

(2010) 09 MAD CK 0408

In the Madras High Court

Case No : C.M.A. No. 315 of 2009 and M.P. No. 1 of 2009

Bajaj Allianz General Insurance Co. Ltd.

APPELLANT

Vs

P. Manimozhi and Others

RESPONDENT

Date of Decision : 02-09-2010

Acts Referred:

Constitution of India, 1950 — Article 142
Motor Vehicles Act, 1988 — Section 149(1)

Citation : (2011) 238 CTR 183 : (2010) 4 LW 742 : (2011) 8 RCR(Civil) 2671

Hon'ble Judges : M.Y. Eqbal, C.J.; T.S. Sivagnanam, J

Bench : Division Bench

Advocate : N. Vijayaraghavan, for the Appellant; A.K. Kumarasamy, for the Respondent

Final Decision : Dismissed

Judgement

T.S. Sivagnanam, J.—This appeal has been filed by Bajaj Allianz General Insurance Co. Ltd against the award dated 01.07.2008 in M.C.O.P. No. 579 of 2005 on the file of the I Additional District Court, Erode.

2. The respondents/claimants are the legal heirs of one Padmanaban, who died in a road accident. The said Padmanaban was walking on Rasipuram-Salem main road on 29.03.2005 at about 9.30 a.m., proceeding to the Head Post Office, Rasipuram, at that time, a TVS 50 bearing registration No.TN-28L-4701 driven by the third respondent herein coming from the opposite direction dashed on Padmanaban and thus the accident occurred, he was immediately taken to Dr. Manickam Hospital, from where he was shifted to Kaveri Medical Centre, Erode for better treatment and despite such treatment, he succumbed to the injuries on 31.03.2005. The deceased was aged about 56 years at the time of accident and he was working as the Senior Accountant Officer in the office of the Accountant General Office, Chennai and was drawing a monthly salary of Rs. 29,073/- and he was the only breadwinner of his family and the claimants are his wife and minor son.

3. The owner of the vehicle opposed the claim as regards the nature of the accident as well as the amount of compensation claimed. The appellant Insurance company denied the accident. Further, it was contended that the rider of the two wheeler did not have valid licence on the date of the accident and the fourth respondent herein did not insure the vehicle and therefore, the claim is liable to be dismissed. Further, it was stated that the victim died due to heart ailment and not due to injuries sustained.

4. The Tribunal framed two questions for consideration:

(i) Whether the accident occurred due to rash and negligent driving of the third respondent herein? and

(ii) Whether the claimants are entitled to claim compensation if so, what would be the quantum?

5. The claimants marked nine documents as Exhibits P1 to P9 and the first claimant examined herself as PW-1 and one Mr. Saravanan eye witness of the accident was examined as PW-2; on the side of the respondents seven documents were marked as Exhibits R1 to R7 and seven witnesses were examined as RW-1 to RW-7.

6. The Tribunal answered question No. 1 in favour of the claimants and held that the accident occurred only due to the careless driving of the third respondent herein. While, deciding the question as to whether the claimants are entitled to compensation, the contention that the rider did not have valid licence to drive a two wheeler was taken up for consideration. The Tribunal by relying upon the decision of the Hon"ble Supreme Court in Premkumari and Ors. v. Prahlad Dev and Ors. 2008 (1) TN MAC 115 (SC) held that the appellant Insurance company will have to pay the compensation to the respondents/claimants and recover the same from the other respondents.

7. On the question of quantum of the compensation payable, the Tribunal considered the evidence of RW-3, the Doctor from P.M. Hospital at Rasipuram, who gave treatment to the deceased Padmanaban on 29.03.2005 and RW-4, the Doctor from Kaveri Medical Centre, who had treated the Padmanaban and after going through the particulars of the treatment given as per the Ex.R.2 concluded that the victim was admitted to the hospital only after getting treatment for the injuries sustained. The age of the victim was taken as 56 years from the Post-Mortem Certificate, Ex.P5. For calculating the total emoluments earned by the victim, the Tribunal took note of Ex.P.9, which is the certificate issued by the competent authority of the office of Accountant General, Chennai and since the certificate was not disputed, the monthly income of the victim was fixed at Rs. 29,666/- and rounded off to Rs. 30,000/-. After deducted 10,000/- for personal expenses, the annual dependency was calculated at Rs. 2,40,000/-. The age of the first claimant was 43 years and the second claimant was a minor and the Tribunal adopted the multiplier 8 and assessed the compensation for loss of income and dependency at Rs. 19,20,000/-; The first claimant was awarded a

sum of Rs. 10,000/- for loss of consortium; Rs. 10,000/- for mental stress and shock; Rs. 10,000/- for love and affection; and Rs. 5,000/- for funeral expenses. In all the total amount of compensation was fixed as to Rs. 19,55,000/- with interest at 7.5% and the same was apportioned, by awarding Rs. 10,00,000/- to the first claimant and the balance Rs. 9,55,000/- to the minor son. Aggrieved by such award, the Insurance company has preferred the present appeal.

8. The learned Counsel appearing for the appellant raised the following contentions:

- a) The compensation awarded by the Tribunal is grossly excessive;
- b) The Tribunal erred in fastening liability on the Insurer when there was no credible evidence on involvement of the insured;
- c) In the absence of a driving licence being possessed by the rider of the two wheeler, the Tribunal erred in directing the payment of compensation with liberty to recover.

9. In support of the third contention, the learned Counsel would submit that though the Division Bench of this Court in *United India Insurance Co. Ltd v. S. Saravanan* 2009 (2) TN MAC 103 (DB) held that not possessing a driving licence by the rider, though would be a breach of policy condition, directed the insurer to pay and then recover, the Hon"ble Supreme Court in a subsequent decision in *National Insurance Co. Ltd. v. Parvathneni and Anr.* 2009 (4) CTC 798 has referred the question as to whether such principle of pay and recover could be ordered, when there is no liability on the Insurance Company to pay compensation for breach of policy condition, to a larger bench and therefore, the award directing payment and subsequent recovery has to be set aside.

10. The learned Counsel appearing for the respondents/claimants would support the award by contending that the same has been granted after careful analysis of the oral and documentary evidence and there is absolutely no perversity in the finding of the Tribunal, the accident has been proved, the fact that the victim took medical treatment was also established and therefore, the claimants are entitled for compensation. The assessment of the compensation has been made based on the certificate given by the Government Department and there is no contra evidence and in such circumstances the award calls for no interference. On the question relating to the theory of pay and recovery, the learned Counsel would submit that the Division Bench Judgment of this Court in the case of *United India Insurance Co. Ltd v. S. Saravanan* referred supra, has considered all the recent decisions of the Hon"ble Supreme Court on the point and held that the insurer has to pay and subsequently recover. As long as the Judgment has not been reversed or modified and only due to the fact, a reference has been made to a larger bench should not act as a factor for this Court to take a different view and not follow the view taken by the earlier Division.

11. We have carefully considered the submissions on either side and perused the

materials available on record.

12. On the question whether the accident occurred due to the rash and negligent driving of the third respondent herein, the Tribunal after considering Ex.P1 the FIR, Ex.P2 the rough sketch, Ex.P3 the Observation Mahazar, Ex.P4 the Motor Vehicle Inspector Report, Ex.P6 the Charge sheet laid in the criminal case in which the Inspector has examined 12 witnesses and charged the rider of the two wheeler for offences u/s 279 and 304A, Ex.P18, the hospital record from Kaveri Medical Centre, held that the accident occurred due to rash and negligent driving of the third respondent herein. Further, the Tribunal also considered the deposition of PW-2, who is the occurrence witness and also taking note of the inconsistency in the deposition of the rider of the two wheeler both before Tribunal as well as the Criminal Court held that the accident occurred due to the careless driving of the third respondent. We are satisfied with the reasons assigned and the findings rendered by the Tribunal in this regard and the same do not call for any interference.

13. Coming to the next question as regards the compensation, while we consider the quantum fixed, we note that the Tribunal was guided by Ex.P.9, which is a certificate issued by a competent authority in the office of the Accountant General, Chennai wherein, the monthly income of the victim was mentioned as Rs. 29,666/- this was rounded off to Rs. 30,000/-. The Tribunal noted that the document was not contested and therefore, fixed the salary at Rs. 30,000/-, 1/3rd deduction was given and the annual dependency was worked out as Rs. 2,40,000/-. Considering the relevant factors, the Tribunal adopted the multiplier of 8 and after awarding compensation on the other heads awarded a total compensation of Rs. 19,55,000/- together with interest at 7.5% per annum from the date of petition. We find no error in the manner in which, the Tribunal assessed the compensation and therefore, we confirm the same.

14. The next contention raised by the learned Counsel appearing for the appellant is that the third respondent, the rider of the two wheeler did not have a valid driving licence on the date of the accident and therefore, the insurer is not liable to pay. The Hon"ble Supreme Court as regards this point namely, possession of valid driving licence broadly classified the same under four different categories:

(i) Where, there was no licence Where, the licence is forged/fake

(ii) Where, the licence is for a different class of vehicle from the offending vehicle and

(iii) Where, the licence is for a learner and held that when there is a breach of condition under an Insurance policy is proved then the Insurance company must pay and may recover. A Division Bench of this very Court in which one of us (T.S. Sivagnanam, J.) was a party considered this very issue and after taking note of the decisions of the Hon"ble Supreme Court in the case of New India Assurance Co., Shimla Vs. Kamla and Others etc. etc., , United India Insurance Co. Ltd. v.

Lehru 2004 (1) TN MAC 340 (SC), Skandia Insurance Co. Ltd. Vs. Kokilaben Chandravadan and Others, , Sohan Lal Passi Vs. P. Sesh Reddy and others, , Oriental Insurance Co. Ltd. v. Swaran Singh 2004 (1) TN MAC 104 (SC) and National Insurance Co. Ltd. v. Laxmi Narain Dhut 2001 (1) TN MAC 310 (SC) held that the insurer must pay the amount and then may recover.

15. In the case before the Division Bench of this Court also it was a case where the claimant was knocked down by a two wheeler and its rider did not possess a driving licence and the claimant was reduced to a vegetative state and filed the compensation claim represented by his next friend, his wife.

16. As could be seen from the decision of the Hon''ble Supreme Court in the case of National Insurance Co. Ltd. v. Parvathneni and Anr. referred supra, the question as to whether such a direction could be issued under Article 142 of the Constitution of India has been placed before the Hon''ble Chief Justice of India for reference to a larger bench.

17. Admittedly, in the instant case, there is a valid insurance policy and the defence which has been taken by the Insurance company is that the owner of the two wheeler did not have a valid licence.

18. Chapter 11 of the Motor Vehicles Act provides for compulsory insurance of vehicles in relation to the matters specified therefor. The provision for compulsory insurance has been made with a view of protect the right of a third party. The Hon''ble Supreme Court in the case Sohan Lal Passi, referred above took note of the fact that the road accidents in India have touched a new height and in majority of cases due to rash and negligent driving and innocent persons become victims of such accidents because of which their dependants in many cases are in the streets. Therefore, their Lordships observed that the question of payment of compensation in respect of motor accidents has assumed great importance for public as well as for Courts. The Hon''ble Supreme Court in the case of Oriental Insurance Co. Ltd. v. Swaran Singh referred supra, took note of the various decisions of the Hon''ble Supreme Court including that of the decision in Sohan Lal Passi, and their Lordships held as follows:

15. The intention of Parliament became further evident when in the Motor Vehicles Act, 1939, a new chapter being Chapter VII-A dealing with insurance of motor vehicles against third-party risks was introduced and the beneficent provisions contained in the Motor Vehicles Act, 1939 were further made liberal by reason of the Motor Vehicles Act, 1988 and the amendments carried out therein from time to time in aid of the third-party claims by way of grant of additional or new rights conferred on the road accident victims.

16. Under the common law a person injured by reason of another person''s wrongdoing had no right of action against insurers who undertook to indemnify the wrongdoer. The first invasion of this principle took place by reason of the Third Parties (Rights against Insurers) Act, 1930. The British Parliament in the light of the aforementioned act enacted the Road Traffic Act, 1930 which has

since been replaced by the Road Traffic Act, 1988.

17. The Third Parties (Rights against Insurers) Act, 1930 was enacted with a view to correct injustice effecting a statutory assignment of the rights of the assured to the injured person as prior thereto the right of a person to be indemnified under a contract of insurance against claims made against him by persons whom he might have injured was one personal to himself, and there was no privity of any sort between the injured person and the insurers. The injured person had no interest either at law or in equity in the insurance money, either before or after it was paid by the insurers to the assured. In a case where the assured became bankrupt and if the injured person had not already obtained judgment and levied execution of his claim for damages, his only right was to move in the bankruptcy or the winding-up proceedings. The beneficial provisions of the aforementioned English statutes were incorporated by the Parliament of India while enacting the Motor Vehicles Act, 1939 which has also since been repealed and replaced by the Motor Vehicles Act, 1988.

18. Concededly, different types of insurance covers are issued containing different nature of contracts of insurance. We are, however, in this batch of cases mainly concerned with third-party right under the policy. Any condition in the insurance policy, whereby the right of the third party is taken away, would be void.

19. Indisputably, such a benefit to a third party was provided under the statute keeping in view the fact that the conditions in the assured's policy may be of little or no effect in relation to a claim by a person to whom an assured was under a compulsorily insurable liability.

20. In this context, it is necessary to consider as to what is a third-party right. A third-party claim arises when a victim of an accident suffers a bodily injury or death as a result thereof or his property is damaged. An accident is not susceptible to a very precise definition.

21. The popular and ordinary sense of the word was "an unlooked-for mishap or an untoward event which is not expected or designed".

22. In *R.V. Morris* 10 the Court of Appeal defined the word as an "unintended occurrence which has an adverse physical result". The Supreme Court of Canada in *Pickford & Black Ltd. v. Canadian General Insurance Co.*¹¹ stated the law thus:

The meaning to be attached to the word "accident" as employed in the body of an insurance policy was thoroughly explored by Mr Justice Pigeon in the reasons for judgment which he delivered on behalf of the majority of this Court in *Canadian Indemnity Co. v. Walkem Machinery & Equipment Ltd.*¹² In the course of these reasons at p. 5 he adopted the views expressed by Mr Justice Freedman, in a dissenting opinion in the Court of Appeal of Manitoba in *Marshall Wells of Canada Ltd. v. Winnipeg Supply and Fuel and R. Litz & Sons Co. v. Canadian General Insurance Co.*¹³, at p. 665 where that learned Judge said:

With respect, I am of the view that what occurred here was an accident. One must avoid the danger of construing that term as if it were equivalent to "inevitable accident". That a mishap might have been avoided by the exercise of greater care and diligence does not automatically take it out of the range of accident. Expressed another way, "negligence" and "accident" as here used are not mutually exclusive terms. They may coexist.

After expressing the view that even an occurrence which is the result of a calculated risk or of a dangerous operation may come within the meaning of the word "accident", Mr Justice Pigeon went on to say at p. 6:

While it is true that the word "accident" is sometimes used to describe unanticipated or unavoidable occurrences, no dictionary need be cited to show that in everyday use, the word is applied as Halsbury says . to any unlooked-for mishap or occurrence . this is the proper test....

23. In Halsbury's Laws of England, 4th Edn. Reissue, it is stated:

An injury caused by the wilful or even criminal act of a third person, provided the assured is not a party or privy to it, is to be regarded as accidental for the purposes of the policy, since from the assured's point of view it is not expected or designed.

24. In Colivaux: Law of Insurance, 6th Edn., p. 304, the following illustration is given:

If a man walks and stumbles, thus spraining his ankle, the injury is accidental for while he intends to walk he does not intend to stumble. In *Hamlyn v. Crown Accidental Insurance*¹⁴ the assured's injury was due to stooping forward to pick up a marble dropped by a child as it rolled away from him. He stood with his legs together, separated his knees, leaned forward and made a grab at the marble, and in doing so, wrenched his knee. The injury was held by the Court of Appeal to be accidental, on the ground that the assured did not intend to get into such a position that he might wrench his knee.

25. At para 17-13 of the said treatise it is stated:

Accident includes negligence.

It makes no difference that the accident was caused by the negligence of the assured (as opposed to his intentional act). Thus there is an accident where the assured crosses a railway line without exercising due care and is knocked down by an approaching train. In fact, one of the commonest causes of accidents is negligence, and an accident policy applies, excepted perils apart, whether the injury is caused by the negligent act of the assured himself or of a third party.

26. The right of the victim of a road accident to claim compensation is a statutory one. He is a victim of an unforeseen situation. He would not ordinarily have a hand in it. The negligence on the part of the victim may, however, be contributory. He has suffered owing to wrongdoing of others. An accident may

ruin an entire family. It may take away the only earning member. An accident may result in the loss of her only son to a mother. An accident may take place for a variety of reasons. The driver of a vehicle may not have a hand in it. He may not be found to be negligent in a given case. Other factors such as unforeseen situation, negligence of the victim, bad road or the action or inaction of any other person may lead to an accident.

27. A person suffering grievous bodily injury may require money for his survival/ medical treatment. Statutory compensation paid to the next of kin of the victim of an accident may, thus, bring to a large number of families the only ray of light at the end of the tunnel.

28. In other words, what would also be covered by the contract of insurance vis-?-vis the beneficent statutory provisions like Sub-section (2) [sic (1)] of Section 149 of the said Act would be when a death or bodily injury has been caused as a result of the assured?s own voluntary act. Even an unforeseeable result of the assured?s deliberate act may come within the purview of the accident. Even if an accident has occurred due to negligent driving of the assured person, it may not prevent recovery under the policy and certainly thereby a third party would not be non-suited.

19. In the case on hand also the victim was aged about 56 years and he was the sole breadwinner of the family and he left behind is widow and a minor son. Hence, we are of the view that the insurance company should be directed to make payment with liberty to recover the same.

20. In the result, the appeal fails and it is dismissed. Consequently, connected miscellaneous petition is closed. No costs.