IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 04.12.2018

CORAM:

THE HONOURABLE MRS.JUSTICE R. HEMALATHA

C.M.A.No.286 of 2009

Murugan
... Appellant/Petitioner
(amended as per order in M.P.No.2286 of 2006 dated 07.11.2006)

..Vs..

1.P.Mani

2.The New India Assurance Company Limited,
No.45, Moore Street,
Chennai – 600 001.
... Respondents/Respondents

PRAYER: Civil Miscellaneous Appeal filed under Section 173 of the Motor Vehicles Act, 1988 against the decree and orders in M.C.O.P.No.2057 of 2002 dated 19.04.2007 on the file of Motor Accident Claims Tribunal, III Judge, Small Causes Court, Chennai.

For Appellant : Mr.S.Partheeban

For Respondents: Mr.J.Chandran for R2
R1 – not known

JUDGMENT

The appellant is the claimant in M.C.O.P.No.2057 of 2002 on the file of the III Judge, Court of Small Causes, Chennai. He filed the above claim petition seeking compensation of Rs.4,00,000/- for the injuries sustained by him in a road accident that took place on 07.04.2002.

2.The brief facts of the case of the appellant/claimant is as follows:

On 07.04.2002, the appellant/claimant was travelling as a pillion rider in a bicycle along the 4th cross street, Velachery, Chennai. At about 01.00 pm, a speeding lorry bearing

Registration No. TAC 6070 hit the bicycle, as a result of which, the appellant/claimant sustained grievous injuries all over his body. He was immediately rushed to Government General Hospital, Chennai.

3.According to the appellant/claimant, he was a mechanic earning a sum of Rs.3,000/- per month and that the rash and negligent driving of the driver of the lorry was the cause of the accident. It is also contended by him that since the said lorry owned by the first respondent and was insured with the second respondent, both of them are jointly and severally liable to pay compensation to him.

4.In the trial court, the first respondent remained absent and was set ex-parte. The second respondent insurance company filed a counter contending that the insurance policy was cancelled since the cheque issued by the owner of the lorry towards payment of premium was dishonoured. Therefore, they contended that they are not liable to pay any compensation to the appellant/claimant.

5.The Tribunal after analysing the evidence on record, awarded a compensation of Rs.97,803/- to the appellant/claimant together with interest at the rate of 7.5% per annum and directed the first respondent/owner of the lorry to pay the compensation to the appellant/claimant. The Tribunal further held that the second respondent was not liable to pay any compensation to the appellant/claimant, since the policy was not subsisting on the date of the accident. Aggrieved over the orders passed by the III Judge, Court of Small Causes, Chennai, the claimant has filed the present appeal.

6.Mr.S.Partheeban, learned counsel appearing for the appellant contended that though the Insurance Company had contended that the Insurance Policy issued to the owner of the lorry was cancelled on 08.05.2001, there is no record to show that the same was intimated to the owner of the lorry.

7.As fas as the present case is concerned, the second respondent has issued the Policy (Ex.R1) on 27.04.2001 after receiving a cheque from the first respondent, the owner of the vehicle towards the premium. The period of the policy was from 27.04.2001 to 26.04.2002. The contention of the second respondent Insurance Company is that the cheque bearing No. 208293 for Rs.3012 dated 27.04.2001 drawn on HDFC Bank Limited (Ex.R4) was dishonoured on 27.04.2001, as evidenced by bank card return memo (Ex.R5) and on 08.05.2001, the policy was cancelled as evidenced by Ex.R8.

8.The learned counsel appearing for the appellant relied on the decision in New India Assurance Company Limited vs. V.Boomi and others reported in 2010 ACJ 1809 and contended that since the insurer has not followed the prescribed procedure while cancelling the policy, they cannot contend that they are not liable to pay any compensation to the appellant/claimant. In the above decision, it has been held thus:

> "A. Cancellation of Insurance
>
> (a) A policy may be cancelled by the insurer by sending to the insured seven days notice of cancellation by recorded delivery to the insured's last known address and the insurer will refund to the insured the pro-rata premium for the balance period of the policy.
>
> (b) A policy may be cancelled at the option of the insured with seven days notice of cancellation and the insurer will be entitled to retain premium on short period scale of rates for the period for which the cover has been in existence prior to the cancellation of the policy. The balance premium, if any, will be refundable to the insured. Refund of premium will be subject to:
>
> (i) There being no claim under the policy, and
>
> (ii) The retention of minimum premium as specified in the Tariff.
>
> (c) A policy can be cancelled only after ensuring that the vehicle is insured elsewhere, at least for Liability Only cover and after surrender of the original certificate of insurance for cancellation.
>
> (d) Insurer should inform the Regional Transport Authority (RTA) concerned by recorded delivery about such cancellation of insurance.
>
> Therefore, even though the section relating to the duty to inform the Regional Transport Authority is not found in the present case, the regulations should have the third party risk by insisting that the policy can be cancelled in the manner mentioned above Therefore, we are satisfied that in this case, there is proof that he has intimated the facts of cancellation to the insured. But, it has not been complied with in full with its duty as laid down in the General Regulations mentioned above. Therefore, even though the insurance company

may contend that it owes no duty to the insured to indemnify the claim for compensation as far as the third party is concerned, he is bound to receive the just and reasonable compensation.

25.We have already referred to Swaram Singh's case, 2004 ACJ 1 (SC), where the Supreme Court has clearly stated in para 42 that a judgment must be satisfied by the insurer, though the insurer may be entitled to avoid or to cancel the policy or may in fact have done so. Therefore, though we may accept that the policy has in fact been cancelled, the judgment will have to be satisfied by the insurer and the insurer may recover it from the policyholder. It is to this extent only that we can say that the insurer has no liability to indemnify the insured. But the third party's claim stands unaffected as we understand from Swaran Singh's case (supra). Therefore, we feel that the only course open to us would be to direct the insurance company to pay the claimants and thereafter, recover the same from the insured."

9.He also relied on the decision rendered by a full bench of the Kerala High Court in Oriental Insurance Company Limited vs. A.B.Sivankuty & others reported in 2005 (2) TN MAC (Ker.) (FB) 471, wherein it has been held that the insurer cannot disown the liability to the third party and that he must work out his remedy by recovering the award amount from the Insured.

10.In the decision in United India Insurance Company Limited vs. Laxmamma and others reported in (2012)5 Supreme Court Cases 234, relied upon by Mr.S.Partheeban, learned counsel appearing for the appellant, a Division Bench of the Honourable Supreme Court has held thus:

"26.In our view the legal position is this: where the policy of insurance is issued by an authorised insurer on receipt of cheque towards the payment of premium and such a cheque is returned dishonoured, the liability of the authorised insurer to indemnify the third parties in respect of the liability which that policy covered subsists and it has to satisfy the award of compensation by reason of the provisions of

Sections 147(5) and 149(1) of the MV Act unless the policy of insurance is cancelled by the authorised insurer and intimation of such cancellation has reached the insured before the accident.....

27....

28.... However, the insurer shall be at liberty to prosecute its remedy to recover the amount paid to the claimants from the insured."

11.Another decision in Oriental Insurance Company Limited vs. Neelu Devi and Others reported in 2008(2) TN MAC 209 (DB) (Jhar), relied upon by the learned counsel appearing for the appellant, a Division Bench of Jharkhand has held thus:

"12.After return of the cheque unpaid in the aforesaid situation, what the appellant-Insurance Company was required to do was to immediately inform the owner (insured) of the vehicle who had issued the cheque acknowledgement due and also to the Transport Authority/Registering Authority by whom the permit/token used to be issued for plying of the vehicle in question. Admittedly, none of the provisions of the Motor Vehicles Act, 1988 had overriding effect over Section 64(v) B of the Insurance Act which deals with risk covered under insurance policy.

....

14.In the instant case, we find that there was no evidence on the record in support of the claim of the appellant-Oriental Insurance Co. Ltd. that the cancellation of the policy particulars of the offending truck in question on 2nd June, 1999 was communicated to the owner of the truck on 4th June, 1999 against receipt/ acknowledgement. Similarly no evidence was led by the appellant-Insurer in respect of any communication made to the Transport Authority/Registering Authority regarding cancellation of the insurance policy of the truck No. MP-26-D-0470 so as to shift the third party liabilities upon the owner respondent.

15.Under the aforesaid premises, we find that the appellant Oriental Insurance Co. Ltd. failed to discharge its burden by not giving intimation to the owner against acknowledgement as well as the appropriate authority. In absence of such acknowledgement/receipt we observe that there shall be presumption of insurance of the offending vehicle in question against the valid policy and the Insurer-appellant is bound to compensate the Claimants by indemnifying the insured-owner....”

12.The learned counsel appearing for the appellant also relied on the recent decision of the Honourable Supreme Court in National Insurance Company Limited vs. Smt. Shivadevi Jadon & Others in Civil Appeal No. 1380 of 2010 in which it has been held thus:

“2........The policy was intended to be valid for the period from 03.08.1992 to 02.08.1993. On 14.08.1992, the cheque was duly presented to the banker for realization but the same was dishonored on 14.08.1992 and consequently it was returned to the appellant with remarks 'refer to the drawer'. It is alleged that the appellant-Insurance Company sent intimation of dishonor of the cheque and resultant cancellation of the cover note and policy by Registered post AD to the postal address as given by the Respondent No. 3 on the Cover Note No. 72541. However, the intimation letter was received back unserved with postal remarks “incomplete address”.
....

6.Having gone through the material on record, we find that the Insurance Company failed to intimate properly the factum of dishonor of the cheque and cancellation of the contract of insurance to the insured. It is necessary on the part of Insurance Company to convey to the insured about the dishonor of cheque and subsequent consequences so as to give the insured an opportunity to remit the premium amount by proper means. It cannot be said to be a valid service by just sending intimation of cancellation of the cover note by post which has come back unserved, without reaching the addressee. It is not the case of the appellant that the insured has deliberately not accepted the intimation. In such situation, the Insurance Company cannot distance itself from the

> liability. We are, therefore, in complete agreement with the view taken by the High Court that under the circumstances, the Insurance Company is liable jointly and severally.

In the instant case, admittedly, the policy was issued on 27.04.2001 and it would expire only on 26.04.2002. Though the Insurance Company states that a letter was issued to the Insured immediately after the dishonour of cheque, the Insurance Company did not file any documentary evidence to show that the said notice was actually served on the owner of the lorry bearing Registration No. TAC 6070.

13.Per contra, the learned counsel appearing for the second respondent relied on the decision in United India Insurance Company Limited vs. P.Sivakami @ Shantha reported in 2018(2) TN MAC 68 (DB) and contended that since the owner of the vehicle did not produce the insurance policy, adverse inference has to be drawn against him. In the decision cited above, the Insurance Company has taken a specific plea that the policy was in force from 26.04.2004 to 25.04.2005 and accident took place subsequent to that period. In such circumstances, the Division Bench of this Court has held that since the owner of the vehicle did not produce the Insurance Policy, adverse inference has to be drawn against him. The facts and circumstances of the present case are totally different and therefore, the above ruling would not be applicable in the instant case. The learned counsel appearing for the second respondent also relied on the decision in Pappu and Others vs. Vinod Kumar Lamba and Another reported in 2018(1) TN MAC 148 (SC) wherein it has been held that

> “unless the owner pleads and proves facts within his knowledge that driver was authorized by him to drive and had a valid driving licence, onus does not shift to insurer”.

In the above case, the owner of the offending vehicle did not prove that his driver was authorised to drive his vehicle and in fact no driving license was produced by the owner. In such circumstances, it was held that the onus of proof lies on the owner and not on the insurer. This case also would not apply to the facts of the present case.

14.In the light of the decisions cited by the learned counsel appearing for the appellant/claimant, it is clear that the Insurance Company is liable to pay the compensation amount and at the most, the Insurance Company can workout its remedy against the owner of the vehicle on the same cause of action by recovering the compensation amount.

15.As far as the quantum of compensation is concerned, the learned counsel appearing for the appellant contended that the appellant/claimant sustained the following injuries:

"1.Fracture of Pelvic both Bones
2.Fracture of Left femur
3.Head Injury
4.Blunt Injury on the abdomen
5.Tenderness over L.S.Spine
6.Urinary bladder raptured and the same is to be replaced once on a month"

He would further contend that the appellant/claimant has taken treatment as an inpatient in Government General Hospital, Chennai for nearly six months and the Tribunal has awarded a very meagre amount of Rs.97,803/-, especially when the doctors N.Saichandran (Ex.P.W.3) and J.R.R.Thiagarajan (Ex.P.W.4) has assessed the partial permanent disability as 80%.

16.A perusal of the Judgment of the Tribunal shows that the Tribunal without assigning any reason has awarded a sum of Rs.65,000/- towards partial permanent disability and loss of earning power. As far as the present case is concerned, the appellant/ claimant was a mechanic and as a result of the injury sustained by him, he has been permanently disabled from continuing his profession and therefore, multiplier method has to be adopted as per the decision of a division bench of the Honourable Supreme Court in Rajkumar vs Ajaykumar & Another reported in 2011 (1) SCC 343.

17.Since the appellant/claimant in his claim petition has contended that he was earning a sum of Rs.3,000/- per month and was aged 19 years on the date of the accident, the monthly income of the appellant/claimant is taken up as Rs.3,000/- per month and the proper multiplier to be adopted is 18 as per the decision rendered in Sarlavarma and others vs. Delhi Transport Corporation and another reported in (2009) 6 SCC 121.

18.Apart from this, as per the decision in National Insurance Co. vs Pranay sethi and others reported in 2017 (2) TNMAC 601, 40% has to be added towards future prospectus of the appellant/claimant and therefore, the monthly income is fixed at Rs.4,200/-. The permanent disability is assessed as 65%. Thus, loss of earning capacity is calculated as follows:

= Rs.4,200/- x 12 x 18 x 65/100
= Rs.5,89,680/-

19.Apart from the above amount, a sum of Rs.20,000/-, Rs.20,000/- and Rs.50,000/- are awarded towards transportation, extra nourishment and pain and sufferings respectively. The contention of the appellant/claimant is that he had incurred an expenditure of Rs.6,903/- towards medical expenses. He is entitled to the said amount and apart from that a sum of Rs.1,000/- is awarded towards damage to clothing and articles.

20.The learned counsel appearing for the appellant would contend that the urinary bladder got ruptured and the same has to be replaced once a month and therefore, the appellant/claimant has to incur an expenditure of Rs.50,000/- towards future medical expenses. The amount of Rs.50,000/- claimed by the appellant under the head future medical expenses is very reasonable considering the nature of injuries sustained by the appellant.

21.A perusal of the medical records shows that the appellant/claimant was admitted as an inpatient for more that six months ant therefore, he is entitled to a sum of Rs.18,000/- towards loss of income. Thus the various heads under which the appellant/claimant is entitled to compensation are extracted hereunder:

S.No	Head	Amount granted
1.	Partial permanent disability	Rs.5,89,680/-
2.	Loss of income	Rs.18,000/-
3.	Transportation	Rs.20,000/-
4.	Extra nourishment	Rs.20,000/-
5.	Damage to clothing and articles	Rs.1,000/-
6.	Medical expenses	Rs.6,903/-
7.	Pain and sufferings	Rs.50,000/-
8.	Future medical expenses	Rs.50,000/-
Total		Rs.7,55,583/-

Thus the second respondent is directed to deposit the above amount, (less the amount already deposited by them) together with interest at the rate of 7.5% per annum on Rs.7,55,583/- from the date of claim petition till the date of deposit. The second respondent is at liberty to recover the same from the first respondent on the same cause of action. No interest is awarded for future medical expenses.

22.In the result,

(i) The appeal is partly allowed. No costs.

(ii) The compensation amount is enhanced from Rs.97,803/- to Rs.7,55,583/-. The appellant is directed to pay the court fee for the enhanced compensation amount if any and the Registry is directed to draft the decree only after the payment of Court fee.

(iii)The second respondent Insurance Company is directed to pay the award amount within a period of four weeks from the date of receipt of a copy of this order to the credit of M.C.O.P.No.2057 of 2002. On such deposit being made by the second respondent, the appellant/claimant is at liberty to withdraw the same. No interest is awarded to the amount under the head future medical expenses.

mbi

Sd/-
Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

To

1.The III Judge,
Small Causes Court,
Chennai.

2.The Section Officer,
V.R.Section,
High Court,
Madras - 104.

+1cc to Mr.S.Partheeban, Advocate, SR.No.83029/18
+1cc to Mr.J.Chandran, Advocate, SR.No.83524/18

C.M.A.No.286 of 2009

Kak(11/04/2019)