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C.M.A(MD)Nos.622 and 673 of 202

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : 27.01.2023

PRONOUNCED ON : 27.03.2023

CORAM

THE HONOURABLE MRS.JUSTICE N.MALA

C.M.A(MD)Nos.622 and 673 of 2021

and

C.M.P(MD)Nos.5991 of 2021 and 1313 of 2023

C.M.A(MD)No.622 of 2021

The Regional Manager,
The New India Assurance Company Limited,
Regional Office,
BSNL.CMD Building, 70 feet Road,
Ellis Nagar, Madurai -625 016. ... Appellant/2nd Respondent

Vs

1.Minor.M.Sivagurunadhan

2.Minor.M.Harini
*(Minors R1 and R2 are represented
through their Grandmother/Guardian,
Mrs.M.Ramayi)*

3.P.Ramu

4.R.Ramayi ...Respondents 1 to 4/Petitioners

5.P.Palani ...5th Respondent/1st Respondent

PRAYER :-

This Civil Miscellaneous Appeal is filed under Section 173 of Motor Vehicle Act to set aside the judgment and decree in M.C.O.P.No.183 of 2018



C.M.A(MD)Nos.622 and 673 of 202

dated 14.12.2020 on the file of the Motor Accidents Calims Tribunal, Special District Court to deal with Motor Accident Cases, Madurai.

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For Appellant : Mr.J.S.Murali
For R1 to R4 : Mr.K.Kumaravel
For R5 : No Appearance

C.M.A(MD)No.673 of 2021

1.Minor.M.Sivagurunadhan

2.Minor.M.Harini
*(Minors R1 and R2 are represented
through their Grandmother/Guardian,
Mrs.M.Ramayi)*

3.P.Ramu

4.R.Ramayi ... Appellants/Petitioners

Vs

1.P.Palani

2.The Regional Manager,
The New India Assurance Company Limited,
Regional Office,
BSNL.CMD Building, 70 feet Road,
Ellis Nagar, Madurai -625 016. ...Respondents/Respondents

PRAYER :-

This Civil Miscellaneous Appeal is filed under Section 173 of Motor Vehicle Act to enhance the compensation amount in M.C.O.P.No.187 of 2018 on the file of Motor Accident Claims Tribunal/Special District Judge, Madurai, dated 14.12.2020.

For Appellants : Mr.K.Kumaravel



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C.M.A(MD)Nos.622 and 673 of 2021



For R1 : No Appearance
For R2 : Mr.J.S.Murali

COMMON JUDGMENT

C.M.A(MD)No.622 of 2021 is filed by the insurance company challenging the judgment and decree of the Motor Accident Claims Tribunal Special Court to deal with Motor Accident Cases, Madurai, dated 14.12.2020 in M.C.O.P.No.183 of 2018.

2.C.M.A(MD)No.673 of 2021 is filed by the claimants against the judgment and decree of the Motor Accidents Claims Tribunal/Special District Judge, Madurai, dated 14.12.2020 in M.C.O.P.No.183 of 2018 for enhancement of compensation.

3.As common issues are raised in both the appeals, the appeals are taken up together and common judgment is passed.

4.The brief facts in appeals are as follows:

According to the claimants, the accident occurred on 14.01.2017 at about 3.30 pm near the speed breaker at Narikudi Railway gate. The deceased was travelling in a two wheeler along with her husband, who drove the



vehicle in a rash and negligent manner near the speed breaker, due to which, the deceased fell down and sustained grievous injuries. The deceased was taken to Aruppukottai Government Hospital initially and later, taken to Madurai Government Hospital for further treatment where she finally died on 17.01.2017. The deceased was aged about 27 years at the time of the accident and she was earning Rs.10,000/- per month. Therefore, the claimants, who are minor son and daughter of the deceased and also the father and mother of the deceased filed a claim petition seeking a sum of Rs.28,00,000/- as compensation.

5.The first respondent filed counter denying the negligence of the rider of the two wheeler and further contended that the accident occurred only due to the negligence of the deceased. He further contended that at the time of the accident, the two wheeler was insured with the second respondent insurance company and therefore, the liability, if any, should be mulcted on the insurance company.

6.The second respondent insurance company filed counter generally denying all the contentions raised in the claim petition, and particularly denied that the driver of the two wheeler was possessed of a valid driving licence. The second respondent further contended that it was for the petitioner



to prove that there was a valid insurance coverage for the two wheeler and that none of the terms and conditions of the policy were violated. On these and other grounds, the second respondent insurance company prayed for dismissal of the claim petition.

7.The Tribunal on an assessment of the entire evidence on record allowed the claim petition and awarded a sum of Rs.14,62,300/- as compensation along with 7.5% interest.

8.Aggrieved by the judgment and decree of the Tribunal, both the insurance company as well as the claimants have filed the above appeals.

9.The appellant insurance company has filed C.M.P(MD)No.1313 of 2023 for receiving additional evidence. The appellant insurance company has filed the said C.M.P to receive the insurance policy as an additional evidence. According to the insurance company, the deceased was riding the two wheeler as a pillion rider and as the policy was an Act Policy the pillion rider was not covered. The appellant insurance company contended that due to inadvertence the insurance policy could not be filed before the lower Court and that the receipt of the additional evidence would aid the Court in rendering substantial justice.



10.The learned counsel for the insurance company therefore prayed that additional evidence may be received and the appeal be allowed.

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11.The learned counsel for the respondents on the other hand submitted that the additional evidence now sought to be marked should not be received as absolutely no explanation is given by the insurance company for not producing the same earlier. According to the learned counsel, the M.C.O.P is of the year 2018 and in the absence of justifiable reasons for not filing the same before the Tribunal, the same cannot be filed before the appellate Court. The learned counsel further submitted that there is absolutely no pleading as regards the Act only policy in the counter to the claim petition. Therefore, the learned counsel submitted that in the absence of a specific plea as regards the liability of the insurance company on the basis of the policy being an Act only policy, the additional evidence now sought to be produced has to be rejected.

12.I have heard both the learned counsels and perused the materials on record.

13.As far as the appeal of the insurance company is concerned, the only point to be decided is whether the insurance company is liable to pay compensation or not. The liability of the insurance company is contingent on



the receipt of the additional evidence. If the policy is received in additional evidence, then the insurance company can escape liability, otherwise not. Therefore, the issue of receipt of additional evidence gains significance. As far as the additional evidence is concerned, the averments of the insurance company in the affidavit filed in support of the petition are note worthy. According to the insurance company, due to inadvertence, the policy could not be marked before the Tribunal and it was further contended that undue hardships and inconvenience would be caused to it, if the additional evidence was not received. Before discussing the facts in support of the additional evidence, the case laws on the subject will be discussed.

In North Eastern Railway Admn. V. Bhagwan Das reported in (2008) 8 SCC 511, the Court observed thus:

“13.Though the general rule is that ordinarily the appellate court should not travel outside the record of the lower court and additional evidence, whether oral or documentary is not admitted but Section 107 CPC, which carves out an exception to the general rule, enables an appellate court to take additional evidence or to require such evidence to be taken subject to such conditions and limitations as may be prescribed. These conditions are prescribed under Order 41 Rule 27 CPC. Nevertheless, the



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additional evidence can be admitted only when the circumstances as stipulated in the said Rule are found to exist.....”

In *K.R.Mohan Reddy Vs. Net Work Inc.* reported in (2007) 14 SCC 257, the Court held as under:

“19. The appellate court should not pass an order so as to patch up the weakness of the evidence of the unsuccessful party before the trial court, but it will be different if the court itself requires the evidence to do justice between the parties. The ability to pronounce judgment is to be understood as the ability to pronounce judgment satisfactorily to the mind of the court. But mere difficulty is not sufficient to issue such direction.....”

In *N. Kamalam (dead) and another v. Ayyasamy and another* reported in (2001) 7 SCC 503, the Court, interpreting Rule 27 of Order XLI of the Code, observed in para 19 as under: -

“..... the provisions of Order 41 Rule 27 have not been engrafted in the Code so as to patch up the weak points in the case and to fill up the omission in the court of appeal – it does not authorize any lacunae or gaps in the evidence



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to be filled up. The authority and jurisdiction as conferred on to the appellate court to let in fresh evidence is restricted to the purpose of pronouncement of judgment in a particular way.”

In Union of India v. Ibrahim Uddin and another

reported in (2012) 8 SCC 148, the Court held as under: -

“49. An application under Order 41 Rule 27 CPC is to be considered at the time of hearing of appeal on merits so as to find out whether the documents and/or the evidence sought to be adduced have any relevance/bearing on the issues involved. The admissibility of additional evidence does not depend upon the relevancy to the issue on hand, or on the fact, whether the applicant had an opportunity for adducing such evidence at an earlier stage or not, but it depends upon whether or not the appellate court requires the evidence sought to be adduced to enable it to pronounce judgment or for any other substantial cause. The true test, therefore is, whether the appellate court is able to pronounce judgment on the materials before it without taking into consideration the additional evidence sought to be adduced.....”



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In *Mahavir Singh and others v. Naresh Chandra and another* reported in (2001) 1 SCC 309, explaining the scope of revision in the matters of acceptance of additional evidence by the lower appellate court interpreting expression “or for any other substantial cause” in Rule 27 of Order XLI, the Court held as under: -

“The words “or for any other substantial cause” must be read with the word “requires”, which is set out at the commencement of the provision, so that it is only where, for any other substantial cause, the appellate court requires additional evidence, that this rule would apply as noticed by the Privy Council in *Kessowji Issur v. G.I.P. Rly.* [ILR (1907-08) 31 Bom 381]. It is under these circumstances such a power could be exercised.”

14.The Hon'ble Supreme Court in the case of *Andisamy Chettiar Vs. Subburaj Chettiar in Civil Appeal No.14055 of 2015 (Arising out of S.L.P. (C) No.7798 of 2015)* held that the necessity to adduce additional evidence would arise when the appellate Court require such evidence to pronounce the Judgment and not in any other circumstances. The said Judgment was followed by the Hon'ble Supreme Court in the case of *Sanjay Kumar Singh*



Vs. State of Jharkhand reported in ***(2022) 7 Supreme Court Cases 247***. The

Hon'ble Supreme Court in paragraph No.7 of the Judgment held as follows:

“It is true that the general principle is that the appellate court should not travel outside the record of the lower court and cannot take any evidence in appeal. However, as an exception, Order 41 Rule 27 CPC enables the appellate court to take additional evidence in exceptional circumstances. It may also be true that the appellate court may permit additional evidence if the conditions laid down in this Rule are found to exist and the parties are not entitled, as of right, to the admission of such evidence. However, at the same time, where the additional evidence sought to be adduced removes the cloud of doubt over the case and the evidence has a direct and important bearing on the main issue in the suit and interest of justice clearly renders it imperative that it may be allowed to be permitted on record, such application may be allowed. Even, one of the circumstances in which the production of additional evidence under Order 41 Rule 27 CPC by the appellate court is to be considered is, whether or not the appellate



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court requires the additional evidence so as to enable it to pronouncement judgment or for any other substantial cause of like nature.”

15.In the light of the law on the subject as stated above, let me now discuss the factual basis on which the application is made and find out whether additional evidence in the form of the Policy copy can be received at this stage. The reason given by the appellant insurance company for not filing the policy before the Tribunal is inadvertence. In my view, inadvertence is antithesis to due diligence, whereas, diligence means care and persistent effort, Inadvertence on the other hand implies absence of care, though unintentionally. It is also pertinent to note here that both the claimant as well as the first respondent in their counter gave the policy particulars and inspite of that the insurance company had not taken any steps to produce the policy. I am therefore of the view that the contention of the insurance company that the policy could not be marked inspite of due diligence is unacceptable. When the policy particulars were given by both the insurer as well as the claimants, it was the duty of the insurance company to produce the same at the earliest point of time. It is trite in law that the additional evidence cannot be permitted and the same cannot be taken for the purpose of filing up the loop holes in the case. The attempt of the insurance company in the present case is only to fill



up the lacuna in its case and the same cannot be permitted in the light of the Judgments referred to above. One more important aspect for not receiving the additional evidence is want of plea. In the absence of a foundational plea regarding the liability of the insurance company on the basis of Act only policy, the evidence cannot be accepted. It is trite in law that no amount of evidence can be looked into in the absence of a plea.

16.The Hon'ble Supreme Court in the case of ***Biraji @ Brijraji & Another Vs. Surya Pratap & others in Civil Appeal Nos.4883-4884 of 2017*** vide Judgment ***dated 03.12.2020*** held as follows:

“7.... It is fairly well settled that in absence of pleading, any amount of evidence will not help the party.”

17.The insurance company in it's counter had not taken the plea that it had no liability as the pillion rider was not covered by the policy. The averments, if any, are general in nature and to the effect that the claimant had to prove that there was no violation of the policy. I am therefore of the considered view that the additional evidence filed by the insurance company cannot be entertained. Therefore, the C.M.P(MD)No.1313 of 2023 is rejected.

18.In the absence of the pleadings and in the absence of policy, the plea



of the insurance company that it is not liable to pay compensation cannot be accepted and therefore finding on the issue of liability is confirmed.

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19. On the quantum of compensation, the claimant has filed the appeal for enhancement of compensation. According to the claimant, the deceased was working as a coolie in Appalam factory and in support of the said plea, the claimants examined P.W.3 and marked Exhibit P.15. P.W.3 an employer of the deceased, deposed that, the deceased was working in his Appalam Factory as a coolie and was paid Rs.2,000/- per week. The Tribunal rejected Exhibit P. 15 and the evidence of P.W.3 and fixed the income of the deceased notionally at Rs.6,500/- per month. In my view, in the absence of any contra evidence, the Tribunal was wrong in rejecting Exhibit P.15. If the salary of the deceased is taken as Rs.2,000/- per week and same is computed for 26 days of month because there is no evidence that the deceased was working on Sundays also, the income for a month works out to Rs.7,410/-. If 40% towards future prospect is added to this amount, then the income would be Rs.10,374/-(Rs. 7,410/- + Rs.2,964/-). If $\frac{1}{4}$ is deducted towards the deceased personal expenses, the same works out to Rs.7,781/- (Rs.10,374/- – Rs.2,593/-). The amount under the Head of loss of income would be Rs.7,781/- X 12 X 17=Rs. 15,87,324/-. The Tribunal has awarded Rs.40,000/- towards consortium. The learned counsel for the claimants is right in contending that the other



claimants are also entitled for consortium of Rs.1,20,000/-. The compensation under the Heads of funeral and transport charges are reasonable. The award of the Tribunal is modified accordingly as follows:

	Trial Court	High Court
Loss of income	Rs.13,92,300/-	Rs.15,87,324/-
Consortium	Rs.40,000/-	Rs.1,20,000/-
Funeral expenses	Rs.15,000/-	-
Transport charges	Rs.15,000/-	-
Total	Rs.14,62,300/-	Rs.17,07,324/-

20.The appeal of the insurance company (C.M.A(MD)No.622 of 2021) is dismissed and the appeal of the claimants (C.M.A(MD)No.673 of 2021) is partly allowed. C.M.P(MD)No.1313 of 2023 filed for receiving additional evidence stands dismissed. The insurance company is directed to deposit the award amount less the amount already deposited. It is seen that there was a direction to the insurance company by order, dated 02.08.2021 to deposit 50% of the award. The insurance company is therefore directed to deposit the balance amount along with accrued interest less the amount already deposited in pursuance of the interim order passed by this Court within a period of eight weeks from the date of receipt of copy of this order. It is needless to state that the Petitioners 3 and 4 in C.M.A(MD)No.673 of 2021 would be entitled to withdraw the amounts in the proportion as ordered by the Tribunal. As far as the share of the minor child is concerned, it shall be kept in deposit in any of



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the nationalised bank and the fourth petitioner C.M.A(MD)No.673 of 2021 is permitted to withdraw the accrued interest monthly. As far as the direction to pay and recover is concerned, the same is confirmed. The Insurance Company shall pay the compensation in the first instance and thereafter recover the same from the 5th respondent. No costs. Consequently, connected C.M.P(MD)Nos.5991 of 2021 is closed.

27.03.2023

NCC : Yes / No
Index : Yes / No
Internet : Yes / No
sn/ah

To

- 1.The Motor Accidents Calims Tribunal,
Special District Court to deal with Motor Accident Cases,
Madurai.
- 2.The Section Officer, Vernacular Records,
Madurai Bench of Madras High Court, Madurai.



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N.MALA, J

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