

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 29.01.2019

CORAM:

THE HONOURABLE MS.JUSTICE V.M.VELUMANI

C.M.A.No.2396 of 2015

The Branch Manager,
The New India Assurance Co. Ltd.,
Neela South Street,
Nagapattinam District & District Munsif.
... Appellant /2nd Respondent

Vs.

1.Kannan

2.Ganesan

..Respondents/Petitioner/1st Respondent

Prayer: This Civil Miscellaneous Appeal is filed under Section 173 of Motor Vehicles Act, 1988, against the judgment and decree dated 16.06.2015 made in M.A.C.T.O.P.No.107 of 2015 on the file of the Motor Accidents Claims Tribunal, Chief Judicial Magistrate, Nagapattinam.

For Appellant : Mr.M.Krishnamoorthy
For R1 : Mr.S.Saibharath

J U D G M E N T

This Civil Miscellaneous Appeal is filed against the award dated 16.06.2015 made in M.A.C.T.O.P.No.107 of 2015 on the file of the Motor Accidents Claims Tribunal, Chief Judicial Magistrate, Nagapattinam.

2.The appellant/Insurance company is second respondent in M.A.C.T.O.P.No.107 of 2015 on the file of the Motor Accidents Claims Tribunal, Chief Judicial Magistrate, Nagapattinam. The first respondent/claimant filed the said claim petition claiming a sum of Rs.20,00,000/- as compensation for the injuries sustained by him in the accident that took place on 22.10.2014.

3.The Tribunal considering the pleadings, oral and documentary evidence held that the accident occurred not due to the negligence on the part of the first respondent and accident

occurred due to the negligence on the part of the driver of the vehicle, which was coming in the opposite direction, the first respondent fell down and sustained injuries and directed the appellant being insurer of the motorcycle belonging to the second respondent to pay a sum of Rs.8,29,600/- as compensation to the first respondent.

4. Against the said award dated 16.06.2015 made in M.A.C.T.O.P.No.107 of 2015, the appellant/Insurance Company has come out with the present appeal challenging the liability fastened on them.

5. The learned counsel appearing for the appellant contended that the first respondent drove the motorcycle belonging to the second respondent, insured with the appellant in a rash and negligent manner with uncontrollable speed and fell down and sustained injury. The first respondent is only responsible for the accident due to his rash and negligent driving. FIR was registered only against the first respondent. The appellant is liable to indemnify when the vicarious liability is on the part of the insured/owner of the vehicle. Unless negligence is proved, the first respondent cannot maintain the application under section 166 of the Motor Vehicles Act. The Tribunal having held that there was no negligence on the part of the first respondent ought to have dismissed the claim petition against the appellant. As per section 147 of the Motor Vehicles Act, the risk of rider of two wheeler is not required to be covered and even in package policy the rider of motorcycle is not covered. The learned counsel for the appellant further contended that as per Section 147 of the Act, the Insurance company is not liable to cover the risk of rider of motorcycle, even in case of package policy, the rider of motorcycle cannot maintain claim petition against the Insurance Company under Sections 163A or 166 of the Motor Vehicles Act. The Tribunal ought to have dismissed the claim petition against the appellant as the rider of motorcycle is not a workmen or paid driver of second respondent. The learned counsel appearing for the appellant further contended that the first respondent sustained injuries by the negligence of the driver of the unknown lorry and the first respondent can claim compensation under Section 140 of the Motor Vehicle Act on no fault compensation and he is entitled to only a total sum of Rs.25,000/- for the injuries sustained by him and prayed for setting aside the award of the Tribunal.

5(i). The learned counsel for the appellant relied on the following judgments in support of his contentions:

(i) 2007 (2) TN MAC 9 (SC) (Oriental Insurance Company Limited vs. Meena Variyal and others);

"11. The object of the insistence on insurance under Chapter XI of the Act thus seems to be to compulsorily cover the liability relating to their person or properties of third parties and in respect of employees of the insured employer, the liability that may arise under the Workmen's Compensation Act, 1923 in respect of the driver, the conductor and the one carried in a goods vehicle carrying goods. On this plain understanding of Section 147, we find it difficult to hold that the insurance company, in the case on hand, was liable to indemnify the owner, the employer Company, the insured, in respect of the death of one of its employees, who according to the claim, was not the driver. Be it noted that the liability is not one arising under the Workmen's Compensation Act, 1923 and it is doubtful, on the case put forward by the claimant, whether the deceased could be understood as a workman coming within the Workmen's Compensation Act, 1923. Therefore, on a plain reading of Section 147 of the Act, it appears to be clear that the insurance company is not liable to indemnify the insured in the case on hand.

14. It is difficult to apply the ratio of this decision to a case not involving a third party. The whole protection provided by Chapter XI of the Act is against third party risk. Therefore, in a case where a person is not a third party within the meaning of the Act, the insurance company cannot be made automatically liable merely by resorting to the Swaran Singh (supra) ratio. This appears to be the position. This position was expounded recently by this Court in National Insurance Co. Ltd. Vs. Laxmi Narain Dhut [2007 (4) SCALE 36]. This Court after referring to Swaran Singh (supra) and discussing the law summed up the position thus: "In view of the above analysis the following situations emerge:

1. The decision in Swaran Singh's case (supra) has no application to cases other than third party risks.

2. Where originally the licence was a fake one, renewal cannot cure the inherent fatality.

3. In case of third party risks the insurer has to indemnify the amount and if so advised, to recover the same from the insured.

4. The concept of purposive interpretation

has no application to cases relatable to Section 149 of the Act.

(ii) (2012) 4 SCC 552 (Surender Kumar Arora and another vs. Manoj Bisla and Others);

8. The claimants are the parents of the deceased person. The deceased was a doctor by profession. The deceased was travelling in the motor vehicle driven by respondent no.1, who happens to be a close associate/friend. It has come in the evidence of the claimants as well as respondent no.1 that the vehicle in question was not driven in a rash and negligent manner by respondent no.1.

9. Admittedly, the petition filed by the claimants was under Section 166 of the Act and not under Section 163-A of the Act. This is not in dispute. Therefore, it was the entire responsibility of the parents of the deceased to have established that respondent no.1 drove the vehicle in a rash and negligent manner which resulted in the fatal accident. Maybe, in order to help respondent no.1, the claimants had not taken up that plea before the Tribunal. Therefore, High Court was justified in sustaining the judgment and order passed by the Tribunal. We make it clear that if for any reason, the claimants had filed the petition under Section 163-A of the Act, then the dicta of this Court in the case of Kaushnuma Begum (Smt.) & Ors. (supra) would have come to the assistance of the claimants.

10. In our view the issue that we have raised for our consideration is squarely covered by the decision of this Court in the case of Oriental Insurance Co. Ltd. (supra). In the said decision the Court stated :

"....Therefore, the victim of an accident or his dependants have an option either to proceed under Section 166 of the Act or under Section 163-A of the Act. Once they approach the Tribunal under Section 166 of the Act, they have necessarily to take upon themselves the burden of establishing the negligence of the driver or owner of the

vehicle concerned. But if they proceed under Section 163-A of the Act, the compensation will be awarded in terms of the Schedule without calling upon the victim or his dependants to establish any negligence or default on the part of the owner of the vehicle or the driver of the vehicle." "

(iii) 2009 (2) TN MAC 169 (SC) (Ningamma & Anr. vs. United India Insurance Co. Ltd.);

"18. In the case of Oriental Insurance Company Ltd. v. Rajni Devi and Others, (2008) 5 SCC 736, wherein one of us, namely, Hon'ble Justice S.B. Sinham is a party, it has been categorically held that in a case where third party is involved, the liability of the insurance company would be unlimited. It was also held in the said decision that where, however, compensation is claimed for the death of the owner or another passenger of the vehicle, the contract of insurance being governed by the contract qua contract, the claim of the claimant against the insurance company would depend upon the terms thereof. It was held in the said decision that Section 163-A of the MVA cannot be said to have any application in respect of an accident wherein the owner of the motor vehicle himself is involved. The decision further held that the question is no longer res integra. The liability under section 163-A of the MVA is on the owner of the vehicle. So a person cannot be both, a claimant as also a recipient, with respect to claim. Therefore, the heirs of the deceased could not have maintained a claim in terms of Section 163-A of the MVA. In our considered opinion, the ratio of the aforesaid decision is clearly applicable to the facts of the present case. In the present case, the deceased was not the owner of the motorbike in question. He borrowed the said motorbike from its real owner. The deceased cannot be held to be employee of 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.

19. 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. 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 MVA."

(iv) 2004 (2) TN MAC 144 (SC) (Dhanraj vs. New India Assurance Co. Ltd. & Anr.);

"7. We have seen the Policy. It is a comprehensive policy. The question that arises is whether a comprehensive Policy would cover the risk of injury to the owner of the vehicle also. Thus, an insurance policy covers the liability incurred by the insured in respect of death of or bodily injury to any person (including an owner of the goods or his authorized representative) carried in the vehicle or damage to any property of a third party caused by or arising out of the use of the vehicle. Section 147 does not require an Insurance Company to assume risk for death or bodily injury to the owner of the vehicle.

9. In this case, it has not been shown that the policy covered any risk for injury to the owner himself. We are unable to accept the contention that the premium of Rs.4,989/- paid under the heading "Own damage" is for covering liability towards personal injury. Under the heading "Own damage", the words "premium on vehicle and non-electrical accessories" appear. It is thus clear that this premium is towards damage to the vehicle and not for injury to the person of the owner. An owner of a vehicle can only claim provided a personal accident insurance has been taken out. In this case, there is no such insurance."

6. Per Contra, the learned counsel appearing for the first respondent contended that the vehicle belonging to the second respondent was insured with appellant and insurance policy was in force at the time of accident. The accident occurred as first respondent tried to avoid an on coming lorry driven in a rash and negligent manner and due to the same, the first respondent fell down and sustained injury. In view of the valid policy in existence, the appellant is liable to pay the compensation awarded by the Tribunal. The learned counsel for the first respondent further contended that as per insurance policy, the rider of the motorcycle is also covered and even if there is no negligence on the part of the rider of motorcycle, the Insurance Company is liable to pay compensation. The Tribunal by giving valid reason held that the appellant is liable to pay compensation to the first respondent. The appellant has not pleaded and proved that as per policy or under section 147 of the Motor Vehicles Act, the rider of the motorcycle is not covered by policy and claim under section 166 of Motor Vehicles Act is not maintainable. Hence, the appellant is not entitled to raise such a plea in the appeal. The first respondent is a third party in respect of insurance policy issued by appellant and the said policy is a package policy. In support of his contentions, the learned counsel appearing for the first respondent relied on the following judgements:

(i) 2013 (1) TN MAC 729 (National Insurance Co. Ltd., vs. Krishnan);

"27. An occupant in a vehicle, may include all the persons, including the owner. When there are different kinds of policies, for the owner-cum-driver, employee, unnamed passengers, etc., for which, different rates of premium is prescribed under the Indian Motor Tariff, it cannot be contended that the claim for compensation is maintainable, only when the owner is on the wheels and not when he travelled in the vehicle, as an occupant. In the light of the decisions, stated supra, this Court is of the view that the respondent is entitled to maintain a claim for compensation, against the insurer alone.

.....
.....

35. The last question to be considered is whether the claims Tribunal is empowered to award a compensation more than the limit, provided for, in the Personal Accident Cover Policy. When the Respondent/Claimant has

sustained multiple injuries, resulting in huge Medical expenditure of Rs.1,15,934/-, restricting the quantum of compensation to the maximum amount of Rs.1,00,000/-, as per the Policy, would defeat the Principles of "Just Compensation".

36. If the contention of the appellant-Insurance Company has to be accepted, then no compensation can be awarded under other heads, viz., disability, loss of earning, pain and suffering or under any other pecuniary and non-pecuniary losses. Even the respondent/claimant will not be in a position to get back Rs.1,15,934/-, incurred by him, towards medical expenses. Such a narrow construction of limiting the compensation only to Rs.1 Lakh, cannot be made, when sufficient oral and documentary evidence, has been adduced to prove that the pecuniary and non-pecuniary losses suffered by the injured, exceeds the maximum limit. Restricting the compensation to only Rs.1 Lakh, would defeat the very intention of the legislature, to award, just compensation to the accident victim, and it will not be in conformity with the judgments of the Apex Court, stated supra."

(ii) 2017 (1) TN MAC 184 (new India Assurance Co. Ltd., vs. Murugan);

"13. A Full Bench of the Madhya Pradesh High Court in Jugal Kishore and another v. Ramlesh Devi and others, 2004 ACJ 297, while dealing with the meaning and scope of 'third party' under Section 145(g) of the Motor Vehicles Act, has also held that the 'third party' should include everyone, be it a person travelling in another vehicle, one walking on the road or a passenger in the vehicle itself which is the subject matter of the insurance policy.

14. Word "third party" is considered by the Division Bench of this Court in the case of Usha Jain v. United India Insurance Co., (1996 J LJ 117) in para 7 of the judgment, it is held that word "third party" have nowhere been defined in the Act and under Chapter VIII section 93(d) of the Act only states that "third party" includes

the "Government". In the context of the provisions contained in Chapter VIII and the Scheme of Insurance with regard to motor vehicles, it may well be understood by the words "third party" that they include persons and Government other than the insurer and insured."

(iii) 2009-2-L.W. 353 (Royal Sundaram Alliance Insurance Co. Ltd , vs. A.Meenakshi & others)

"6. So the law relating to Requirements of Policies and Limits of Liability is set down in Section 147 of the Motor Vehicles Act, 1988. This corresponds to Section 95 of the Motor Vehicles Act, 1939. Section 147(1)(i) provides that in order to comply with the requirements of the said Chapter, an insurance policy would cover any liability incurred by the insured in respect of the death of or bodily injury to any person, including owner of the goods etc. The section is quite wide in its scope and meaning and the object of the legislature has to be given the widest, most effective and practical meaning so that the net of coverage is extended to as many classes of persons relating to as many types of vehicles without exception. Courts are obliged to ensure that as many classes of motor accident victims receive the benefit of compensation, unless it is specifically restricted by the Act or it is specifically restricted by the contract, without violating the provisions of the Act. The insurer can and may contract to cover risks and liabilities which he is not bound to under the Act. To put it in other words, he can expand his net of coverage far beyond the statute-imposed limits, but he can not restrict his net of coverage contrary to the statute. This is how we must advance the object of the Act. Then again we must understand who is a "third party". A third party is one who is neither the insurer nor the insured. He is simply a third party. By the same logic, third party coverage must include all third parties, unless by doing so we breach the covenants of the Policy, or include specific categories of "third parties" who are excluded by the Section."

7. Heard the learned counsel appearing for the appellant as

well as the learned counsel appearing for the first respondent and perused the materials available on record.

8. From the materials available on record, it is seen that admittedly, the first respondent while riding the motorcycle belonging to second respondent insured with appellant, fell down and sustained injuries. It is an admitted case that while first respondent tried to avoid being hit by on coming lorry, fell down and sustained injury. The second respondent/owner of the motorcycle disputed his liability to pay compensation as claimed by first respondent on the ground that the second respondent stated that the vehicle was insured with appellant. The stand of the appellant in the counter statement is that first respondent was in drunken mood at the time of accident and he is responsible for the accident and therefore, the appellant is not liable to pay compensation. The contention of the learned counsel for the appellant is that the first respondent has filed claim petition under Section 140 and 166 of Motor Vehicles Act, and the claimant has to prove the negligence on the part of the driver. As per Section 147 of the Motor Vehicles Act, the insurance policy covers only third party liability and owner or authorised representative travelling in goods vehicle accompanying the goods only. When the owner takes package policy by paying extra premium to the occupants of the four wheeler, and for owner, driver and pillion rider they are covered by the insurance policy. In view of the above provision, the learned counsel appearing for the appellant is liable to indemnify the owner of the goods only when the negligence of the driver was proved, the owner of the vehicle becomes vicariously liable. In the present case, the Tribunal has held that the first respondent who drove the vehicle at the time of accident was not negligent. In such case, the second respondent, who is the owner of the motorcycle driven by the first respondent is not vicariously liable and the appellant is not liable to pay compensation at the time.

9. The contention of the learned counsel appearing for the appellant that the policy issued by the Insurance Company under Section 147 of the Motor Vehicles Act, does not cover the injury or death of owner, pillion rider and occupants of four wheeler and driver, has considerable force. The policy issued by the Insurance Company under the said Section is only "Act Policy" which covers third party and owner of the goods and it is open to the owner of the vehicle to pay additional premium to cover personal accident claim of owner and pillion rider and occupants of four wheeler. On receipt of additional premium, the Insurance Company agrees to pay the compensation for the bodily injury or death of above referred persons and "Act Policy" is converted as 'Package Policy'.

10. From the judgments relied on by the appellant, it is clear that the Insurance Company is liable to pay compensation to the owner, driver, pillion rider and occupants of vehicle only when the policy is package policy namely, only when additional premium is paid. The learned counsel appearing for the appellant referred to Ex.P3/Insurance Policy and contended that the second respondent paid additional premium only for own damage and no additional premium paid for personal accident cover. The learned counsel appearing for the appellant further contended that the Tribunal has erred in holding that driver of the vehicle was covered by Ex.P3/Insurance Policy. The said contention has considerable force, in view of the well settled judicial pronouncement and unless additional premium is paid, the persons, who are not covered by the policy issued under Section 147 of the Motor Vehicles Act, are not entitled to claim compensation from Insurance Company.

11. The first respondent has filed the claim petition under Section 140 and 166(1) of the Motor Vehicles Act. When the claim petition is filed under Section 166(1) of the Act, the claimant has to prove the negligence. Unless the negligence is proved, the owner of the vehicle and Insurance Company are not liable to pay compensation. From the materials available on record, it is seen that first respondent fell down while giving way to on coming lorry driven in a rash and negligent manner and sustained injuries. The Tribunal accepted the contention of first respondent and held that accident did not occur due to the negligence on the part of the first respondent. The Tribunal did not fix negligence on anybody especially on the second respondent/owner of the vehicle. In such case, the claim petition under Section 166(1) of the Motor Vehicles Act is not maintainable against the second respondent as well as the appellant. It is to be taken note that the first respondent also filed claim petition under Section 140 of the Act. As per this Section, the injured or legal heirs of deceased need not prove negligence, but the injured or legal heirs of deceased are entitled only Rs.25,000/- and Rs.50,000/- respectively.

12. The issue whether the claimant is entitled to only Rs.1,00,000/- under personal accident coverage came up for consideration before this Court. This Court in the Judgment reported in 2013 (1) TN MAC 729 (National Insurance Co. Ltd., Vs. Krishnan), held that the Tribunal or Courts must award just compensation after referring to the judgment with regard to just compensation. This Court held that the claimant is entitled to more amount than Rs.1,00,000/- under personal accident coverage and held that the claimant is entitled to amount under different heads as awarded by Tribunal.

13. In view of the fact that the first respondent failed to prove the alleged negligence, the first respondent is entitled to only a sum of Rs.25,000/- as per Section 140 of Motor Vehicles Act. This Court in the judgment reported in 2013 (1) TN MAC 729 as referred to above, held that inspite of restriction in Insurance Policy, the claimants can be awarded more compensation. Applying the said principle, the first respondent is entitled to claim compensation under different heads for the reasons stated above. As per various judgments of Hon'ble Apex Court and this Court the Tribunal and Courts have ample power to award just compensation even more than the amounts claimed by claimants. The amount awarded by the Tribunal is modified and this Court grants the following amounts to the first respondent under different heads.

(i) As per Section 140 of the Motor Vehicles Act, the first respondent is entitled to Rs.25,000/-.

S.No	Description	Amount awarded by Tribunal (Rs)	Amount awarded by this Court (Rs)	Award confirmed or enhanced or granted
1.	Disability	2,31,000	25,000	Reduced
2.	Loss of pain and Suffering	77,000	77,000	confirmed
3.	Loss of Extra Nourishment	15,000	15,000	Confirmed
4.	Attendant Charges	15,000	15,000	Confirmed
5.	Medical Expenses	4,45,600	4,45,600	Confirmed
6.	Loss of income for 32 days	16,000	-	Set aside
7.	Frustration	25,000	-	Set aside
8.	Traveling Charges	5,000	5,000	Confirmed
	Total	8,29,600	5,82,600	Reduced by Rs.2,47,000 /-

14. With the above modification, the Civil Miscellaneous Appeal is partly allowed. The compensation of Rs.8,29,600/-

awarded by the Tribunal is hereby reduced to Rs.5,82,000/- with interest at the rate of 7.5% per annum from the date of petition till the date of realisation. The appellant/Insurance Company is directed to deposit the modified award amount along with interest and costs, less the amount already deposited, if any, within a period of six weeks from the date of receipt of a copy of this judgment. On such deposit, the first respondent/claimant is permitted to withdraw the modified award amount along with interest

and costs, after adjusting the amount if any, already withdrawn. The appellant/Insurance Company is permitted to withdraw the excess amount, if any lying in deposit to the credit of M.C.O.P.No.107 of 2015. No costs.

Sd/-

Assistant Registrar (CS-I)

//True Copy//

Sub Assistant Registrar

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To

The Motor Accidents Claims Tribunal
Chief Judicial Magistrate, Nagapattinam.

Copy To

The Section Officer,
V.R. Section, High Court,
Madras.(2 copies)

+1cc to Mr.M.Krishnamoorthy, Advocate, S.R.No.6914

+1cc to Mr.Sai & Bharath, Advocate, S.R.No. 7100

C.M.A.No.2396 of 2015

SAI (CO)
GN(03/04/2019)