

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 29.06.2018
Pronounced on : 14.08.2018

CORAM

THE HONOURABLE MR.JUSTICE C.SARAVANAN

C.M.A.No.1232 of 2008

Shanmugasundaram

.. Appellant/Petitioner

Vs.

1.Subramanian

2.Rukmani

3.Cholamandalam

M/s.General Insurance Company Limited,
Daro Chouse II Floor, N.S.C Bose Road,
Chennai.

.. Respondents/Respondents

Prayer:-

This Civil Miscellaneous Appeal has been filed under Section 173 of the Motor Vehicles Act,1988, to set aside the fair and decretal order dated 06.08.2007 made in M.C.O.P.No.79 of 2005 on the file of the Court of Sub Judge/Motor Accident Claims Tribunal, Dharapuram.

For Appellant : Mr.N.S.Sivakumar

For Respondents : No appearance

JUDGMENT

The present appeal is directed against the impugned fair and decretal order dated 6.08.2007 (referred to as impugned order) passed by the Motor Accident Claims Tribunal, Erode District (Referred to as the Tribunal) in M.C.O.P No.79 of 2005.

2.By an order dated 06.08.2007, the Tribunal dismissed the claim petition filed by the appellant herein.

3.This is an unfortunate case of hit and run case. The appellant was perhaps unable to lay a legitimate claim against the lorry owner its insurer as the lorry sped away after hitting the motor cycle on which the appellant was a pillion rider and got injured. Therefore, claim was made against the insurer of the motor cycle and the legal representatives of the deceased rider Magudeeswaran.

4.The motor cycle was owned and driven by the deceased Magudeeswaran on 5.11.2004 when the accident is said to have taken place at about 8.45 p.m.

5.While the deceased Magudeeswaran died on the spot of the accident, the appellant suffered grievous injuries to his body, resulting in hospitalization, surgery amputation of legs and medical expenses therewith and consequential loss of earning for a year.

6.Ex.P-1, First Information Report is said to have been filed by the 1st respondent, the father of the deceased Magudeeswaran with the jurisdictional Police Station, pursuant to which a statement under Section 161 of Cr.P.C. was obtained from the appellant. The 2nd respondent is the mother of the deceased Magudeeswaran while the 3rd respondent is the insurance company with which the accident motor cycle was insured.

7.The appellant-claimant filed a claim petition for Rs.5,00,000/- under Section 166 of the Motor Vehicles Act, 1988 under the following heads:

1	Loss of earning	Rs. 48,000/-
2	Partial loss of earnings	Nil
3	Transport to Hospital	Rs. 1,000/-
4	Extra Nourishment	Rs. 10,000/-
5	Damage to clothing and articles	Rs. 1,000/-
6	Others medical expenses	Rs. 1,00,000/-
7	Compensation for pain and sufferings	Rs. 40,000/-
8	Compensation for continuing as permanent disability, if any	Rs. 80,000/-
9	Compensation for the loss of earning power	Rs. 2,20,000/-
	Total	Rs. 5,00,000/-

8.The Tribunal after considering the oral and documentary evidence on record concluded that the accident occurred due to rash and negligence of the speeding lorry coming from the opposite direction and caused fatal accident involving the death of the deceased Magudeeswaran and injury to the appellant.

9.On the other hand, the appellant-claimant would state that but for negligence of the deceased rider Magudeeswaran, the accident would not have taken place and therefore claimed compensation from the insurer of the motor cycle viz., 3rd

respondent-Insurance Company.

10. Heard the learned counsel for the appellant and the 3rd respondent.

11. The Tribunal has considered Ex.P1 FIR and other evidence on record and has concluded that the accident was on account of the rash and negligence of the driver of the lorry which sped away after the accident and therefore the 3rd respondent was not liable to pay the compensation to the appellant.

12. The case of the appellant is that none of the evidence relied by the 3rd respondent-Insurance Company disproves the statement of the appellant that the accident took place involving the motor cycle belonging to the deceased Magudeeswaran son of the respondent Nos.1 and 2 insured with it.

13. The accident not only killed the rider of the motor cycle on the spot but also caused grievous injuries to the appellant and therefore the appellant was entitled for the compensation.

14. It is contended that the 3rd respondent has not discharged the burden of proof and has simply relied on Ex. P-1 FIR and the statement recorded from the appellant under Section 161 of the Motor Vehicles Act, 1988 by the police and the report prepared by RW-2 surveyor appointed by the 3rd respondent which in any event is not based on any direct evidence.

15. It was further contended that none of the statement recorded are relevant to disprove the statement of the appellant that the injury was caused due to the negligence of the rider of the motor cycle.

16. It is further contended that the fact that the accident has taken place while overtaking the vehicle, has not been disputed and shows negligence on the part of the deceased respondent.

17. It was further contended that it has also not been disputed that the accident was on account of the head on collision with the van coming from the opposite direction and thus proving that this is the case of negligence on the part of the rider of the motorcycle and therefore, the appellant was entitled to get just compensation under such 166 of the Act.

18. Several decisions were cited during argument to impress that the statement recorded under Section 161 and FIR registered are not relevant.

19. In this connection, the learned counsel has additionally

relied on the following cases.

i. Medical Officer, Government Primary Health Centre, vs. Rasupaiyan @ Rasu 2. P.Kalimuth 2014(1) TN Mac 801.

ii. Branch Manager, New India Assurance Co., Ltd., Vellore vs. Ekanathan and two others 2013 SCC Online Mad1460: (2014) 1 TN Mac 304(DB).

iii. Managing Director, Tamil Nadu State Transport Corporation Ltd., vs. S.Yobu 2. C.Provas 2014(1) TN MAC 295(DB).

iv. Baskar vs. The Superintendent of Police, Namakkal and two others 2014(1) TN Mac 109.

v. Maya Azhagar v. Thangiah (Madras) (Madurai Bench) 2011 AAC 2438 : 2012(1) AICJ 521: 2012(6) R.C.R. (Criminal) 891: 2012 ACJ 2529.

vi. New India Assurance Company Limited vs. P.Arunachalam and two others 2016 (2) TN MAC 85 (DB)

vii. Oriental Insurance Company limited vs. Surendra Nath Loomba and others (2012) 13 SCC 792

viii. Veera Lakshmi and others vs. Commissioner of Police, Madurai City, Madurai and others 2018 (1) TN MAC 45

ix. Metropolitan Transport Corporation (Chennai Division) Ltd vs. D.Shanthi and others 2012 (1) TN MAC 206

x. Deepal Girishbhai Soni and others vs. United India Insurance Company Limited, Baroda 2001 (1) TN MAC (SC) 193

xi. United India Insurance Company Limited, vs. Sunil Kumar and another 2013 (2) TN MAC 737 (SC)

xii. Cholamandalam M.S.General Insurance Co. Ltd. vs. Amutha 2018 (1) TN MAC 135

xiii. Hemlata and others vs. Vipin Kumar and others 2012 SCC Online Del 3342 : 2014 ACJ 1248

xiv. Oriental Insurance Company limited vs. Dhanbai Kanji Gadhvi and others, Civil Appeal Nos.682 of 2011 (@ SLP (C) No.12743 of 2010)

xv. Mangla Ram vs. Oriental Insurance Company limited and others, 2018 (1) TN MAC 681 (SC)

xvi. United India Insurance Company Limited, vs. Rita Devi and others 2014 SCC Online Del 7523

20.It was further submitted on behalf of appellant-claimant that Section 147 of the Motor Vehicles Act would stand defeated if the Insurance Company is allowed raise the objection especially in a case where there are no independent witnesses, but circumstances otherwise indicate Motor Vehicles Accident.

21.The appellant counsel further submitted that this is a fit case to invoke the principle of Res Ipso loquitur to inter negligence on the part of the rider of the motorcycle resulting in his death and injury to the appellant-claimant.

22.The learned counsel submitted that the claim filed under Section 166 of the Act be treated as having filed under Section 163-A of the Act and applying no fault liability principle the appellant-claimant be allowed just compensation.

23.Though the case was listed for passing order on 13.08.2018 in the additional list, the learned counsel for the appellant requested for making additional submission which was acceded.

24.The case laws cited by the counsel for the appellant are irrelevant. The decisions cited deal with cases involving accidents between two wheeler and four wheeler and are therefore not relevant.

25.In some of the cases referred above, the claimant was either a rider of a motorcycle/2 wheeler or a pillion rider and claims were filed against the owner of the four wheeler bus/jeep/car etc and their insurer. Therefore, most of these judgments are irrelevant merely because the victim was a rider of a two wheeler or a pillion rider and their claim were allowed.

26.The other decisions relating to FIR are also not relevant even though in the present case reliance was placed on the FIR for disallowing the claim.

27.The Hon'ble Supreme Court in Deepal Girishbhai Soni v. United India Insurance Co. Ltd., (2004) 5 SCC 385 held that "It may be true that Section 163-B provides for an option to a claimant to either go for a claim under Section 140 or Section 163-A of the Act, as the case may be, but the same was inserted ex abundanticautela so as to remove any misconception in the minds of the parties to the lis having regard to the fact that both relate to the claim on the basis of no-fault liability. Having regard to the fact that Section 166 of the Act provides

for a complete machinery for laying a claim on fault liability, the question of giving an option to the claimant to pursue their claims both under Section 163-A and Section 166 does not arise. If the submission of the learned counsel is accepted the same would lead to an incongruity".

28. Though, simultaneous claim cannot be filed under Section both under 140 read with Section 166 and under 163A of the Act, there is no bar in converting a claim under Section 163A. There are several instances of the other High Court's allowing such conversion to do justice.

29. In Hemlata and others vs. Vipin Kumar and others 2012 SCC Online Del 3342; 2014 ACJ 1248, this Court followed the decision of the Hon'ble Supreme Court in Deepal Girishbhai Soni vs. United India Insurance Co. Ltd., cited supra and United India Insurance Co. Ltd., vs. Sunil Kumar and another to hold that Section 163A can be invoked even in cases of negligence on the part of the victim.

30. In New India Assurance Co. Ltd., Vs. P. Arunachalam 2016 (2) TN MAC 84 (DB), a division bench of this Court has upheld the contention of a claimant that the insurance company was bound to compensate the accident claimant as a third party.

31. However, the above decision of this Division Bench of this Hon'ble Court has not taken note of the decision of the Hon'ble Supreme Court in Oriental Insurance Company Limited vs. Sudhakaran.K.V and others (2008) 7 SCC 428, wherein it has been categorically held that "the pillion-rider in a two-wheeler was not to be treated as a third party when the accident has taken place owing to rash and negligent riding of the scooter and not on the part of the driver of another vehicle."

32. Hon'ble Supreme Court in Oriental Insurance Company Ltd., vs. Sudhakaran.K.V. and Others (2008) 7 SCC 428 has summarised the position of law as under:

(i) the liability of the insurance company in a case of this nature is not extended to a pillion-rider of the motor vehicle unless the requisite amount of premium is paid for covering his/her risk;

(ii) the legal obligation arising under Section 147 of the Act cannot be extended to an injury or death of the owner of vehicle or the pillion-rider;

(iii) the pillion-rider in a two-wheeler was not to be treated as a third party when the accident has taken

place owing to rash and negligent riding of the scooter and not on the part of the driver of another vehicle.

33.The Court further held that if the contract of insurance did not cover the owner of the vehicle, certainly it would not cover a pillion-rider. It is observed that "the deceased was travelling as a passenger, strict sensu may not be as a gratuitous passenger as in a given case she may not be a member of the family, a friend or other relative. In the sense of the term which is used in common parlance, she might not be even a passenger. In view of the terms of the contract of insurance, however, she would not be covered thereby."

34.Similar was taken by the Hon'ble Supreme Court United India Insurance Co. Ltd. Vs Tilak Singh and Others 2006 (4) SCC 404 after examining the case laws that were prevailing at that point of time.

35.Case laws relating to reliance placed on FIR to disallow the claim are irrelevant in the facts of the present case as admittedly there is a motor vehicle accident and injury was on account of such an accident

36.Though not cited, however, in New India Assurance Co. Ltd. Vs Shanti Bopanna (2018) 12 SCC 540 a passenger employee of a company was held to be a third party. The Court observed as under:

"We find that the claim of the widow and the adopted son is fully covered by the clause in the insurance contract i.e. the policy and there is no scope for acceding to the submission made on behalf of the appellant Company that the claim is excepted by virtue of the provisions of Section 147(1) of the Act in this case. We, therefore, reject the contention made on behalf of the appellant that the deceased was not a third party because he was an employee sitting in the car. It is obvious from the circumstances that the deceased was indeed a third party being neither the insurer nor the insured."

37.Compensation was awarded in the light of the specific language in the Policy which read as under:

"(i) death of or bodily injury to any person including occupants carried in the vehicle (provided such occupants are not carried for hire or reward)...."

38.The Supreme Court in National Insurance Co. Ltd. vs.

Balakrishnan [(2013) 1 SCC 731, after referring to various decisions and its decision in Bhagyalakshmi [(2009) 7 SCC 148, held that there is a distinction between "Act policy" and "comprehensive/package policy". The Bench took note of a decision of the Delhi High Court in Yashpal Luthra v. United India Insurance Co. Ltd., [2011 ACJ 1415 (Del)]. The High Court had referred to the circulars issued by the Tariff Advisory Committee (TAC) and the Insurance Regulatory and Development Authority (IRDA). The Supreme Court in National Insurance Co. Ltd. v. Balakrishnan [(2013) 1 SCC 731, referred to the portion of Circulars dated 16-11-2009 and 3-12-2009 which was reproduced by the High Court and held as follows:

"24.It is extremely important to note here that till 31-12-2006 the Tariff Advisory Committee and, thereafter, from 1-1-2007 IRDA functioned as the statutory regulatory authorities and they are entitled to fix the tariff as well as the terms and conditions of the policies issued by all insurance companies. The High Court had issued notice to the Tariff Advisory Committee and IRDA to explain the factual position as regards the liability of the insurance companies in respect of an occupant in a private car under the 'comprehensive/package policy'. Before the High Court, the competent authority of IRDA had stated that on 2-6-1986, the Tariff Advisory Committee had issued instructions to all the insurance companies to cover the pillion rider of a scooter/motorcycle under the 'comprehensive policy' and the said position continues to be in vogue till date. It had also admitted that the 'comprehensive policy' is presently called a 'package policy'. It is the admitted position, as the decision would show, the earlier Circulars dated 18-3-1978 and 2-6-1986 continue to be valid and effective and all insurance companies are bound to pay the compensation in respect of the liability towards an occupant in a car under the 'comprehensive/package policy' irrespective of the terms and conditions contained in the policy. The competent authority of IRDA was also examined before the High Court who stated that the Circulars dated 18-3-1978 and 2-6-1986 of the Tariff Advisory Committee were incorporated in the Indian Motor Tariff effective from 1-7-2002 and they continue to be operative and binding on the insurance companies. Because of the aforesaid factual position, the Circulars dated 16-11-2009 and 3-12-2009, that have been reproduced hereinabove, were issued.

25.It is also worthy to note that the High Court, after referring to individual circulars issued by

various insurance companies, eventually stated [2011 ACJ 1415 (Del)] thus: (Yashpal Luthra case [2011 ACJ 1415 (Del)] , ACJ p. 1424, para 27)

'27. In view of the aforesaid, it is clear that the comprehensive/package policy of a two-wheeler covers a pillion rider and comprehensive/package policy of a private car covers the occupants and where the vehicle is covered under a comprehensive/package policy, there is no need for the Motor Accidents Claims Tribunal to go into the question whether the insurance company is liable to compensate for the death or injury of a pillion rider on a two-wheeler or the occupants in a private car. In fact, in view of the TAC's directives and those of IRDA, such a plea was not permissible and ought not to have been raised as, for instance, it was done in the present case.'

26. In view of the aforesaid factual position, there is no scintilla of doubt that a 'comprehensive/package policy' would cover the liability of the insurer for payment of compensation for the occupant in a car. There is no cavil that an 'Act policy' stands on a different footing from a 'comprehensive/package policy'. As the circulars have made the position very clear and IRDA, which is presently the statutory authority, has commanded the insurance companies stating that a 'comprehensive/package policy' covers the liability, there cannot be any dispute in that regard. We may hasten to clarify that the earlier pronouncements were rendered in respect of the 'Act policy' which admittedly cannot cover a third-party risk of an occupant in a car. But, if the policy is a 'comprehensive/package policy', the liability would be covered. These aspects were not noticed in Bhagyalakshmi [(2009) 7 SCC 148 : (2009) 3 SCC (Civ) 87 : (2009) 3 SCC (Cri) 321] and, therefore, the matter was referred to a larger Bench. We are disposed to think that there is no necessity to refer the present matter to a larger Bench as IRDA, which is presently the statutory authority, has clarified the position by issuing circulars which have been reproduced in the judgment by the Delhi High Court and we have also reproduced the same.

39. The above view was followed in *Oriental Insurance Co. Ltd. v. Surendra Nath Loomba*, (2012) 13 SCC 792 and held as follows: "In view of the aforesaid legal position, the question that emerges for consideration is: whether in the case at hand, the policy is an 'Act policy' or 'comprehensive/package policy'? There has been no discussion either by the Tribunal or the High Court in this regard. True it is, before us, Annexure P-1 has been filed which is a policy issued by the insurer. It only mentions the policy to be a 'comprehensive policy' but we are inclined to think that there has to be a scanning of the terms of the entire policy to arrive at the conclusion whether it is really a 'package policy' to cover the liability of an occupant in a car."

40. The Supreme Court remanded the case back to the Tribunal to examine the policy and its terms for verifying if the coverage was comprehensive.

41. In the present case, curiously the insurance policy has not been filed by the 3rd respondent. Since the policy is not available for perusal in present case, the case is remanded back to the Tribunal for deciding the case in the light of the above two cases.

42. In the event the policy is not a comprehensive/package policy, the appellant is entitled to explore the possibility of getting compensation under Sub Clause 2 of Section 161 of the Motor Vehicles Act, 1988.

43. The Motor Accident Claims Tribunal, Erode District is therefore directed

- (i) To take up the case afresh in the light of the above observations and decide the case afresh.
- (ii) The 3rd respondent-insurance company is directed to produce the copy of the insurance certificate and the policy, which was subsisting on the date of accident before the said Tribunal.
- (iii) If, there was comprehensive/package insurance policy, the appellant who was pillion rider of the motor cycle can claim just compensation as per para 26 of the Hon'ble Supreme Court in Balakrishnan case reproduced above.
- (iv) Liberty is granted to the appellant to choose the option for treating the claim either under Section 163-A or under Section 140 r/w 166 of the Act and to make out a case for enhanced compensation before the Tribunal in case of comprehensive/package policy.
- (v) The Tribunal is directed to complete the proceedings within a period of six months from the

date of communication of this order and shall pass an order after hearing the appellant.

46. This civil miscellaneous appeal is therefore disposed by way of remand. No costs.

Sd/-
Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

kkd/ia

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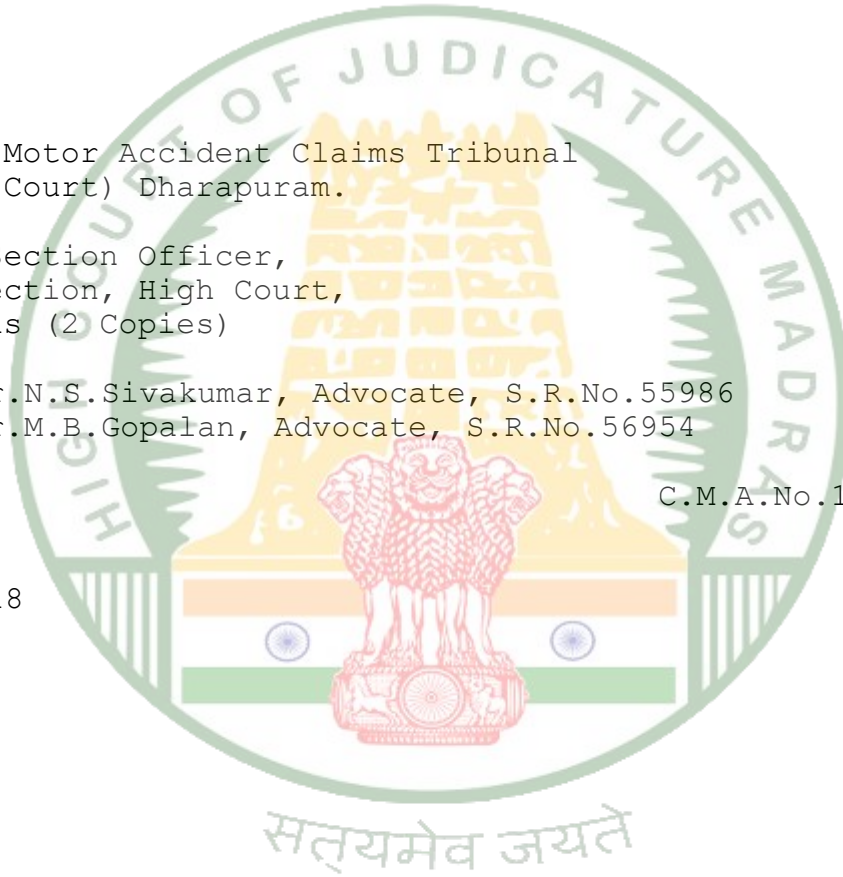
1. The Motor Accident Claims Tribunal
(Sub Court) Dharapuram.
2. The Section Officer,
VR Section, High Court,
Madras (2 Copies)

+1cc to Mr.N.S.Sivakumar, Advocate, S.R.No.55986

+1cc to Mr.M.B.Gopalan, Advocate, S.R.No.56954

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MR(Co)
CS/09/10/18



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