(2008) 05 KAR CK 0013

In the Karnataka High Court

Case No : M.F.A. No''s. 8242 and 8647 of 2004

Geetha APPELLANT

Vs

G.K. Subrahmanya since deceased by Lr., Gowramma and The Manager, Oriental Insurance Co. Ltd.
 Branch Manager, Oriental Insurance Co. Ltd. Vs Pramod Hanumantharao Naragundkar and Susheelamma RESPONDENT

Date of Decision : 26-05-2008

Acts Referred:

Motor Vehicles Act, 1988 — Section 147, 147 (1) (b) (i), 147 (2) (b)

Citation : (2009) ACJ 1132 : (2008) ILR (Kar) 4112

Hon'ble Judges : Ram Mohan Reddy, J

Bench : Single Bench

Advocate : K.T. Surudeva Prasad, in M.F.A. Nos. 8243, 8244, 8245, 8246, 8247, 8248, 8249 of 2004, Sathyapal, in M.F.A. No. 8249 of 2004, A.N. Krishna Swamy and S.R. Murthy, in M.F.A. No. 8647 of 2004 and M.U. Poonacha, in M.F.A. No. 5184 of 2005, for the Appellant; V.Y. Kumar, for R2 in M.F.A. Nos. 8243, 8244, 8245, 8246, 8247, 8248, 8249 of 2004, G. Balakrishna Shastry, for R1 in M.F.A. No. 8647 of 2004 and Veeresh B. Patil, for R1 and V.B. Siddaramaiah, for R2 and 3 in M.F.A. No. 5184 of 2005, for the Respondent

Judgement

Ram Mohan Reddy, J.—Common questions of fact and that of law arise for decision-making, hence, with the consent of the learned Counsel for the parties, the appeals are clubbed together, finally heard and are disposed of by this common order.

2. The claimants-injured aggrieved by the common judgment and award dated 9-7-2001 in M.V.C. Nos. 258/2000 to 265/2000 of the Prl. District Judge & MACT, Mandya (for short ''MACT''), have preferred M.F.As. 8242 to 8249/2004 respectively, for enhancement of compensation and to fasten the liability on the insurer to pay the compensation.

3. The insurer of the offending vehicle, aggrieved by the judgment and award dated 5-8-2004 in M.V.C. No. 2/2003 of the Civil Judge (SR DN.) & AMACT,

Channarayapatna, (for short ''MACT'') in so far as it relates to fastening of liability to pay the compensation, has preferred M.F.A. No. 8647/2004.

4. M.F.A. 5184/2005 is filed by the insurer of the offending motor vehicle calling in question the judgment and award dated 19-02-2005 in M.V.C. No. 386/2002 of the Pit Civil Judge (Sr.Dn) & CJM, Raichur (for short ''MACT'') in so far as it relates to fastening of liability to pay the compensation.

5. FACTS IN BRIEF:

(A) M.F.As. 8242 To 8249/2004 (Appeals by the claimants-injured)

The appellants - occupants of the motor car, being an Ambassador Car bearing Registration No. M.E.G-255, a private car, owned by the 11st respondent, since deceased by legal representative, insured by the 2nd respondent and driven by one Krishnappa, proceeding from Mandya to Dharmasthala via Hassan-Saldeshpura, on 17-05-1994, suffered grievous and simple injuries when the car dashed against a roadside tree, due to rash and negligent driving. The appellants preferred separate claim petitions, initially numbered as M.V.C. 1090 to 1097/1994 and thereafter renumbered as M.V.C. 258 to 265/2000 respectively, for compensation, invoking Section 166 of the Motor Vehicles Act, 1988 (for short ''Act''). The owner of the offending motor vehicle though served with notice of the claims, remained absent and was placed exparte while the insurer entered appearance through counsel, resisted the claim by filing separate Statement of objections, interalia contending that the motor vehicle being a private car, the terms of the policy of insurance did not cover the risk of injury/death of occupants. The MACT, in the premise of the pleadings of parties, framed issues, similar in each of the claim petitions, held a common trial, recorded the deposition of seven witnesses as PW-1 to FW-7 and the Doctor as CW-1, for the claimants, marked 88 documents as Exhibits P-1 to P-88 and the medical records as Exhibits C-1 to C-16, while for the respondent-insurer, one witness was examined as RW-1 and the Policy of Insurance marked as Exhibit R-1. The MACT, having considered the material on record, the evidence both oral and documentary, attributed actionable negligence to the driver of the motor vehicle, exonerated the insurer from the liability to pay the following compensation:

a) M.V.C. No. 258/2000:

Pain, suffering, injury - Rs. 20,000/- Medical expenses - Rs. 3,000/- Total - Rs. 23,000/-

b) M.V.C. No. 259/2000:

Pain, suffering & injury - Rs. 20,000/- Medical expenses - Rs. 2,100/- Total - Rs. 22,100/-

c) M.V.C. No. 260/2000:

Global compensation of Rs. 5,000/-

d) M.V.C. No. 261/2000:

Global compensation of Rs. 4,000/-

e) M.V.C. No. 262/2000:

Global compensation of Rs. 3,000/-

f) M.V.C No. 263/2000:

Pain, suffering & injury - Rs.20,000/- Medical expenses - Rs. 3,000/- Total - Rs. 23,000/-

g) M.V.C. No. 264/2000:

Global compensation of Rs. 10,000/-

h) M V.C. No. 265/2000:

Global compensation of Rs. 5,000/-

with interest at 6% per annum from the date of petition, by the impugned judgment and award.

(B) M.F.A. No. 8647/2004 (Appeal by the insurer):

In the accident that occurred on 24-05-1993, the motor vehicle being an Ambassador car bearing Registration No. CKE.8007, a private car, owned by the 2nd respondent and insured by the appellant, dashed against a roadside tree, whence the 11st respondent suffered grievous injuries leading to filing of a Claim Petition numbered as M.V.C. No. 2/2003, for compensation, invoking Section 166 of the Act Before the MACT, the respondents, insured and insurer, entered appearance, resisted the claim by filing separate Statement of objections. The MACT, in the premise of the pleadings of the parties, framed issues, recorded the depositions of the claimant and the Doctor as PW-1 and PW-2 respectively, marked 56 documents as Exhibits P-1 to P-56 while for the respondents, none were examined except marking the Policy of insurance as Exhibit R-1, by consent The MACT, having regard to the material on record, the evidence both oral and documentary, without assigning reasons, recorded a finding that the claimant was entitled to Rs. 2,80,362/-with interest at 6% per annum from the date of petition and fastening the liability on the appellant to pay the compensation, by the impugned judgment and award.

(C) M.F.A. No. 5184/2005 (Appeal by the insurer):

The 11st respondent, alleging that on 2-1-2002 while travelling as an occupant of the motor vehicle being a Mahindra Jeep bearing Registration No. KA-34 M.466 belonging to the 3rd respondent driven by the 2nd respondent and insured by the appellant, fell off from the moving jeep, suffered grievous injuries, filed a Claim Petition numbered as M.V.C. No. 386/2002 before the MACT, for compensation, arraigning the driver, owner and the insurer of the motor vehicle as party-respondents. The claim was resisted by filing Statement of objections of the driver, which was adopted by the owner, while the insurer filed Statement of objections interalia contending that due to breach of the terms and conditions of the Policy of Insurance, the insurer was not liable to answer the claim of the injured. The MACT, in the premise of the pleadings of parties, framed issues, recorded the depositions of the claimant as PW-1, marked 13 documents as Exhibits P-1 to P-13, while for the respondent, no oral evidence was tendered but the policy of insurance was marked as Exhibit R-1 by consent The MACT, having regard to the material on record, the evidence both oral and documentary, attributed actionable negligence to die driver of the motor vehicle and awarded Rs. 40,000/- with interest at 8% per annum from the date of petition and held the insurer and the insured, jointly, liable to pay the compensation, by the judgment and award impugned.

6. FACTS NOT IN DISPUTE:

The accident, injuries, death of one of the occupants and the finding attributing actionable negligence to the drivers of the motor vehicles are not in dispute. So also not in dispute is the fact that the motor vehicles were private vehicles(cars), insured by issue of Form ''A'' policy for Act liability, covering the risk of third-party, without any endorsements accepting premiums covering the risk of injury/ death of the gratuitous passengers travelling in the cars.

7. CONTENTIONS:

(i) Learned Senior counsel for the claimants - injured - appellants advances the following contentions:

(1) the award of compensation under the different heads of damage is on the lower side and calls for enhancement.

(2) That the MACT was not justified in exonerating the insurer of the liability to pay the compensation.

Elaborating on the second contention it is submitted that in terms of the India Motor Tariff, Rationalisation and Revision on 1-2-1982, the following types of policies of insurance for motor vehicles were issued.

(a) Act only - Basic premium graded and limited liability under the Motor Vehicles Act, 1939.

(b) To public risk.

(c) Comprehensive - statutory and own damage under the Act Policy.

(ii) According to the Learned Senior counsel, u/s 95(1)(b)(ii) of the Motor Vehicles Act, 1939, the insurers of Motor vehicles were free to contract higher liability than what was provided u/s 95(2) of the said Act. In other words, 95(1) and 95(2) provided for graded as well as limited liability, depending upon the type of vehicle, i.e., in case of goods vehicle liability towards third party was limited to Rs. 1,50,000/- while in case of passenger carrying vehicle, liability was limited to Rs. 50,000/- and that of passengers carried for hire in a public service vehicle including a taxi, was limited to Rs. 1,50,000/- per passenger. It is submitted that under the 1939 Act, occupants of a private vehicle were not required to be covered and therefore, the three different types of policies noticed supra in existence, were done away with after the coming into force of the Act, whence no graded or limited liability was provided for, except in case of Third Party property damage u/s 147(2)(b). It is further submitted that the Apex Court in the case of Pushpabai Purshottam Udeshi and Others Vs. Ranjit Ginning and Pressing Co. (P) Ltd. and Another, and Dr. T.V. Jose v. Chacko P.M. alias Thankachan and Ors. reported in AIR 2001 SC 3939 and New India Assurance Co. Ltd. Vs. C.M. Jaya and Others, , the Apex Court, while interpreting Section 95 of Motor Vehicle Act 1939, held that the insurer was not statutorily liable to cover the risk of injury/death to occupants of a private car. After the coming into force of the Act, w.e.f. 1.7.1989, the statute imposed compulsory cover of insurance to third party and third party property damage, limited to Rs. 6,000/- and in all other cases, liability as incurred by the insured. The Law Commission of India having noticed the limitations of the scope of insurance cover under the M.V. Act 1939, which were removed by the Section 147 of the Act, however opined that Section 147(1)(b)(ii) suffered from infelicitous drafting, want of clarity and avoidable overlapping with Section 147(1)(b)(i) and in its 149th report, recommended the recasting of the sub-clause, learned Senior Counsel points out to the recommendation, to contend that Sub-clause (i) of Clause (b) of Sub-section (1) of Section 147, is wide enough to cover the risk of injury/ death to occupants of a private car or a Motor Cycle.

(iii) It is next submitted that the India Motor Tariffs effective from 1-8-1989 provided for two types of policies namely A and B policy while the India Motor Tariffs brought into force with effect from 1-7-2002, superceding the earlier tariff, provided for "liability only policy" and "Package Policy" covering the risk arising out of death of or bodily injury to any person including occupants carried in a private car, provided such occupants are not carried for hire or reward, while limiting the third party property damage to Rs.6,000/-under Section 147(2)(b).

(iv) It is submitted that since Section 147 of the Motor Vehicles Act, 1988 provides for only one kind of policy that is compulsory to meet the requirements of the Act, the Insurance Companies cannot be permitted typify a policy of insurance as "Act policy" or "Liability only policy," which in the context of Section 149(4) of the Act of 1988 is to be treated as void.

(v) In addition it is submitted that learned Single Judges and Division Benches of this Court have interpreted Section 147 of the Act, as requiring an insurer to meet the risks of death of or inquiry to occupants of a car or a pillion rider, which have since become final and binding, places reliance upon the following two reported opinions.

(1) Oriental Insurance Company Limited, Bangalore Vs. Minaxi and Others,

(2) National Insurance Co. Ltd. Vs. Smt. Rasheeda and Another, , and Ors. decisions.

(vi) It is lastly submitted that the Apex Court, in the case of National Insurance Company Ltd. Vs. Behari Lal and Others, , having held that the liability of Insurance Co. will be covered by Sub-section (2) of Section 147 of the Act of 1988 and not u/s 95(1)(b)(ii) of the Act of 1939 in respect of a policy of insurance issued on October 29, 1988 valid upto October 27, 1989 and the new act having come into force with effect from 11st July 1989, contends that the decision of the Apex Court in United India Insurance Co. Ltd., Shimla Vs. Tilak Singh and Others, is a mere obiter dicta. In the light of the authoritative pronouncement of the Apex Court consisting of 11 Judges in the case of H.H. Maharajadhiraja Madhav Rao Jivaji Rao Scindia Bahadur of Gwalior and Others Vs. Union of India and Another, , it is contended that in Tilaksingh''s case, the insurer suppressed the factual matrix that the Motor vehicle was not covered by the endorsement IMT-70, the tariff which, in fact, was brought into force from 1-4-1990 though the policy of Insurance was issued on 7-3-1989, hence, the declaration of law having not been a full exposition of the law on a question which did not even fail for consideration, is but a mere obiter dicta.

(vii) Per contra, learned Counsel for the respondent-Insurance Companies as well as the appellants-Insurance Companies contend that in the light of the law laid down by the larger bench of the Apex Court in New India Assurance Co. Limited v. Asharani 2003 (2) SCC 223 followed by the decision in Tilak Singh''s case, the opinions of learned Single Judges and that of the Division Bench of this Court stand impliedly overruled. According to the learned Counsel, the Insurance Co. the policies of Insurance, being Act Policies, owed no liability towards the injured and the deceased, gratuitous passengers, travelling in private cars. Learned Counsel contends that the MACT fell in error in clamping liability on the Insurance Co. to pay the compensation by judgment and award dated 5-8-2004 in M.V.C. No. 2/2003, subject matter of M.F.A. 4647/2004; and judgment and award dated 19-02-2005 in M.V.C. No. 386/2002, subject matter of M.F.A. 5184/2005.

8. QUANTUM OF COMPENSATION:

M.F.A. 8242/2004 (MVC. 258/2000):

(i) The claimant, a married lady aged 26 years suffered fracture of the superior and inferior rami of the left pubic bone and fracture of Iahicuum and inferior rami of the right pubic bone, opined to be grievous, and a lacerated wound, a simply injury, in the accident that occurred on 17-05-1994 as recorded in the Wound Certificate Exhibit P-6 and testified by Dr. Somayaji, Orthopedic Surgeon of the District Hospital, Hassan examined as CW-1. The Discharge card Exhibit P-28 issued by K.V. Shankaragouda Memorial Hospital, Mandya records that die report of the radiologist disclosed fracture of both pubic bones, treated conservatively while as an in-patient from 30-05-1994 to 6-6-1994. The bills Exhibit P-7 to P-26 are for having purchased medicines totaling to Rs. 2,265.62. CW-1 testified that on a clinical examination of the claimant on 9-8-2003, there was restriction in the movements of the hips and the; X-ray showed fractures which were united but "with little bit melanin". In the opinion of CW-1, the claimant is said to suffer 10 to 15% permanent disability. In the cross-examination, CW-1 states that the percentage of disability is with reference to the limb and is unable to opine over the percentage of disability to the whole body, while, admitting that after discharge on 30-05-1994, there are no hospital records to establish that the claimant took further treatment.

(ii) The evidence both oral and documentary disclose that the claimant suffered two fractures on each of the left and right side of both the pubic bones and in that view of the matter, the award of Rs. 20,000/- for injury, pain and suffering being on the lower side, deserves enhancement to Rs. 40,000/-. The claimant was an in-patient for seven days during which period, she must have had the services of an attendant, having regard to the nature of injuries, entitling her to compensation for attendant charges at the rate of Rs. 100/- per day, and for food, nutrition and conveyance charges and cost of medicine as per bills, which in my opinion is Rs. 5,000/-

(iii) During the year 1994, the value of services of a housewife if reckoned as Rs. 1,500/- per month and taking three months as the period of recuperartion, the claimant is entitled to Rs. 4,500/- for loss of income during laid off period.

(iv) The evidence of CW-1 is not in the direction of establishing, by a scientific evaluation or assessment of the percentage of whole body disability suffered by the claimant due to the injuries. The fractures, though admittedly united, the statement of CW-1 that there is a "little bit of melanin" leading to the opinion of permanent disability of 10 to 15%, does not inspire confidence. More so, in the absence of evidence over the degree of flexion, adduction in the movement of the hips, the muscle strength, etc., the opinion of CW-1 over percentage of disability is unacceptable. In my considered view, though the MACT did not discuss the evidence of CW-1, nevertheless stumbled upon the correct decision in rejecting the opinion of CW 1.

(v) The fact that a young lady suffered fractures of the pelvic bone cannot but have led to hardship, inconvenience, discomfort, frustration, etc. which will have to be endured for the rest of her life entitling her to compensation of Rs. 20,000/- for loss of amenities of life. Thus, the claimant is entitled to enhancement of total compensation from Rs. 23,000/- to Rs. 69,500/-.

M.F.A. No. 8243/2004 (MVC. 259/2000):

(i) The Wound Certificate Exhibit P-83 of the Government Hospital, Hassan records that the claimant suffered two injuries, one simple and another grievous. The dislocation of the left hip joint was opined to be grievous. The Discharge card Exhibit P-79 of the Government Hospital discloses that the claimant was an in-patient for two days while the Discharge card Exhibit P-80 of K.V. Shankara

Gowda Memorial Hospital, Mandya records that the claimant was an in-patient from 19-05-1994 to 28-05-1994 while no treatment was extended.

(ii) CW-1 Dr. Somayaji testifies to the feet that the dislocation of the posterior left hip joint was reduced before discharge, on 19-05-1994, This witness does not refer to any other medical treatment to the injured during the period from 19-05-1994 to 9-8-2003 on which date the claimant is said to have been clinically examined. The note-sheet and the X-Ray Exhibit C-4 to C-7 do not reflect either evaluation or assessment of disability. The opinion of CW-1 that the claimant suffered from 15% permanent disability is not supported by medical records or report of the Radiologist

(iii) The bills Exhibits P-67 to P-78 and receipt Exhibit P-82 discloses purchase of medicines, hospital and ambulance charges totaling to Rs. 2,493.55/-.

(iv) The Salary Certificate dated 13-02-2002 Exhibit P-81 discloses that the claimant held the post of "Assistant Teacher" as on January 2002, drawing a gross salary of Rs. 9,893/- for the said month.

(v) In the light of the aforesaid evidence both oral and documentary, the MACT awarded Rs. 20,000/- for pain, suffering and injury and Rs. 2,100/- towards medical expenses.

(vi) It is no doubt true that the nature of injury suffered was dislocation of the posterior left hip joint which was treated conservatively both at the Government Hospital, Hassan, while as an in-patient for two days and also at the hospital at Mandya where the claimant was an in-patient for 10 days. Admittedly, there is no evidence of medical treatment after 28-05-1994 to establish that the dislocation which was reduced, resulted in permanent disability, despite treatment The evidence of CW-1 being very sketchy and not in the direction of establishing permanent disability, by a scientific method of evaluation and assessment, the MACT rightly rejected the said opinion. Having regard to the number of days the claimant was an in-patient, the MACT was not justified in not awarding compensation for food, nutrition, attendant charges, loss of income during laid off period and loss of amenities of life.

(vii) The claimant was an in-patient for 12 days during which period he must have had the assistance of an attendant and required nourishing food. The award of Rs. 2,000/- under the said head of damage, in the circumstances, is just and reasonable.

(viii) The claimant did not place relevant material constituting substantial legal evidence over both income and avocation as on the date of accident, that is 17-05-1994. Exhibit F-81, the Salary Certificate is for the month of January 2002 which makes no reference to either the avocation or income of the injured as on the date of accident The particulars of the date from which the claimant was engaged as an Assistant Teacher and the salary received by him are not forthcoming coupled with the fact that no material is placed on record to establish that the claimant was on medical leave during the relevant period. In my opinion, the MACT was fully justified in rejecting Exhibit P-81.

(ix) Keeping in mind the nature of injury, and that the claimant was off duty for a period of two months while reckoning notional income of Rs. 1,500/- per month, the claimant is entitled to Rs. 3,000/- for loss of income while off duty.

(x) The discomfort, inconvenience, frustration which the claimant, an able-bodied man aged 36 years will have to endure for the rest of his life entitles him to Rs. 5,000/- as compensation for loss of amenities of life. Thus, the total compensation awarded by the MACT stands enhanced to Rs. 32,100/-.

M.F.A. 8244/2004 (MVC. 260/2000P):

(i) The girl aged 6 years suffered multiple lacerated injuries to the nose, lip, above right and left eyelids as recorded in the Wound Certificate Exhibit P-88 which was treated conservatively, and testified by CW-1 Dr. Somayaji as also recorded in the case-sheet Exhibit P-8 and the Out-patient slip Exhibit P-9. The claimant when clinically examined on 9-8-2003, CW1 found scars on the face which in his opinion were permanent requiring correction by Plastic surgery.

(ii) It is no doubt true that the claimant did not examine Dr. H.V. Satish who issued the letter dated 27-09-2003 appended to the memo dated 16-02-2004 suggesting that Rs. 28,000/- to 35,000/- as cost of Plastic Surgery. The photographs and negatives of the claimant, enclosed to the memo dated 16-02-2004 are not spoken to by any witness nor proved in evidence. However, in the cross-examination of PW-7 K.V. Chandraiah, the father of the claimant, the MACT has recorded thus:

Witness volunteers that his daughter is present before the Court. The Court observes that there are five scar marks on the face of the child.

(iii) Having regard to the fact that the claimant, a female child suffered multiple injuries to the face leading to permanent scars as testified by CW 1, coupled with the observations of the MACT as recorded in the evidence of PW-7, it is reasonable to infer that the scars which have disfigured the face, requires correction by a Plastic Surgery, entitling the claimant to compensation for disfigurement and future medical expenses. Unfortunately, there is no cogent evidence over the exact medical expenses for Plastic Surgery to rectify the disfigurement of the face. In the circumstances, ends of justice would be met by enhancing the global compensation from Rs. 5,000/- to Rs. 35,000/-.

M.F.A. No. 8245/2004 (MVC No. 261/2000)

The claimant K.K. Puttaswamy aged 39 years, when clinically examined on 17-05-1994 tenderness was noticed over the left thigh and chest while the X-Ray did not disclose any abnormalities, as recorded in Exhibit P-37, the Wound Certificate. CW-1 does not testify to any grievous injury or permanent disability suffered by the claimant In the circumstances, the award of Rs. 4,000/- as global compensation by the MACT cannot be found fault with.

M.F.A. No. 8246/2004 (MVC.262/2000)

The claimant, a housewife aged 26 when examined, the Doctor noticed tenderness over the right rib and right leg which in his opinion were simple injuries. CW-1, in his deposition, does not testify to any grievous injury or any permanent disability suffered by the claimant The MACT, having regard to the documentary evidence, more appropriately the bills Exhibits P-52 to P-54, for purchase of medicines totaling to Rs. 383.95/-, awarded Rs. 3,000/- as global compensation. The judgment and award, in my considered opinion, does not call for interference.

M.F.A. 8247/2004 (MVC.263/2000):

The claimant, a student aged 19 suffered fracture of the superior rami of the right pubic bone, a grievous injury which was treated conservatively as disclosed in the Wound Certificate Exhibit P-66. The fracture is supported by the report of the Radiologist on the basis of the X-Ray Exhibit C-11. Though CW-1 Dr. Somayaji refers to the grievous injury, nevertheless does not testify to permanent disability suffered by the claimant, due to the injury. The bills Exhibits P-59 to P-65 discloses purchase of medicines for Rs. 384.70/-. No material is forthcoming as to the nature of treatment that the claimant underwent during the period upto 9-8-2003, the date of clinical examination by CW 1. Having regard to the nature of injury coupled with the conservative treatment, it is needless to state that the claimant, a young boy will have to endure discomfort, frustration, inconvenience, etc., entitling him to compensation for loss of amenities of life. In my opinion, enhancing the compensation from Rs. 23,000/- to Rs. 33,000/- in the circumstances, is just and reasonable.

MFA 8208/04 (MVC 264/2000)

(i) The claimant, a girl aged 9 years suffered fracture of the shaft of the left femur, a grievous injury and two simple injuries in the accident, as recorded in the wound certificate Ex. P51. The injuries were treated conservatively as disclosed in the case sheet Ex.C12 of Sri Chamarajendra hospital, Hassan, where the claimant was an inpatient for a period of 2 days. Thereafter, the claimant was admitted to K.V. Shankaragouda Memorial Hospital, Mandya, and was an inpatient from 19.5.94 to 6.6.94, where Plaster of Paris cast was applied. The bills Exs.P38 to P48 are for purchase of medicines and ambulance charges, totalling to Rs. 3,246.65 ps.

(ii) Dr. Somayaji CW-1 in his evidence states that the fracture was treated by fixing "thomas splint". According to CW-1 a clinical and radiological examination of the claimant on 9.8.2003 disclosed that the fracture was well united "with little bit of melanin", which in his opinion was 15 to 20% permanent disability.

(iii) In the cross-examination of CW-1 it is elicited that the opinion over the percentage of disability is with reference to the limb and is unable to render an opinion over the percentage of whole body disability.

(iv) An examination of the evidence both oral and documentary discloses that the claimant having suffered fracture, was treated conservatively by fixing a "Thomas Splint" at the first instance in the Govt. hospital at Hassan and thereafter by a Plaster of Paris cast, at the hospital at Mandya. The subsequent x-ray in the year 2003 and the report of the radiologist disclosed that the fracture was well united. The records relating to treatment after 6.6.1994 the date of discharge to 9.8.2003 the date of clinical examination by CW-1, are not forthcoming. It is in the evidence of PW-3 Puttaswamy, the father of the claimant, that after the accident and injury the claimant is pursuing her education successfully. The evidence of CW-1 is not in the direction of establishing a scientific evaluation or assessment of the percentage of whole body disability suffered by the claimant due to the injury and therefore the opinion that the claimant suffers from 15-20% disability to the limb, is unacceptable.

(v) It is no doubt true that the MACT was not justified in not awarding compensation for injury, pain and suffering, conveyance, food, nourishment, attendant charges and loss of amenities of life and the award of Rs. 10,000/- as global compensation in the circumstances, is neither just nor within the contemplation of the Act.

(vi) Having regard to the fact, that the claimant''s fractured left leg was sought to be set right by a POP cast for 1? months, as recorded in Ex.P50 -discharge card of K.V. Shankaragouda Memorial hospital, Mandya, the claimant is entitled to Rs. 20,000/- towards injury, pain and suffering. As an inpatient for a total period of 20 days at the aforesaid two hospitals, the claimant must have had the assistance of an attendant since both her parents having suffered injuries were inpatients and required nourishing food. In this view of the matter, it is reasonable to award Rs. 5,000/- as compensation under the said head of damage and Rs. 3,500/- towards medical expenses.

(vii) The discomfort, inconvenience, frustration, etc., which the claimant, a girl child has to undergo for the rest of her life entitles her to Rs. 10,000/- as compensation for loss of amenities of life.

(viii) Thus the claimant in all is entitled to Rs. 38,500/- as compensation instead of Rs. 10,000/-awarded by the MACT.

MFA 8249/2005: (MVC 265/2000)

(i) The claimant, a 64 year old man, suffered fracture of lower oval of the left patela, as disclosed by the report of the radiologist-Ex. C16 and as recorded in the wound certificate Ex.P58, the bills Exs.P56 and P57 disclose purchase of medicine for Rs. 311/-. The treatment for the injury, admittedly was conservative. CW-1 Dr. Somayaji does not justify to any bodily disability due to the injury. Although PW-5 claimant states that he is under constant medical treatment under Dr. Vidyaprasad, no material in respect of the said claim is forthcoming.

(ii) Having regard to the totality of circumstances and the nature of injury, ends of justice would be met by enhancing the award from Rs. 5,000/- to Rs. 15,000/-

(9) LIABILITY (STATUTORY)

(i) Motor Vehicles Act 1939;

(a) Section 94 of the Motor Vehicles Act, 1939, compels the owner of a motor vehicle to insure the vehicle in compliance with the requirements of Chapter VIII of the said Act Section 95 requires a policy of insurance to be one which insures the person against any liability which may be incurred by him in respect of death or bodily injury to any person or damage to any property of third party, caused by or arising out of the use of the vehicle in a public place. This Section does not require a policy to cover the risk of passengers who are not carried for hire or reward. Thus, a statutory insurance does not cover injury suffered by occupants of the vehicle who are not carried far hire or reward and the insurer cannot be held liable under the said Act This does not, however, prevent an insurer from entering into a contract of insurance covering a risk wider than the minimum requirements of the statute to include the risk of gratuitous passengers. This leads to the conclusion that under the Act of 1939, the terms of policy have to be considered to determine the liability of the insurer in respect of injury/death caused to gratuitous passengers in a private vehicle or scooter.

(b) In fact, this provision of law came up for consideration before the Apex Court in Pushpabai Purshottam Udeshi and Others Vs. Ranjit Ginning and Pressing Co. (P) Ltd. and Another, , whence, their lordships'' observations, extracted below, indicate that the law does not require a policy of insurance to cover the risk of a passenger who is not carried for hire or reward.

21. The insurer can always take policies covering risks which are not covered by the requirements of Section 95. In this case the insurer had insured with the insurance Co. the risk to the passengers. By an endorsement to the policy the insurance company had insured the liability regarding the accidents to passengers in the following terms :

In consideration of the payment of an additional premium it is hereby understood and agreed that the Co. undertakes to pay compensation on the scale provided below for bodily injury as hereinafter defined sustained by any passenger....

The scale of compensation is fixed at Rs. 15,000/- The insurance Co. is ready and willing to pay compensation to the extent of Rs. 15,000 according to this endorsement but the learned Counsel for the insured submitted that the liability of the insurance Co. is unlimited with regard to risk to the passengers. The counsel relied on Section II of the Policy which relates to liability to third parties. The clause relied on is extracted in full:

Section II - Liability to Third Parties

1. The Co. will indemnify the insured in the event of accident caused by or arising out of the use of the Motor Car against all sums including claimant''s costs and expenses which the insured shall become legally liable to pay in respect of

(a) death of or bodily injury to any person but except so far as is necessary to meet the requirements of Section 95 of the Motor Vehicles At, 1939, he Co. shall not be liable where such death or injury arises out of and in the course of the employment of such person by the insured.

It was submitted that the wording of Clause I is wide enough to cover all risks including injuries to passengers. The clause provides that the co. will indemnify the insured against all sums including claimant''s costs and expenses which the insured shall become legally liable. This according to the learned Counsel would include legal liability to pay for risk to passengers. The legal liability is restricted to Clause 1(a) which states that the indemnity is in relation to the legal liability to pay in respect of death of or bodily injury to any person but except so far as is necessary to meet the requirements of Section 95 of the Motor Vehicles Act, the Co. shall not be liable where such death or injury arises out of and in the course of the employment of such person by the insured. Clause 1 and 1(a) are not very clearly worded but the words "except so far as is necessary to meet the requirements of Section 95 of the Motor Vehicles act, 1939", would indicate that the liability is restricted to the liability arising out of the statutory requirements u/s 95. The second part of Clause 1(a) refers to the non-liability for injuries arising in the course of employment of such person.

The meaning of this Sub-clause becomes clear when we look to the other clauses of the insurance policy. The policy also provides for insurance of risks which are not covered u/s 95 of the Act by stipulating payment of extra premium. These clauses would themselves indicate that what was intended to be covered under Clause 1 and 1(a) is the risk required to be covered u/s 95 of the Motor Vehicles Act

22. On a construction of the insurance policy had insured the owner only to the extent of Rs. 15,000/- regarding the injury to the passenger. In the result we hold that the liability of the insurance Co. is restricted to Rs. 15,000/-. There shall be a decree in favour of the claimants/appellants to the extent of Rs. 27,500/- against the respondents out of which the liability of the insurance Co. will be restricted to Rs. 15,000. The appeal is allowed with the costs of the appellant which will be paid by the respondents in equal share.

(c) A three Judge bench of the Supreme Court in Smt. Mallawwa Etc. Vs. The Oriental Insurance Co. Ltd. and Others, on a reference by a Division Bench over the correct interpretation of Section 95 of the Motor Vehicles Act, 1939, reconsidered the decision in Pushpabai Purshottam Udeshi''s case supra and held thus:

12. xxx

What was held in that case is, with respect, consistent with our interpretation of Section 95 as it stood before and after its Amendment by Act 56 of 1969.

13. The 1939 Act is now replaced by the 1988 Act. Section 147 which corresponds to old Section 95 has been substantially altered by the Legislature. Therefore, the above interpretation of Section 95 of the 1939 Act will govern the cases which have arisen under the 1939 Act.

(ii) Motor Vehicles Act, 1988:

(a) Section 147 prescribes the requirement of a policy of insurance and limits of liability, while the proviso appended thereto carves out an exception to the main provision. This proviso is not identical to proviso (ii) of Section 95 of the Motor Vehicle Act, 1939. In other words, Clause (ii) of proviso to Section 95 of the Motor Vehicles Act, 1939 is not existent in the proviso to Section 147(1) of the Motor Vehicles Act, 1988. In New India Assurance Co. v. Satpal Singh and Ors. (2000) 1 SSC 237 the fact that a 10 year old girl succumbed to injuries in an accident that occurred on 11-03-1990 while travelling in a truck, when considered, the Apex Court, interpreted Section 147 of the Act, thus:

11. The result is that under the new Act an insurance policy covering third-party risk is not required to exclude gratuitous passengers in a vehicle, no matter that the vehicle is of any type or class. Hence the decisions rendered under the old Act vis-a-vis gratuitous passengers are of no avail while considering the liability of the insurance Co. in respect of any accident which occurred or would occur after the new Act came into force.

(b) Another Bench of equal strength of the Supreme Court, in New India Assurance Co. Ltd. Vs. Asha Rani and Others, felt it appropriate to reconsider the decision in Satpal Singh''s case supra by observing thus:

14. Then came the new Act and the similar question is raised under it. We find corresponding to Section 95 of the old Act in Section 147 of the new Act. The only difference we find in Section 147(1) of the new Act from Section 95(1) of the old Act is that proviso (ii) which was under the old Act stands deleted and (iii) is renumbered as (ii). There is also amendment to Sub-section (2) to Section 95 of the old Act in Sub-section (2) of Section 147 of the new Act which is in respect of quantum to which we are not concerned.

15. It is because of this deletion of Sub-clause (ii) to the proviso to Section 95(1)(b) of the old Act has been interpreted in New India Assurance Company Vs. Shri Satpal Singh and Others, , to bring liability on the insurer to pay both for the gratuitous passengers and the owner of the goods or his representative travelling in a goods carriage.

(c) On reference, in New India Assurance Co. Ltd. D v. Asha Rani (2003) 2 SCC 223 his lordship Pattanaik, C.J., speaking for a three judge bench, held:

On an erroneous impression this Court came to the conclusion that the insurer would be liable to pay compensation in respect of death or bodily injury caused to either the owner of the goods or his authorised representative when being carried in a goods vehicle the accident occurred. If the Motor Vehicles Amendment Act of 1994 is examined, particularly Section 46, by which the expression "injury to any person" in the original Act stood substituted by the expression "injury to any person including owner of the goods or his authorised representative carried in the vehicle", the conclusion is irresistible that prior to the aforesaid Amendment Act of 1994, even if the widest interpretation is given to the expression "to any person" it will not cover either the owner of the goods or his authorised representative being carried in the vehicle. The objects and reasons of Clause 46 also state that it seeks to amend Section 147 to include owner of the goods or his authorised representative carried in the vehicle for the purposes of liability under the insurance policy. It is no doubt true that sometimes the legislature amends the law by way of amplification and clarification of an inherent position which is there in the statute, but a plain meaning being given to the words used in the statute, as it stood prior to its amendment of 1994, and as it stands subsequent to its amendment in 1994 and bearing in mind the objects and reasons engrafted in the amended provisions referred to earlier, it is difficult for us to construe that the expression "including owner of the goods or his authorized representative carried in the vehicle" which was added to the pre existing expression "injury to any person" is either clarificatory or amplification of the pre-existing statute. On the other hand it clearly demonstrates that the legislature wanted to bring within the sweep of Section 147 and making it compulsory for the insurer to insure even in case of a goods vehicle, the owner of the goods or his authorised representative being carried in a goods vehicle when that vehicle met with an accident and the owner of the goods or his representative either dies or suffers bodily injury. The judgment of this Court in Pushpabai Purshottam Udeshi and Others Vs. Ranjit Ginning and Pressing Co. (P) Ltd. and Another, therefore must be held to have not been correctly decided and the impugned judgment of the Tribunal as well as that of the High Court accordingly are set aside and these appeals are allowed. It is held that the insurer will not be liable for paying compensation to the owner of the goods or his authorised representative on being carried in a goods vehicle when that vehicle meets with an accident and the owner of the goods or his representative dies or suffers any bodily injury.

His lordship S.B. Sinha., J., supplementing the judgment observed thus:

26. In view of the changes in the relevant provisions in the 1988 Act vis-a-vis the 1939 Act, we are of the opinion that the meaning of the words "any person" must also be attributed having regard to the context in which they have been used i.e. "a third party". Keeping in view the provisions of the 1988 Act, we are of the opinion that as the provisions thereof do not enjoin any statutory liability on the owner of a vehicle to get his vehicle insured for any passenger travelling in a goods vehicle, the insurers would not be liable therefor.

27. Furthermore, Sub-clause (i) of Clause (b) of Sub-section (1) of Section 147 speaks of liability which may be incurred by the owner of a vehicle in respect of death of or bodily injury to any person or damage to any property of a third party caused by or arising out of the use of the vehicle in a public place, whereas Sub-clause (ii) thereof deals with liability which may be incurred by the owner of a vehicle against the death of or bodily injury to any passenger of a public service vehicle caused by or arising out of the use of the vehicle in a public place.

(d) In National Insurance Co. Ltd. v. Baljith Kaur2004 (1) TAC 366a co-ordinate three judge bench of the Apex Court, while clarifying the legal position rendered in New India Assurance Co. Ltd. Vs. Asha Rani and Others, , to have prospective effect, and opined thus, at paragraphs 12 and 20.

12. We find ourselves unable, furthermore, to countenance the contention of the respondents that the words "any person" as used in Section 147 of the Motor Vehicles Act, would be rendered otiose by an interpretation that removed gratuitous passengers from the ambit of the same, it was observed by this Court in the case concerning New India Assurance Co. Ltd. v. Asha Rani (supra) that the true purport of the words "any person" is to be found in the liability of the insurer for third party risk, which was sought to be provided for by the enactment.

xxxxxx xxxxx xxxxx 20. It is therefore, manifest that in spite of the amendment of 1994, the effect of the provision contained in Section 147 with respect to persons other than the owner of the goods or his authorized representative remains the same. Although the owner of the goods or his authorized representative would now be covered by the policy of insurance in respect of a goods vehicle, it was not the intention of the legislature to provide for the liability of the insurer with respect to passengers, especially gratuitous passengers, who were neither contemplated at the time the contract of insurance was entered into, nor any premium was paid to the extent of the benefit of insurance to such category of people.

(e) The question as to whether a gratuitous passenger is covered by a statutory insurance policy came up for consideration before the Apex Court in United India Insurance Co. Ltd., Shimla Vs. Tilak Singh and Others, . The facts therein, were that on 31.10.1989, one Rajinder Singh, while riding pillion on a scooter belonging to Balakrishna and insured by United India Insurance Co. Limited, effective for the period 7-3-1989 to 6-3-1990, sold to one Tilak Raj on 23-03-1989, without notice of transfer to the insurer, met with an accident and succumbed to injuries leading to a Claim petition for compensation invoking Section 166 of the Act of 1988. The Policy of Insurance, it was noticed, did not carry an endorsement IMT 70, to cover the liability of the pillion rider. Their lordships, having considered all earlier pronouncements of the Supreme Court over the interpretation of Section 95 of the Motor Vehicles Act, 1939 and Section 147 of the Motor Vehicles Act, 1988, as it stood prior to and after its amendment with effect from 14-11-1994, held thus:

21. In our view, although the observations made in Asha Rani case were in connection with carrying passengers in a goods vehicle, the same would apply with equal force to gratuitous passengers in any other vehicle also. Thus, we must uphold the contention of the appellant Insurance Co. that it owed no liability towards the injuries suffered by the deceased Rajinder Singh who was a pillion rider, as the insurance policy was a statutory policy, and hence it did not cover the risk of death of or bodily injury to a gratuitous passenger.

(f) The contention that the decision in United India Insurance Co. Ltd., Shimla Vs. Tilak Singh and Others, is an obiter dicta, as it was actuated by a misrepresentation of a relevant fact by the Insurance Co. as regards there being no endorsement of IMT 70 on the Policy of Insurance, since the said tariff was not available in the year 1989, and for the first time introduced with effect from 1-7-2002 and onwards, cannot be countenanced. The decision in State of U.P. and Another Vs. Synthetics and Chemicals Ltd. and Another, in support of the contention that the decision in Tilak Singh''s case was without; any argument or reference to the crucial words of the Section and without any citation or authority, is also without merit I say so because, the Judge''s decision in Tilak Singh''s case is based on the fact that there was no endorsement on the insurance policy, accepting additional premium to cover higher liability in respect of the risk of death of or bodily injury to the pillion rider. Having regard to the law declared in Asha Rani''s case (2003) 2 SCC 223 followed by in Baljit Kaur''s case 2004 (1) TAC 366. The principle laid down in United India Insurance Co. Ltd., Shimla Vs. Tilak Singh and Others, , in my opinion is a ratio decidendi, a binding authority upon a subsequent Judge.

(g) In the light of the decisions of the Supreme Court referred to supra, and more appropriately Tilak Singh''s case, the contention advanced by the learned Senior counsel that the expression "any person" in Section 147 of the Act of 1988 includes a gratuitous passenger in an insured vehicle, be it a private car or a two-wheeler, is without merit

(h) Having regard to the authoritative pronouncements of the Supreme Court that the insurer owed no liability towards death of or bodily injury to a gratuitous passenger travelling in a private vehicle, insured with a statutory policy, the reported opinions to the contrary, both of the learned Single Judges and that of Division Bench of this Court must stand impliedly over-ruled.

(10) LIABILITY (INSURANCE POLICY)

A. MFA 8242 to 8249/04:

The nomenclature of the policy of insurance Ex. R 1 is shown as "A policy for Act liability" and the certificate appended to it states "policy ''A'' act only" issued on 27.4.1994 effective for the period from 27.4.1994 to 26.4.1995 (accident occurred on 17.3.1994), the net premium of Rs. 240/- is shown against the word ''basic'' while no premium is paid towards passenger cover IMT 12. The policy of insurance contains the term IMT-12 which reads as under:

Imt 12 Legal Liability of Passengers Excluding Liability for Accidents to employees of the Insured Arising out of the curse of their Employment:

In consideration of an additional premium of Rs.------- and notwithstanding anything to the contrary contained in Section-II-I proviso (c) but subject otherwise to the terms exceptions, conditions and limitations of this policy, the Co. will indemnify Insured against liability at law for compensation (including the law costs of any claimant) for death of or bodily injury to any persons other a person excluded under Section-II-I(b) being carried in or upon or entering or mounting or alighting from the Motor Vehicle but such indemnity is limited as per the provisions of Motor Vehicle Act 1988 in respect of any number of claims in connection with the Motor Vehicle arising out of one cause.

Provided always, that in the event of an accident occurring whilst the motor vehicle is carrying more than the number of persons mentioned in the Schedule hereto as being the licensed carrying capacity of that vehicle in addition to the conductor if any then the Insured shall repay to the Co. rateable proportion of the total amount which would be payable by Co. by reason of this endorsement if not more than the said number of persons were carried in the motor vehicle.

Provided further than in computing the number of persons for the purpose of this endorsement any three children not exceeding 15 years of age will be reckoned as two persons and any children in arms not exceeding 3 years of age will be discharged. Provided also that the provisions of condition 3 of the policy are also applicable to a claim or series of claim under this endorsement.

Provided further that in the even of the policy being cancelled at the request of the Insured no refund of premium paid respect of this endorsement will be allowed Subject otherwise to the terms exceptions, conditions and limitations of this policy.

Clause (1) under the nomenclature "liability to third party" and Clause (4) under the heading "General Exceptions" of the policy of insurance reads thus:

LIABILITY TO THIRD PARTIES:

1. Subject to the Limit of Liability as laid down in the Motor Vehicle Act the Co. will indemnify the Insured in the event of accident caused by or arising out of the use of Motor Vehicle anywhere in India against all sums including claimants cost and expenses which the Insured shall become legally liable to pay in respect of death of or bodily injury to any person and/or damage to any property of Third Party.

GENERAL EXCEPTIONS:

4. Except so far as is necessary to meet the requirements of the Motor Vehicle Act, the Co. shall not be liable in respect of death or bodily injury to any person (other than a passenger carried by reason of or in pursuance of a contract of employment) being carried in or upon or entering or mounting or alighting from

the Motor Vehicle at the time of the occurrence of the event out of which any claim arises.

B. MFA 8647/2004:

The policy of insurance Ex. R 1 bears the nomenclature "policy ''A'' Act only" issued on 22.1.1993 effective for the period from 22.1.93 to 21.1.94 (accident occurred on 24.5.1993). The premium of Rs. 160/- is accepted against the word ''basic'' while no payment against non-passenger cover IMT-12. Clause (4) of the General Exception and Clause (1) of liability to third party is identical to what is noticed supra in MFA.8242 to 8249/2004. The policy, in addition states that liability is as per Motor Vehicles, 1988.

C. MFA 5184/2005:

The copy of the certificate-cum-policy schedule, Ex. R 1 is in relation to a private car (Zone-A) "Policy ''A'' Act only" issued on 4.7.2001 effective for the period from 5.7.2001 to 4.7.2002 (accident occurred on 2.1.2002). The premium of Rs. 509/- is towards liability of public ''basic'' while Rs. 15/- is towards paid driver and Rs. 50/- for third party property damage cover unlimited, totalling to Rs. 574/-.

11. Admittedly, the aforementioned policies of insurance are statutory policies, in other words cover act only. There is no dispute that the standard form for ''A'' policy for act only contains the very same terms and conditions that fall for consideration viz., Clause (1) under liability to third party and Clause (4) of General exceptions, extracted supra.

12. A careful examination of the terms and conditions of ''A'' policy covering act only and that of ''B'' policy covering own damage losses and act liability, (as made available by the learned Sr. counsel) what emerges is that:

i) the liability of the insurer depends upon the terms and conditions as stipulated in the contract of insurance entered into between the insurer and the insured.

ii) The insured is free to enter into a contract of insurance to cover the risk wider than the immediate requirement of the statute, whereby risk to gratuitous passengers could also be covered.

13. Although learned Sr. counsel for the claimants-appellants submits that the words "any person" in Clause (1) above would include an occupant of the car who is gratuitously travelling, I am not impressed for the following reasons:

(a) Section 147(1)(a) does not take into its fold the risk of injury or death of a gratuitous passenger in a private car.

(b) Clause (4) of the General exceptions of the policy of insurance carves out A specific exclusion in respect of liability towards death or bodily injury to any person other than a passenger carried by reason of or in pursuance of a contract of employment, being carried In the car.

14. In the circumstances, there being no endorsement over the policy of insurance for a higher liability to cover the risk of gratuitous passengers in a private car, by accepting a higher premium, the liability of the Insurance Co. is neither unlimited nor higher than the statutory liability fixed u/s 147(1)(a) of the Act.

15. For the very same reasons, the contention that since Section 147 of Motor Vehicles Act 1988, provides for one policy, the two kinds of policies i.e. ''A'' and ''B'' under the India Motor Tariff, is to be treated as void, is unacceptable.

16. In the result, MFA 8242/04 to 8244/04 and MFA 8247/04 to 8249/04 are allowed in part, enhancing the compensation thus:

MFA 8242/04 from Rs. 23,000/- to Rs. 69,500/- MFA 8243/04 from Rs. 22,100/- to Rs. 32,100/- MFA 8244/04 from Rs. 5,000/- to Rs. 35,000/- MFA 8247/04 - Rs. 23,000/- to Rs. 33,000/- MFA 8208/04 from Rs. 10,000/- to Rs. 38,500/- MFA 8249/04 from Rs. 5,000/- to Rs. 15,000/- MFA8245/04 AND 8246/04 are dismissed.

MFA 8647/04 and 5184/05 are allowed. The impugned Judgments and awards dated 5.8.2004 and 19.2.2005, respectively, insofar as they relates to fastening of liability on the appellant to pay the compensation are set-aside and the owner of the offending motor vehicles are liable to pay the compensation.

No costs.

