

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 08.12.2020

CORAM:

THE HONOURABLE MS.JUSTICE V.M.VELUMANI

C.M.A.No.1687 of 2013
and M.P.No.1 of 2013

The National Insurance Company Ltd.
First Floor, Karthegeya Complex
403, B-10, Mettur main road
Bhavani, Bhavani Taluk
Erode District. ... Appellant/2nd Respondent

Vs.

1.Saroja ...1st Respondent/Petitioner

2.Sridhar ...2nd Respondents/1st Respondent

Prayer: This Civil Miscellaneous Appeal is filed under Section 173 of Motor Vehicles Act, 1988, against the judgment and decree dated 13.03.2012 made in M.C.O.P.No.408 of 2009 on the file of Motor Accident Claims Tribunal, Additional District Court, Fast Track Court No.IV, Bhavani, Erode District.

For Appellant : Ms.N.B.Surekha

For R1 : Mr.C.Kulanthaivel

For R2 : No appearance

J U D G M E N T

This matter is heard through "Video-Conferencing".

This Civil Miscellaneous Appeal has been filed by the appellant/Insurance Company challenging the award dated 13.03.2012 made in M.C.O.P.No.408 of 2009 on the file of Motor Accident Claims Tribunal, Additional District Court, Fast Track Court No.IV, Bhavani, Erode District.

2.The appellant/Insurance Company is the 2nd respondent in

M.C.O.P.No.408 of 2009 on the file of Motor Accident Claims Tribunal, Additional District Court, Fast Track Court No.IV, Bhavani, Erode District. The 1st respondent filed the said claim petition claiming a sum of Rs.3,00,000/- as compensation for the injuries sustained by her in the accident that took place on 29.08.2009.

3.According to the 1st respondent, on the date of accident i.e., on 29.08.2009, at 12.35 a.m., while the 1st respondent was travelling in a omni van from Sathiamangalam to Gobichettipalayam Main Road, near Kothukatu Palam from West to East direction, the 2nd respondent suddenly turned the said omni van on seeing the lorry coming in the opposite direction and due to which the omni van got capsized and thus the accident occurred. In the accident, the 1st respondent sustained grievous injuries all over the body. Therefore, the 1st respondent has filed the above claim petition claiming compensation against the 2nd respondent and the appellant.

4.The 2nd respondent, the driver of the omni van filed counter statement denying the averments made in the claim petition and stated that the 2nd respondent is not responsible for the accident. The 2nd respondent has possessed valid driving license and the said omni van was insured with the appellant/Insurance Company at the time of accident. The 2nd respondent has also denied the age, avocation and income of the 1st respondent. In any event, the compensation claimed by the 1st respondent is excessive and prayed for dismissal of the claim petition as against the 2nd respondent.

5.The appellant/Insurance Company insurer of the omni van filed counter statement denying the averments made by the 1st respondent and stated that the 1st respondent, owner of the omni van failed to inform the accident to the appellant as per the policy conditions. The 1st respondent, owner of the vehicle cannot maintain the claim against the appellant as she is not a third party. The 1st respondent has to prove that the 2nd respondent was possessing valid driving license at the time of accident. The appellant/Insurance Company has also denied the age, avocation and income of the 1st respondent. In any event, the compensation claimed by the 1st respondent is excessive and prayed for dismissal of the claim petition.

6.Before the Tribunal, the 1st respondent examined herself as P.W.1, Dr.R.Krishnasamy was examined as P.W.2 and 14 documents were marked as Exs.P1 to P14. The appellant/Insurance Company examined one Mr.S.Karthik, Administrative Officer of the appellant/Insurance Company, as R.W.1 and marked two documents as Exs.R1 and R2.

7.The Tribunal considering the pleadings, oral and documentary evidence, held that the accident occurred due to rash and negligent driving by the 2nd respondent, the driver of the omni van and directed the appellant/Insurance Company being insurer of the said omni van to pay a sum of Rs.2,60,079/- as compensation to the 1st respondent.

8.Against the said award dated 13.03.2012 made in M.C.O.P.No.408 of 2009, the appellant/Insurance Company has come out with the present appeal.

9.The learned counsel appearing for the appellant/Insurance Company contended that the Tribunal failed to see that the 1st respondent is owner of the vehicle, the appellant is liable to indemnify any claim made only against the 1st respondent and hence, the claim petition filed by the 1st respondent is not maintainable. The 1st respondent did not approach the Tribunal with clean hands as she has deliberately failed to fill up the column-15 of the claim petition and failed to give the particulars of owner of the vehicle. The Tribunal failed to see that the 2nd respondent is none other than the son of the 1st respondent. In any event, the 1st respondent is not entitled to claim compensation as no premium was collected to cover the risk of owner of the vehicle. The premium was collected by the appellant only to cover the risk of owner, when he is driving the car and death or injury caused to him. In any event, the Tribunal failed to see that P.W.2/Doctor is not the Doctor who treated the 1st respondent. The percentage of disability assessed by P.W.2/Doctor is without any basis. The 1st respondent failed to prove her avocation and income. The Tribunal in the absence of any materials, fixed income of the 1st respondent at Rs.4,500/- per month and adopted multiplier method to award compensation without there being any loss of earning capacity. The total compensation awarded by the Tribunal is excessive and prayed for setting aside the award of the Tribunal. In support of her contentions, the learned counsel relied on the following judgment of this Court in C.M.A.No.4862 of 2019, dated 10.09.2020 (TATA AIG General Insurance Company Limited vs. Govindarajan and two others);

"12. The owner, being the claimant, is not covered under the policy. Undoubtedly, Personal Accident Cover is available. However, the Personal Accident Cover is not a statutory coverage and therefore, separate claim is to be made strictly in accordance with the terms and conditions stipulated in the policy, which all are agreed between the parties. The Personal Accident

Cover policy is a contractual policy and there is no statutory coverage. Thus, the claim petition filed under the Motor Vehicles Act, 1988 is not maintainable. If there is statutory coverage under Section 147(1) of the Motor Vehicles Act, 1988, the claim petition can be maintainable before the Motor Accident Claims Tribunal. In respect of all other contractual policies, the aggrieved person has to approach the Competent Forum and not the Motor Accident Claims Tribunal. Further, the Personal Accident Cover agreed between the parties are the statutory compensation. However, the statutory compensation is contemplated under the Act and therefore, the benefits to be granted under the contractual obligation cannot be equated with the compensation to be granted under the provisions of the Motor Vehicles Act, 1988, which is of statutory character. In short, the "benefits" agreed between the parties under contract is not akin to that of the statutory liability and payments of compensation contemplated under the provisions of the Motor Vehicles Act, 1988. Thus, the Tribunal had committed an error in not adjudicating the preliminary issue of maintainability and proceeded on the basis that there is a policy coverage and accordingly granted a sum of Rs.2 lakhs under the Personal Accident Cover."

10. Per contra, the learned counsel appearing for the 1st respondent contended that the 1st respondent has paid extra premium to cover the risk of the 1st respondent, who is the owner of the vehicle. Due to the rash and negligent driving by the 2nd respondent, the 1st respondent has suffered injuries in the accident that occurred on 29.08.2009. In view of the payment of extra premium cover the risk of the owner towards personal accident coverage, the Tribunal has rightly held that the appellant is liable to pay the compensation. The total compensation awarded by the Tribunal is not excessive and prayed for dismissal of the appeal. In support of his contentions, the learned counsel relied on the following judgment of this Court reported in 2013 (1) TNMAC 729 (National Insurance Company Limited vs. Krishnan);

"25. Though the learned Counsel for the Appellant-Insurance Company, contended that the coverage for payment of additional premium for "owner-cum-driver", cannot be extended to the occupant of the car, this Court is not inclined to accept the said contentions, in view of the recent

decision of the Supreme Court in National Insurance Co. Ltd. v. Balakrishnan, 2012 (2) TN MAC 637 (SC), and taking note of payment of additional premium, this Court is of the view that when the owner-cum-driver has paid an additional premium of Rs. 100/-, taking a coverage for the pecuniary and non-pecuniary losses, suffered by him, in an accident, arising out of the use of the vehicle, then he is entitled to seek for compensation.

26. A owner may travel in a vehicle, either driving the vehicle or as an occupant. He has taken a policy to cover himself for the bodily injuries or death, due to an accident, arising out of and use of the vehicle. The Policy is to cover him in both the capacities, either as a owner of the vehicle or as a driver. Merely because, at the time of accident, he did not drive the vehicle, it cannot be contended that the contract of insurance cannot be extended to cover the owner of the vehicle. When he travels in the vehicle, not actually driving the vehicle, but as an occupant, there is no alteration in his status, as the owner of the vehicle. The performance of an act, i.e., driving the vehicle, alone is not the criteria, to determine the enforceability of the contract of Insurance. So long as there is a payment of additional premium for the owner cum driver and during the period of validity, an accident has occurred, the Policy would cover the owner also, even if he was not on the wheels, at the time of accident. The expression "owner cum driver" cannot be split up to narrow down the enforceability of the Policy to the driver only, if he is also the owner of the vehicle. When an occupant in the vehicle is covered by the judgment in National Insurance Co. Ltd. v. Balakrishnan, 2012 (2) TN MAC 637 (SC) cited supra, then the owner of the vehicle, who travelled in the offending vehicle, as an occupant, is also entitled to seek for just compensation, when the vehicle is covered by a comprehensive/package policy. If the Policy is Comprehensive/Package Policy and when additional premium has been paid to cover any loss, then the Insurance Company is liable to pay compensation.

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.

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34. When the Claims Tribunal has awarded Rs. 54,000/- for Loss of Earning, during the period of treatment, by fixing the monthly income of the Respondent/Claimant at Rs. 4,500/-, the Claims Tribunal ought to have addressed the issue, as to whether the disablement would have affected his Future Earning Capacity, as well. The challenge in this Appeal, as to whether the nature of injuries and extent of disablement, do not fall within the specified injuries, as provided for, under the Personal Accident Cover Policy, has already been considered in a decision of this Court in *Bajaj Allianz General Insurance Co. Ltd. v. C. Ramesh*, 2013 (1) TN MAC 325: C.M.A. No. 2468 of 2012, dated 8.1.2013.

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". "

11. Though notice has been served on the 2nd respondent and his name is printed in the cause list, there is no representation for the 2nd respondent either in person or through counsel.

12. Heard the learned counsel appearing for the appellant/Insurance Company as well as the learned counsel

appearing for the 1st respondent and perused the entire materials available on record.

13. From the materials available on record, it is seen that it is the contention of the 1st respondent that while she was travelling in the omni van, she sustained injuries due to rash and negligent driving by the 2nd respondent. The 1st respondent claimed compensation for the injuries against the 2nd respondent and the appellant/Insurance Company. The appellant denied their liability to pay the compensation on the ground that the 1st respondent is owner of omni van and the appellant is liable to indemnify the owner for third party claim only. In the grounds of appeal, the appellant has stated that no extra premium was collected to cover the risk of owner. In the next ground in the appeal, the appellant has taken a stand that extra premium collected by the appellant is to cover the personal accident risk of the owner, when he is driving the car or death or injury caused to him. The contention of the learned counsel appearing for the appellant that extra premium was collected only to cover the personal accident risk of owner-cum-driver while driving the vehicle, is without merits. Once the appellant collected extra premium to cover the personal accident claim of owner, the appellant is liable to pay the maximum amount of Rs.2,00,000/- as compensation, when the owner is injured, while he was driving omni van or travelling as passenger.

14. In the judgment relied on by the learned counsel appearing for the 1st respondent, in paragraph Nos.23 and 25, reported in 2013 (1) TNMAC 729 (National Insurance Company Limited vs. Krishnan), this Court has considered this issue and held that the Insurance Company is liable to pay compensation, when the owner is travelling as an occupant. Further, this issue was considered by this Court in the following judgment reported in 2017 (2) TNMAC 674 DB (Divisional Manager, United India Insurance Company Limited vs. R.Rekha and others);

26. As far as the present case is concerned, the deceased was travelling as a pillion rider in the Two-wheeler owned by him. Admittedly, the deceased himself was the owner of the Two-wheeler. At the time of accident, the driver of the Two-wheeler suddenly applied brake and hit a cyclist, which led to the accident. No other motor vehicle has been involved in this case. Thus, the accident did not involve any other motor vehicle other than the one in which the deceased was travelling as a pillion rider. Therefore, the liability of the Insurance Company is only to the extent of indemnification of the insured against the third person or in respect of damages of property. While so, the Insurance Company cannot be fastened with

any liability under the provisions of the Motor Vehicles Act for the death of the deceased who himself was the owner of the vehicle and when no other motor vehicle was involved in this case. Therefore, the question of the insurer being liable to indemnify the deceased/owner of the vehicle does not arise. Since the deceased himself was the owner of the Two-wheeler and not a third party, the claim petition filed by the claimants will not come within the purview of Section 146 or 147 of The Motor Vehicles Act for the purpose of payment of compensation. Therefore, we hold that the impugned Judgment and Decree of the Tribunal cannot be sustained. The Appeal filed by the Insurance Company deserves only to be allowed. At the same time, it is needless to mention that the claimants are entitled for payment of Rs.1,00,000/- only towards Personal Accident Cover proportionate to the premium paid by the deceased.

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29. In the result, the Civil Miscellaneous Appeal is partially allowed. The Award and Decree dated 28.04.2015 made in M.C.O.P. No. 66 of 2011 on the file of Motor Accidents Claims Tribunal, Subordinate Judge, Neyveli is set aside. No costs. It is made clear that the claimants/respondents are only entitled for a sum of Rs.1,00,000/- towards Compulsory Personal Accident Coverage as per the terms and conditions of the Insurance policy, Ex.P5."

The facts of the said case before the Division Bench is that owner of two wheeler was travelling as a pillion rider. In the accident, he died. The legal heirs of the deceased filed claim petition and the Tribunal awarded a sum of Rs.51,37,125/- as compensation payable by insurer. On appeal, the Division Bench of this Court held that owner who travelled as a pillion rider is not a third party and the Insurance Company is not liable to pay compensation to the legal heirs of the deceased. In the said case, the deceased paid extra premium for personal accident coverage and therefore, the Division Bench held that the appellant/Insurance Company in that case is liable to pay a sum of Rs.1,00,000/- only to the legal heirs of the deceased owner, the pillion rider. The Division Bench has also held that due to passage of time, the personal accident coverage of Rs.1,00,000/- for owner of two wheeler and Rs.2,00,000/- for owner of the four wheeler are meagre and recommended for enhancement of said amount to Rs.15,00,000/-. On such recommendation, the personal accident coverage has now been enhanced to Rs.15,00,000/- and

the owners can pay the additional premium for personal accident coverage upto Rs.15,00,000/-.

15.From the judgment relied on by the learned counsel appearing for the appellant, it is seen that the judgments reported in 2013 (1) TNMAC 729 (National Insurance Company Limited vs. Krishnan) and 2017 (2) TNMAC 674 DB (Divisional Manager, United India Insurance Company Limited vs. R.Rekha and others) cited supra, were not brought to the notice of this Court. In view of the Division Bench judgment of this Court, if the owner of the vehicle pays additional premium for personal accident coverage, he can maintain the claim before the Motor Accident Claims Tribunal and the Insurance Company is liable to pay the compensation as fixed in the policy in question.

16.In the present case, the 1st respondent, owner has paid additional premium for personal accident coverage. As per the personal accident cover for the owner of the vehicle, maximum amount as per the policy is Rs.2,00,000/-. The 1st respondent has filed claim petition under Section 163-A of the Motor Vehicles Act. She claimed that she was running a provision stores and was earning a sum of Rs.5,000/- per month. The 1st respondent marked Ex.P14 to show that she has paid license fee for running provision stores. She has not produced any materials to substantiate her contention with regard to income. In the absence of any materials, the Tribunal fixed monthly income of the 1st respondent at Rs.4,500/- per month. The 1st respondent filed claim petition under section 163-A of the Motor Vehicles Act and hence, the notional income fixed by the Tribunal is excessive. The Tribunal after fixing the monthly income as Rs.4,500/-, awarded Rs.2,60,079/- as compensation. The same is not correct. The Tribunal failed to see that the 1st respondent as owner of the vehicle is not entitled to compensation for the injuries sustained by her in the accident except a maximum sum of Rs.2,00,000/- for personal accident coverage. In view of the judgment reported in 2017 (2) TNMAC 674 DB (Divisional Manager, United India Insurance Company Limited vs. R.Rekha and others) referred to above, the 1st respondent is entitled to compensation only for the maximum sum of Rs.2,00,000/-. Therefore, the award of the Tribunal granting Rs.2,60,079/- is set aside and the 1st respondent is entitled to maximum compensation of Rs.2,00,000/- only under personal accident coverage. The 1st respondent has filed claim petition under Section 163-A of the Motor Vehicles Act. When the claim petition is filed under Section 163-A of the Motor Vehicles Act, the compensation can be awarded only as per structural formula mentioned in II Schedule. The income of the claimant should not exceed Rs.40,000/- per annum. The 1st respondent was aged 52 years at the time of accident. The multiplier applicable is '11'. P.W.2/Doctor examined the 1st respondent and certified that

the 1st respondent suffered 35% disability. The appellant has not let in any contra evidence to the evidence of P.W.2/Doctor and disability. Thus, the compensation awarded by the Tribunal towards disability is modified to Rs.1,54,000/- (Rs.40,000/- X 11 X 35/100). The Tribunal granted a sum of Rs.30,178/- and Rs.10,000/- towards medical expenses and pain and suffering respectively. As per II Schedule of the Act, the 1st respondent is entitled to only Rs.15,000/- towards medical expenses and Rs.5,000/- towards pain and suffering. Hence, the amounts awarded by the Tribunal towards medical expenses and pain and suffering are hereby reduced to Rs.15,000/- and Rs.5,000/- respectively. The amounts awarded by the Tribunal towards transportation and extra nourishment are liable to be set aside and they are hereby set aside. As per the calculation mentioned above, the 1st respondent is entitled to only Rs.1,74,000/- towards personal accident claim. The appellant is directed to pay a sum of Rs.1,74,000/- towards personal accident coverage.

17. With the above modification, the Civil Miscellaneous Appeal is partly allowed. The compensation of Rs.2,60,079/- awarded by the Tribunal is hereby reduced to Rs.1,74,000/- together with interest at the rate of 7.5% per annum from the date of petition till the date of deposit. The appellant is directed to deposit the modified award amount now determined by this Court 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 1st respondent is permitted to withdraw the modified award amount now determined by this Court, along with interest and costs, after adjusting the amount if any, already withdrawn. The appellant/Insurance Company is permitted to withdraw the excess amount lying in the deposit to the credit of M.C.O.P.No.408 of 2009 on the file of Motor Accident Claims Tribunal, Additional District Court, Fast Track Court No.IV, Bhavani, Erode District, if the entire award amount has already been deposited by them. Consequently, connected Miscellaneous Petition is closed. No costs.

Sd/-
Asst.Registrar (CSIX)

/true copy/

Sub Asst. Registrar

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To
1.Motor Accident Claims Tribunal
The Additional District Judge
Fast Track Court No.IV, Bhavani
Erode District.

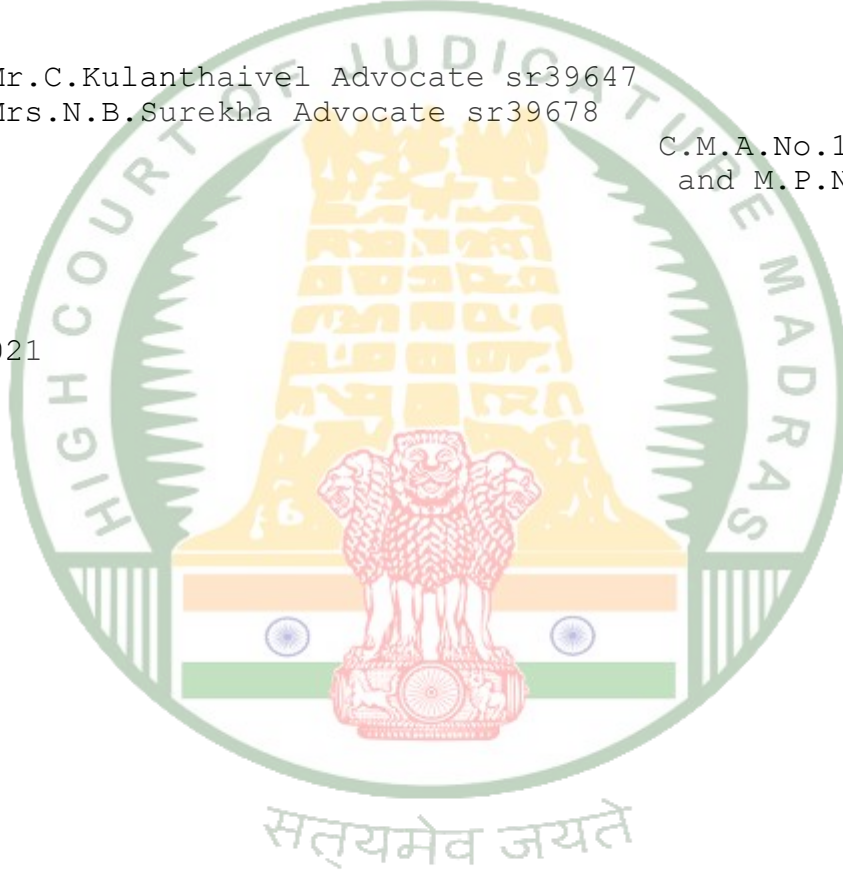
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