

(2007) 01 MAD CK 0214

In the Madras High Court

Case No : Civil Miscellaneous Appeal (NPD) No. 161 of 2001

Clara Mathew and Elizabeth Mathew

APPELLANT

Vs

T. Harendranath and The Original Insurance Company Limited

RESPONDENT

Date of Decision : 05-01-2007

Acts Referred:

Motor Vehicles Act, 1988 — Section 149(2), 168

Citation : (2007) 1 ACC 1 : (2008) ACJ 1837 : (2007) 1 MLJ 600

Hon'ble Judges : K. Mohan Ram, J

Bench : Single Bench

Advocate : V. Raghavachari, for the Appellant; S. Manohar, for R-2, for the Respondent

Final Decision : Allowed

Judgement

K. Mohan Ram, J.—The claimants have preferred the above appeal being aggrieved by the award passed by the Motor Accidents Claims Tribunal (Additional Sub-Judge), Chengalpattu in M.C.O.P.No.180 of 1996.

2. The first appellant-wife and the second appellant-minor daughter of the deceased-Abharam Mathew filed M.C.O.P.No.180 of 1996 claiming a sum of Rs. 30,00,000/- by way of compensation on the basis that while the deceased was travelling as a pillion rider in the scooter bearing Registration No. TN09-E-1382 belonging to the first respondent and insured with the second respondent and driven by one Pushparaj on his way to Guduvanchery to Maraimalainagar. The driver of the scooter drove it rashly and negligently at a high speed and dashed on a blind end and was thrown off resulting in multiple injuries and instant death. According to the claimants, the deceased was aged 30 years on the date of death and the appellants were aged 27 years and 2 years respectively. The deceased was a qualified Automobile Engineer, who had undergone training in Germany in the manufacturing of footwear and was employed as a Maintenance Executive with Wipro Limited on a monthly salary of Rs. 7,500/-.

3. The first respondent-owner of the scooter (insured) remained exparte. The second respondent-insurer contested the claim petition inter alia contending that the first respondent has parted with possession of the scooter in favour of the third party and such third parties are not covered by the terms of the Insurance Policy; the alleged rider of the scooter-Pushparaj had no driving licence on the date of accident; the scooter was driven by the deceased rashly and negligently and the accident occurred only due to his negligence and as such the insurer is not liable to pay any compensation. The insurer did not admit the age, occupation, income, etc., of the deceased and contended that the compensation claimed is on the higher side.

4. Before the Tribunal, the first appellant was examined as P.W.1 and one Thiru.Srinivasan was examined as P.W.2 and on the side of the appellants Exs.P-1 to P-9 were marked. On the side of the respondents one Thiru.V.Ramasubramaniam, Assistant Inspector, was examined as R.W.1 and Thiru.Pushparaj was examined as R.W.2 and Ex.R-1-copy of the Insurance Policy for the scooter was marked.

5. On a consideration of the oral and documentary evidence adduced in the case, the Tribunal, by observing that there is no evidence on hand to fix the responsibility on R.W.2, the circumstances of the case fairly shows that the deceased himself was driving the scooter-TN01-E-1382 rashly and negligently caused the accident and R.W.2-Thiru.Pushparaj had not driven the scooter, dismissed the claim petition. Being aggrieved by that the claimants have filed the above appeal.

6. Heard Mr. V. Raghavachari learned Counsel appearing for the appellants and Mr. S.Manohar learned Counsel appearing for the second respondent-Insurer.

7. Mr. V. Raghavachari learned Counsel for the appellants made the following submissions:

The Tribunal has not properly considered Ex.P-1-First Information Report and the evidence of P.W.2 who is an eye witness and who had deposed clearly that the deceased did not drive the scooter. Though Pushparaj (R.W.2) had sustained injuries, he had not filed any claim petition seeking compensation but he falsely claimed that he had filed a claim petition and as such the Tribunal ought to have held that R.W.2 is not trustworthy. The Tribunal has not properly considered the admission and the evidence of R.W.1. R.W.1 has deposed that the insurer had appointed an Investigating Officer to investigate the genuineness of the claim and from his report the insurer came to know that R.W.2-Pushparaj has no valid licence but the report of the Investigating Officer has not been produced before the Tribunal and the Tribunal failed to draw an adverse inference against the insurer. R.W.2 in his cross examination has stated that from the investigation the insurer came to know that R.W.2-Pushparaj drove the scooter at the time of accident but this crucial aspect has not been considered by the Tribunal.

8. Per contra the learned Counsel for the second respondent-Insurer submitted

that P.W.1 in her cross examination had deposed that she was present with her husband at the time of accident and her husband had borrowed the scooter from the first respondent. He further submitted that P.W.2 is a stranger whose whereabouts would not have been known to P.W.1 and no explanation has been given by P.W.1 as to how P.W.2's address was known to her and no summon was issued to P.W.2 by the Tribunal summoning him as a witness and therefore contended that P.W.2 has been put up as an eye witness but he had not actually seen the accident. He further submitted that in G.S.T. Road there is no blind end but in the claim petition it is stated that the scooter crashed against the blind end and therefore the case of the claimants is not true. The learned Counsel further submitted that there is no need for R.W.2, a co-employee of the deceased, to depose against the interest of the family of the deceased. He further submitted that R.W.2 was summoned by the Insurance Company and no suggestion has been put to R.W.2 by the claimants that he borrowed the scooter from its owner-the first respondent herein and there is no reason to reject the evidence of R.W.2. The learned Counsel submitted that in the event of the Court holding that the scooter was driven by Pushparaj and the insurer is liable to indemnify the insured, the insurer may be permitted to recover the amount from the first respondent-the owner of the scooter. The learned Counsel submitted that since the claim in the above appeal is restricted to Rs. 7,50,000/-, the appellants are not entitled to claim over and above that. But the learned Counsel fairly conceded that the pillion rider is covered by the Insurance Policy-Ex.R-1.

9. I have carefully considered the submissions made on either side, the oral and documentary evidence available on record and the reasoning of the Tribunal for rejecting the claim of the appellants.

10. Admittedly P.W.1 is not an eye witness to the accident and hence the Tribunal has not placed any reliance on the evidence of P.W.1 in deciding the issue as to who drove the scooter at the time of accident. P.W.2 has been examined as an eye witness to the accident. Since the maker of Ex.P-1-First Information Report has not been examined, the Tribunal has not placed any reliance on Ex.P-1. The Tribunal has observed that the evidence of P.W.2 is not specific that the deceased was only a pillion rider and that he was not driving the scooter. The Tribunal has further observed that there is no evidence on hand to fix the responsibility of R.W.2 and the circumstances of the case clearly show that the deceased himself was driving the scooter rashly and negligently and caused the accident and R.W.2-Thiru.Pushparaj has not driven the scooter.

11. It is pertinent to point out that though in his chief-examination P.W.2 has not specifically stated as to who drove the scooter, in his cross examination he has categorically deposed that the deceased-Abraham Mathew did not drive the scooter. The insurer while cross examining P.W.2 has elicited an answer which is in favour of the appellants herein and this evidence of P.W.2 has been totally overlooked by the Tribunal. Therefore the rejection of the evidence of P.W.2 by the Tribunal is erroneous and nothing has been elicited in the cross examination

of P.W.2 to discredit his evidence.

12. One V. Ramasubramaniam, who was employed as an Assistant Inspector with the second respondent had been examined as R.W.1. He had deposed that the Insurance Company appointed one Investigating Officer to investigate into the accident and from his report the insurer came to know that R.W.2-Pushparaj was not possessing a valid licence on the date of accident and he alone was driving the scooter. He had also deposed that R.W.2-Pushparaj had not filed any claim petition seeking any compensation. It has to be pointed out that the Tribunal has not at all considered this vital evidence of R.W.1 in the proper perspective. When R.W.1 has deposed that an Investigating Officer was appointed and after conducting an enquiry he had submitted a report, he had not explained as to why the copy of the report was not produced before the Tribunal and why he was not examined. From the non-production of the said report, the Tribunal should have drawn an adverse inference. When R.W.1 himself has stated that from the investigation conducted by the insurer it came to light that R.W.2-Pushparaj alone was driving the scooter and when that evidence corroborates the evidence of P.W.2 the Tribunal by merely relying upon the untrustworthy evidence of R.W.2 has erred in holding that the deceased was driving the scooter at the time of accident. It has been specifically suggested to R.W.2 by the claimants that he claimed a share in the compensation amount and when the same was not acceded to by the claimants he had chosen to depose against the interest of the claimants. It has to be considered as to whether such a suggestion made to R.W.2 has got any basis. Admittedly R.W.2 had no driving licence. Though R.W.2 claimed in his evidence that he had filed a claim petition, he had not produced any evidence to substantiate the same. R.W.1 has categorically stated that R.W.2 had not filed any claim petition against the second respondent-insurer herein. If the suggestion of the claimants put to R.W.2 is considered in the light of the above said aspects, it has to be held that there is some basis for the suggestion made by the claimants to R.W.2 suggesting that as he could not get any compensation he demanded a share in the compensation amount failing which he had threatened to give evidence against the interest of the claimants.

13. The contention of the learned Counsel for the second respondent that P.W.1 had not deposed as to how she got the address of P.W.2 will not affect the case of the claimants. P.W.1 has not been questioned on this aspect and as pointed out above nothing has been elicited in the cross examination of P.W.2 to discredit his evidence. There is no evidence to show that P.W.2 was a friend of the deceased and there is absolutely no reason for holding that P.W.2 has given false evidence. From the above discussion of the evidence on record, this Court is of the considered view that the Tribunal has committed an error in holding that the deceased was driving the scooter whereas the evidence on record clearly establishes that R.W.2-Pushparaj was driving the scooter and the deceased was only a pillion rider.

14. Once it is held that the deceased was only a pillion rider and when Ex.R-1-Policy covers the pillion rider, as fairly conceded by the learned Counsel for the second respondent, the next issue to be considered is only the quantum of compensation payable.

15. It is to be pointed out that Ex.P-3-SSLC Certificate of the deceased shows that the deceased was aged 30 years on the date of accident, Exs.P-4 and P-5 show that the deceased was a qualified Automobile Engineer and he had undergone training in Germany in the manufacturing of footwear, Ex.P-7-certificate issued by Wipro Limited shows that the deceased was working as a Maintenance Engineer with Wipro Limited, Ex.P-6-Salary Certificate shows that he was getting a monthly salary of Rs. 6,366/- in 1994 and Ex.P-8-Form-16 shows that the deceased was paying Income Tax. Regarding the above aspects P.W.1 has not been cross examined and the claim of P.W.1 in her chief examination that her husband was getting a monthly salary of Rs. 7,500/- and he was contributing a sum of Rs. 6,000/- towards family expenses and about the age of the first appellant viz., 27 years, etc., have not been disputed by putting suggestions during her cross examination. No suggestion has been put to P.W.1 disputing the veracity of P.W.1.

16. The learned Counsel for the appellants relied upon the decision rendered in the case of National Insurance Co. Ltd. Vs. Swaran Singh and Others, . In the said decision in paragraph 110(iii) the Apex Court has laid down as follows:

110 (iii) The breach of policy condition e.g. disqualification of the driver or invalid driving licence of the driver, as contained in sub-section (2)(a)(ii) of Section 149, has to be proved to have been committed by the insured for avoiding liability by the insurer. Mere absence, fake or invalid driving licence or disqualification of the driver for driving at the relevant time, are not in themselves defences available to the insurer against either the insured or the third parties. To avoid its liability towards the insured, the insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by a duly licensed driver or one who was not disqualified to drive at the relevant time.

Basing reliance on the same the learned Counsel submitted that the insurer has neither pleaded nor adduced any evidence regarding any breach of policy condition e.g. disqualification of the driver or invalid driving licence of the driver, as contained in sub-section (2)(a)(ii) of Section 149 of the Motor Vehicles Act by the insured. The learned Counsel further submitted that the second respondent-Insurer has not proved that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the conditions of the policy regarding the use of the scooter by a duly licensed driver or one who was not disqualified to drive at the relevant time to avoid its liability towards the insured. The above said contention of the learned Counsel for the appellants has to be accepted as the second respondent has neither pleaded nor proved by acceptable evidence that the insured was guilty of negligence and failed to exercise

reasonable care in the matter of fulfilling the conditions of the policy regarding the use of scooter by a duly licensed driver.

17. The learned Counsel for the appellants by relying upon the decision rendered in the case of General Manager, Kerala State Road Transport Corporation, Trivandrum Vs. Mrs. Susamma Thomas and others, submitted that considering the fact that the deceased was aged 30 years on the date of accident, the first appellant was aged 27 years and the second appellant was aged just 2 years the highest multiplier of "18" should be adopted. He further submitted that considering the educational qualification of the deceased, his employment and the salary which he got on the date of accident, the Court should take into consideration the prospects of advancement in the future career. The learned Counsel submitted that the Court can take judicial notice of the fact the present salary that is being paid to the professionals employed with Wipro Limited. He further submitted that if the future prospects is taken into account a sum of Rs. 10,000/- should be fixed as the gross monthly income of the deceased. He further submitted that even if 1/3rd is deducted towards the personal expenses of the deceased, the deceased would have contributed a sum of Rs. 6,667/- to the appellants.

18. In the decision rendered in the case of 1994 (2) S.C.C. 176 (referred to supra) the deceased was 39 years of age and his income was Rs. 1,032/- per month and the Apex Court while considering the question of fixing the correct multiplicand has observed as follows:

19. ... Of course, the future prospects of advancement in life and career should also be sounded in terms of money to augment the multiplicand. While the chance of the multiplier is determined by two factors, namely, the rate of interest appropriate to a stable economy and the age of the deceased or of the claimant whichever is higher, the ascertainment of the multiplicand is a more difficult exercise. In deed, many factors have to be put into the scales to evaluate the contingencies of the future. All contingencies of the future need not necessarily be baneful. The deceased person in this case had a more or less stable job. It will not be inappropriate to take a reasonably liberal view of the prospects of the future and in estimating the gross income it will be unreasonable to estimate the loss of dependency on the present actual income of Rs. 1,032 per month. We think, having regard to the prospects of advancement in the future career, respecting which there is evidence on record, we will not be in error in making a higher estimate of monthly income of Rs. 2000 as the gross income. From this has to be deducted his personal living expenses, the quantum of which again depends on various factors such as whether the style of living was spartan or bohemian. In the absence of evidence it is not unusual to deduct one-third of the gross income towards the personal living expenses and treat the balance as the amount likely to have been spent on the members of the family and the dependants. This loss of dependency should capitalize with the appropriate multiplier.

If the above said legal principles are applied to the present case it has to be held that the deceased had a stable job with Wipro Limited, he was highly qualified and having regard to the future prospects of advancement in life and career, it will not be inappropriate in making a higher estimate of Rs. 10,000/- as the gross income. From this, as laid down by the Apex Court, 1/3rd of the gross income should be deducted towards the personal living expenses and treat the balance as the amount likely to have been spent on the appellants/dependants. If 1/3rd is deducted towards the personal expenses of the deceased the loss of dependency will be Rs. 6,667/- per month and therefore the multiplication will be Rs. 80,004/- (Rs. 6,667 x 12).

19. It is well settled that the multiplier method involves the ascertainment of the loss of dependency or the multiplicand having regard to the circumstances of the case and capitalizing the multiplicand by an appropriate multiplier. The choice of the multiplier is determined by the age of the deceased or that of the claimants whichever is higher. Accordingly, since the age of the first appellant was 27 on the date of accident the appropriate multiplier to be adopted will be "17" and not "18". In the present case the loss of dependency per year comes to Rs. 80,004/- and if it is capitalized on a multiplier of "17" it will work-out to Rs. 13,60,068/- (Rs. 80,004 x 17 = Rs. 13,60,068/-). To this amount a sum of Rs. 15,000/- towards the loss of consortium and Rs. 10,000/- to each of the appellants towards loss of love and affection totally Rs. 20,000/- and a sum of Rs. 5,000/- towards funeral expenses has to be awarded. Thus, the total compensation payable comes to Rs. 14,00,068/-.

20. The learned Counsel for the second respondent-insurer submitted that as the appellants have restricted their claim in the above Civil Miscellaneous Appeal to Rs. 8,00,000/- and already a sum of Rs. 50,000/- has been awarded by the Tribunal, the maximum compensation that could be awarded in the appeal would only be Rs. 7,50,000/-. But this Court is unable to accept the said contention of the learned Counsel. In the decision rendered in the case of Nagappa Vs. Gurudayal Singh and Others, , in paragraphs 7, 10, 16 and 21 the Apex Court has observed as follows:

7. Firstly, under the provisions of Motor Vehicles Act, 1988 (hereinafter referred to as "the MV Act") there is no restriction that compensation could be awarded only up to the amount claimed by the claimant. In an appropriate case where from the evidence brought on record if Tribunal/Court considers that claimant is entitled to get more compensation than claimed, the Tribunal may pass such award. Only embargo is - it should be "Just" Compensation, that is to say, it should be neither arbitrary, fanciful nor unjustifiable from the evidence.

...

10. Thereafter, Section 168 empowers the claims Tribunal to ?make an award determining the amount of compensation which appears to it to be just?. Therefore, only requirement for determining the compensation is that it must be

"just". There is no other limitation or restriction on its power for awarding just compensation.

...

16. From the aforesaid observations it cannot be held that there is a bar for the Claims Tribunal to award the compensation in excess of what is claimed, particularly when the evidence which is brought on record is sufficient to pass such award. In cases where there is no evidence on record, the Court may permit such amendment and allow to raise additional issue and give an opportunity to the parties to produce relevant evidence.

...

21. For the reasons discussed above, in our view, under the M.V. Act, there is no restriction that Tribunal/Court cannot award compensation amount exceeding the claimed amount.

21. In the decision rendered in the case of Pallavan Transport Corporation Ltd. Vs. M. Anbumani and Others, a Division Bench of this Court in paragraph 6 has observed as follows:

6. It is unfortunate that the claimants have not filed cross-objections. But at the same time, it is not as if this Court is helpless and this Court can certainly invoke its powers conferred under Order 41, rule 33 of the CPC since the Court in deciding these matters, should remember that the compensation awarded should not be inadequate, neither should be unreasonable, excessive nor deficient. In this case, this Court is of the view that the compensation that has been fixed by the Tribunal is on the lower side.

22. In the light of the above said principles laid down by the Apex Court and the Division Bench of this Court it has to be held that the contention of the learned Counsel for the second respondent-insurer is liable to be rejected. Though appellants have restricted their claim to Rs. 8,00,000/- in the appeal there is no bar for the Court to award compensation in excess of what is claimed particularly when the evidence brought on record in this case warrants quantification of compensation payable at Rs. 14,00,068/-. And on that amount the appellants are also entitled to claim interest at 7.5% per annum from the date of application till the date of payment. Therefore this Court is of the considered view that the total compensation payable is Rs. 14,00,068/- and already the Tribunal has awarded a sum of Rs. 50,000/- towards no fault liability and deducting the same the appellants are entitled to be paid a sum of Rs. 13,50,000/- (rounded off) by the second respondent-insurer.

23. The submission of the learned Counsel for the second respondent that the insurer should be permitted to recover the compensation amount payable by the Insurance Company to the appellants from the first respondent-insured cannot be accepted, since as pointed out above, the breach of policy condition e.g. disqualification of the driver (second respondent) or invalid driving licence of the

driver (second respondent), as contained in sub-section (2)(a)(ii) of Section 149 of the Motor Vehicles Act has to be proved to have been committed by the insured (first respondent) for avoiding liability by the insurer, but in this case such breach of policy condition has not been proved.

24. In the result, the appeal is allowed by fixing the compensation payable to appellants 1 and 2 by the second respondent at Rs. 14,00,068/- and the appellants are entitled for interest at 7.5% per annum on the said amount from the date of application to the date of deposit. After adjusting the sum of Rs. 50,000/- already awarded by the Tribunal and paid by the second respondent, the balance sum of Rs. 13,50,000/- (rounded off) together with interest shall be deposited by the second respondent to the Credit of M.C.O.P.No.180 of 1996 on the file of the Additional Subordinate-Judge-cum-Motor Accident Claims Tribunal, Chengalpattu, within a period of eight (8) weeks from the date of receipt of a copy of this judgment. On such deposit the Tribunal shall pay a sum of Rs. 2,50,000/- to the first appellant and the balance amount shall be kept in a fixed deposit in the name of the first appellant and the minor-second appellant in equal proportion. The fixed deposit in favour of the first appellant shall be made in Indian Bank, Kovalam Branch, kancheepuram District intially for a period of three (3) years and no withdrawal is permitted and only monthly interest will be paid so far as the fixed deposit in the name of the first appellant is concerned. As far as the fixed deposit in the name of the minor is concerned, it shall be in Fixed Deposit re-investment scheme intially for a period of five (5) Years and it shall thereafter be renewed till the second appellant attains majority. No costs.