 3) not inclined to hold that the Tribunal has inherent jurisdiction to direct the insurer to pay compensation to the petitioner and later recover the same from the insured. There is a wider dimension in this case. The decision was more recent in point of time compared to the Division Bench decision of the Calcutta High Court in **Pranab Kumar Mitra**'s case (Supra 2). The Calcutta High Court decided that case on 08.05.2006 whereas the Apex Court decided the **Deddappa**'s case (Supra 3) on 20.12.2007. In view of the judgment of the Supreme Court, which is also more in recent point of time, the Full Bench decision of the Kerala High Court and the Division Bench decision of the Calcutta High Court relied upon by the learned counsel for respondent No.4 lost their relevance. The view of the Supreme Court is that in a case of dishonour of cheque covering the policy amount, if the insurer intimated the same to the insured, the policy would stand cancelled with effect from the date of such intimation and that the insurer would not be answerable to the accident that occurred subsequent to the date of cancelation of the policy.

22. The settled law is that the issuance of cheque towards premium would amount to promise to pay the money and that when the insured failed to pay the premium, as promised, or the cheque was dishonoured and the premium was not collected, the insurer is not liable to perform its part of the promise and would not be answered to the claim. The accident occurred on 07.10.2004, whereas the cheque was dishonoured on 20.09.2004, and Ex.B1 notice was dated 16.09.2004, which was served on respondent No.1 on 20.09.2004 cancelling Ex.B1 policy and no action was initiated. The fact that no action under Section 138 of the Negotiable Instruments Act initiated by respondent No.2 against respondent No.1 is not a ground and respondent No.2 is not liable to satisfy the claim, but having considered that the petitioner is a poor and hails from the lowest strata of society and by virtue of the policy, respondent No.2 will first satisfy the award and recover the same from respondent No.1, as if the award is a decree. As the respondent No.1 died, respondents 3 and 4 being the legal representatives are jointly and severally liable to pay the same.

23. In view of the above findings, the Appeal is partly allowed with costs against the respondents 3 and 4, who are jointly and severally liable to pay the compensation. Respondent No.2-Insurance Company, by virtue of Ex.B1 policy, shall pay the award amount within thirty (30) days from the date of receipt of a copy of this order and recover the same from the respondents 3 and 4.

Accordingly, the Appeal is partly allowed, by modifying the award dated 26.06.2008 in M.V.O.P.No.682 of 2006 passed by the Tribunal, to the extent that respondent No.2 shall pay the award amount and recover the same, while confirming the other part of award. Miscellaneous petitions, if any, pending in this appeal shall stands closed.

N.BALAYOGI, J

Date: 08.12.2017
MVA