IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 20.07.2018

CORAM :

THE HONOURABLE MR.JUSTICE C.SARAVANAN

C.M.A.No.2200 of 2007
and
M.P.No.1 of 2007

The National Insurance Co., Ltd.,
No.403, Mettur Road, Bhavani. .. Appellant/ 2nd respondent

Vs.

1.K.Ponnusamy .. 1st respondent/Claimant
2.R.Jagadeesh .. 2nd Respondents /1st respondent

Prayer: Civil Miscellaneous Appeal filed under Section 173 of the Motor Vehicles Act,1988 against the judgment and decree, dated 18.07.2006 made in M.C.O.P.No.883 of 2004, on the file of the Motor Accident Claims Tribunal, II Additional Subordinate Judge, Erode.

For appellant : Mr.S.Arunkukar
For Respondents : Mr.K.Govi Ganesan for R1
Mr.M.R.Thangavel for R2

J U D G M E N T

The appellant/Insurance company is aggrieved by the order dated 18.07.2006 passed by the Motor Accidents Claims Tribunal, II Additional Subordinate Judge's Court at Erode in M.C.O.P.No.833 of 2004 (for brevity, hereinafter referred to as "the Tribunal").

2. By the said impugned order, the tribunal has awarded for a sum of Rs.99,000/- as compensation payable by the appellant/Insurance Company to the first respondent herein.

3.The facts of the case are under:

i) On 20.06.2004, at about 8.45 P.M., the first respondent while riding his Enfield bullet met with an accident when the second respondent riding his Bajaj motor cycle collided with the 1st respondent. The 1st respondent sustained following grievous injuries:-

a) abrasions over the middle 3 fingers dorsum right hand

b) Swelling and tenderness over

the medial 3 metacarpals right hand

c) multiple abrasions over the left hand dorsum with lacerated wound over the dorsum 1x1x1/2cm.

d) crush injury right foot with lacerated wound 10cmx5cm over the dorsum of the foot exposing crushed muscles, tendon and fractured bones.

ii) The first respondent/claimant filed a claim petition under section 166 of Motor Vehicles Act 1988 and claimed a sum of Rs.4,85,000/- on various heads for the above mentioned injuries.

iii) Details of the claims are as under:

iv) The Tribunal, after considering the evidence on record has awarded an amount of Rs.99,000/- together with interest at 7.5% to the first respondent herein. The details of amount awarded are as follows:

1	Pain and sufferings, mental agony ans the trauma	Rs.10,000/-
2	Medical expenditure	Rs.73,059.90
3	Compensation towards disability fixed at 15%	Rs.15,000/-
4	Transport to hospital and extra nourishment and damage of cloth	Rs. 1,000/-
	Total	Rs.99,059.90

v) The Tribunal has allowed medical expenses of Rs.73,059/- incurred by the 1st respondent.The Tribunal has accepted that the 1st respondent suffered 15% disability and has awarded Rs.15,000/- and further a sum of Rs.1,000/- notionally towards cost of transportation, damage to cloths and extra nourishment in absence of the evidence to substantiate the same.

4. The above decision was rendered in the context of third party policy.

5.The learned counsel for the appellant before this Court argued that the first respondent was not entitled to make a claim on the strength of the insurance policy marked as Ex.P14 and Ex.R3 issued by the appellant to the 1st Respondent's motor cycle as Personal Accident cover can be made only in the case of death or amputation contractually under the Insurance Policy in case of comprehensive policy.

6.The second argument of the appellant/Insurance company is that the 1st respondent cannot make claims against the appellant as the appellant can indemnify the 1st respondent only for the tort committed by him.

7.In para 9, the Tribunal has concluded that it is not known whether the 2nd respondent attached the conditions in printed form containing the terms and conditions of the policy to the first respondent which restricts the policy for the appellant to avoid liability.

8. While 1st respondent has filed a copy of Ex.P14 insurance certificate the appellant/respondents filed Ex.R3 which is a duplicate copy of the insurance certificate along with printed form which contains the terms and conditions of the policy.

9. The Tribunal has concluded that though Section 142 of the Motor Vehicles Act contemplates compensation towards permanent impairing of the any member or joint, the injury to right hand and left foot toes suffered by the 1st respondent is liable to be compensated and the appellant cannot escape the liability by stating that it is liable only P.A. cover only for amputation or death.

10.The Tribunal examined the original of the policy which was available with the first respondent and concluded that the appellant insurance company was liable to pay the compensation and cannot escape liability on the ground that only in the event of death or amputation, compensation can be paid.

11.The Tribunal concluded that the appellant cannot avoid its liability by imposing a burdensome clause, taking advantage its position as an insurer. The Tribunal has concluded that it is also not known whether the appellant had served the printed terms and conditions of policy to extricate from its liability.

12. The Tribunal further concluded that even as per the terms of the policy it is clear that right of any person to claim an amount as compensation by virtue of the provision of the Motor Vehicle Act and the liability is under a compulsory accident cover on receipt of a separate premium over and above the basic premium. The compulsory accident cover premium was more than the 1/4th of the amount payable for the basic premium. Therefore, the 1st respondent being the owner of the insured motor cycle and having suffered bodily injury was held could validly claim compensation from the appellant.

13.The Tribunal has further held that both the appellant and the 2nd respondent herein are jointly and severally liable for the above said amount.

14. I have gone through the impugned order, deposition and evidence on record and considered the arguments advanced.

15. As per the decision of the Supreme Court in Ningamma and Another vs. United India Insurance Company Ltd.,(2009) 13 SCC 710, the Hon'ble Supreme Court held as under:-

> "21. "In our considered opinion, the ratio of the decision in Oriental Insurance Co., Ltd., case is clearly applicable to the facts of the present case. In the present case, the deceased was not the owner of the motorbike although he was authorised to drive the said vehicle by its owner and, therefore, he would step into the shoes of the owner of the motorbike. We have already extracted Section 163 A of the MVA hereinbefore. A bare perusal of the said provision would make it explicitly clear that persons like the deceased in the present case would step into the shoes of the owner of the vehicle.
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> 22. In a case wherein the victim died or where he was permanently disabled due to an accident arising out of the aforesaid motor vehicle in that event the liability to make payment of the compensation is on the insurance company or the owner, as the case may be as provided under Section 163-A. But if it is proved that the driver is the owner of the motor vehicle, in that case the owner could not himself be a recipient of compensation as the liability to pay the same is on him. This proposition is absolutely clear on a reading of Section 163-A of the MVA. Accordingly, the legal representatives of the deceased who have stepped into the shoes of the owner of the motor vehicle could not have claimed compensation under Section 163-A of the M.V.Act.
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> 23. When we apply the said principle into the facts of the present case we are of the view that the claimants were not entitled to claim compensation under Section 163-A of the MVA and to that extent the High Court was justified in coming to the conclusion that the said provision is not applicable to the facts and circumstances of the present case."

16. The above decision was rendered in the contest of third party policy.

17. In Bagyalakshmi vs. United Insurance Company Ltd., (2008) 7 SCC 148, the Hon'ble Supreme Court had to consider an appeal from the Division Bench of this Court. In the decision impugned before it, the Hon'ble Division bench of this Court had held that the legal heirs were entitled to get compensation in case of comprehensive policy.

18. In Royal Sundaram Insurance Co., Ltd., vs. V.A.Meenakshi in C.M.A.No.312 of 2009, the Division Bench of this Court dismissed the appeal filed by the Insurance Company and affirmed the order of the Tribunal awarding a compensation of Rs.19.10 lakhs to the legal representatives of the deceased passenger of the insured vehicle. This Court had observed as under:

> 29. Therefore, it is clear from the Act itself, the words of the policy and the decision in Amrit Lal Soodcase (1998) 3 SCC 744 that a comprehensive policy covers the risk of a gratuitous passenger to the extent of the liability incurred. We may imagine what will happen in a case where the owner is driving his car covered by a comprehensive policy. He is accompanied by his wife and children. There is an accident as in this case. The wife and the children are permanently disabled by the injuries. If we agree with the appellant-Insurance Company, those pathetic claimants will not get any compensation. The law never intended this to happen. That is why the TAC explicitly came out with the clarificatory circular in 1978. We cannot forget that the words used are third party' and comprehensive, so we cannot deny this relief to the third-party occupant in a car covered by a comprehensive policy"

19. In National Insurance Company vs. Balakrishnan and another, (2013) 1 SCC 731 the Hon'ble Supreme Court considered the issue, "What would be the liability of the insurer if the policy is a comprehensive/package policy. It observed that it was absolutely conscious that the matter has been referred to a larger Bench, but, as is evident, the Bench has also observed that it would depend upon the view of the Tariff Advisory Committee pertaining to enforcement of its decision to cover the liability of an occupant in a vehicle in a comprehensive/package policy regard being had to the contract of insurance."

20.In paras 24, 25, 26 and 27 it held as under :

" ………Before the High Court, the Competent Authority of IRDA had stated that on 2nd June, 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 18th March, 1978 and 2nd June, 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 the IRDA was also examined before the High Court who stated that the circulars dated 18th March, 1978 and 2nd June, 1986 of the Tariff Advisory Committee were incorporated in the Indian Motor Tariff effective from 1st July, 2002 and they continue to be operative and binding on the insurance companies. Because of the aforesaid factual position, the circulars dated 16th November 2009 and 3rd December, 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 the 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 the case of Bhagyalakshmi (supra) 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 the 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.

27. 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."

28. In view of the aforesaid analysis, we think it apposite to set aside the finding of the High Court and the Tribunal as regards the liability of the insurer and remit the matter

> to the Tribunal to scrutinize the policy in a proper perspective and, if necessary, by taking additional evidence and if the conclusion is arrived at that the policy in question is a comprehensive package policy", the liability would be fastened on the insurer.

21. The above view was followed by the Hon'ble Supreme Court in Oriental Insurance Co., Ltd., vs. Surendra Nath Loomba, (2012) 13 SCC 792.

22. The Division Bench of this Court in Divisional Manager, United India Insurance Co., Ltd., vs. R.Rekha and 3 Others 2017(2) TN MAC 674 (DB) has taken note of the fact that cost of medical treatment has sky-rocketed, directed the IRDA to enhance the compulsory personal accident cover from the existing Rs.1,00,000/- to be not less than Rs.5,00,000 to add some succor or solace to the victims of accidents, who are the owner of the vehicle. Therefore, the learned counsel for the first respondent has relied on the above decision and seeks to modify the award of the Tribunal.

23.The Hon'ble Supreme Court in the case of NEW INDIA ASSURANCE CO.LTD V. C.M.JAYA& OTHERS reported in [I(2002) ACC 299(SC)] cited by the appellant has held that there is nothing in Section 95 of the Act prohibiting the parties from contracting to create unlimited or higher liability to cover wider risk. The insurer is bound by the terms of the contract as specified in the policy only.

24. The appellant submitted that it was submitted that in the absence of a term or clause in the policy, pursuant to the contract of insurance, a limited statutory liability cannot be expanded to make it unlimited. If it is so done, it would amount to re-writing the statute or the contract of insurance which is not permissible.

25. In this case , Ex.P-14/B-3 is dated 8.6.2004. The accident is said to have taken place on 20.6.2004 at about 8.45 pm. The other accident vehicle did not have a valid insurance cover. Therefore, the 1st respondent will be remedyless. Therefore, under these circumstances, the Tribunal has made the appellant and the 2nd respondent liable to pay compensation by awarding the aforesaid amount. No doubt the policy cannot be modified and substituted. However, there is no proof that the insurance certificate given by the appellant also included the policy containing the restricted liability. Further, restricted covenant in the policy is unconscionable as a victim of RA is denied compensation though he has paid premium.

26. Further, the amount of premium charged for the comprehensive policy is almost 1/4th of the amount charged for the third party cover and therefore the appellant insurance company hid behind the Policy which was not given along with the certificate to the 1st respondent. Further, the fact that the IRDA has itself allowed the benefit to person such as pillion riders and passengers who are admittedly not covered by the Policy, the respondent cannot deny their liability to the insured by placing reliance on the clause restricting the liability. The liability has been restricted to just Rupees One Lakh only and the Tribunal has awarded only Rs.99,059/- which is within the risk covered in the policy.

27. In view of the above observations, this Civil Miscellaneous Appeal is dismissed. Consequently, connected miscellaneous petition is also closed. No costs.

Sd/--
Assistant Registrar(CS)

//True Copy//

Sub Assistant Registrar

kkd

To
1. The Motor Accident Claims Tribunal,
II Additional Subordinate Judge, Erode.

2.The Section Officer,
VR section,
High court
Madras.

+1cc to Mr.M.R.Thangavel , Advocate SR.No. 48716
+1cc to Mr.K.Govi Ganesan , Advocate SR.No. 48670

C.M.A.No.2200 of 2007

ASK(03/10/2018)