

**(2007) 01 MAD CK 0060**

**In the Madras High Court**

**Case No :** Civil Miscellaneous Appeal (NPD) No. 295 of 1999 and CMP. No's. 16001 and 3565 of 1999 and 19696 of 2000

National Insurance Co. Ltd., Mettupalayam Branch

APPELLANT

Vs

Rangasamy (dead), Rangamma, Venkatachalapathi and  
Muthuselvan

RESPONDENT

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**Date of Decision :** 05-01-2007

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 2, Order 41 Rule 27  
Motor Vehicles Act, 1988 — Section 170, 173

**Citation :** (2008) ACJ 791 : (2007) 1 MLJ 718

**Hon'ble Judges :** K. Mohan Ram, J

**Bench :** Single Bench

**Advocate :** Kala Ramesh, for the Appellant; Suresh Viswanath, for R2, for the Respondent

**Final Decision :** Allowed

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**Judgement**

K. Mohan Ram, J.—Being aggrieved by the award dated 22.12.1997 passed by the Motor Accident Claims Tribunal (District Judge) Udagamandalam in M.C.O.P. No. 72 of 1993 the insurer has filed the above appeal.

2. The case of respondents 1 and 2 / claimants, who are the parents of the deceased Arul @ Arulselvam, is as follows:

The aunt of the deceased engaged a lorry bearing Registration No. TDS 4147 for transporting her household articles from Coonur to Annur. The deceased as custodian of the household articles loaded the articles in the lorry and travelled in the said lorry as a non-fare passenger. He was seated beside the driver in the cabin of the said lorry. The second respondent was the owner of the lorry and the lorry was driven by the first respondent-driver and the lorry was insured with the appellant herein. While the lorry was proceeding to Annur it went out of control due to rash and negligent driving of the driver and capsized at about 8.30 pm on 01.09.1992 at Gurrency-Coonur Road. The deceased was caught under the front

side door of the said lorry and sustained multiple injuries including head injuries and died on the spot. The deceased was aged about 27 years and was self-employed as a dealer in Automobile spare parts and was earning income of Rs. 2,500/- per month. The claimants/ respondents 1 and 2 herein were depending upon their son. The second respondent as the owner of the lorry and the appellant as the insurer are liable to pay the compensation. The claimants claimed a sum of Rs. 3,00,000/- as compensation.

3. The first respondent-driver and the second respondent-owner of the lorry remained *exparte*.

4. The appellant herein who was the third respondent before the Tribunal alone contested the claim petition by filing a counter statement containing the following averments:

The appellant denied the allegations contained in the claim petition and contended that the accident was not due to any rash and negligent driving of the lorry driver but owing to the circumstances beyond the control of the driver; the age, income and employment of the deceased was not admitted; the deceased was accompanying the goods as non-paying passenger and as such the insurer is not liable to pay any compensation; the driver was not possessing an effective valid driving licence; the terms of the policy has not been complied with and therefore the insurer is not liable to pay any compensation.

5. Before the Tribunal, the second respondent was examined as P.W.1 and one Subramania Chettiyar was examined as P.W.2 and Exs.P-1 to P-5 were marked. On the side of the respondents one Aravind Ponnaiya was examined as R.W.1 and no documents were marked on their side. On a consideration of the evidence on record the Tribunal held that the accident occurred only due to the rash and negligent driving of the lorry by the first respondent-driver and awarded a total compensation of Rs. 2,20,000/- with 12% interest per annum. The above appeal is directed against the said award.

6. The appellant has filed C.M.P. No. 3565 of 1999 under Order 41 Rule 2 of the CPC to raise additional grounds and C.M.P. No. 19696 of 2000 under Order 41 Rule 27 of the CPC to raise additional evidence by producing the Investigation Report dated 28.09.1998 as Annexure-A and claim petitions in M.C.O.P. Nos. 110 and 111 of 1992 on the file of the District Court, Nilgiris at Udagamandalam as Annexures-B and C. In the affidavit filed in support of the above said petitions it is stated that when the appellant tried to contact the owner of the lorry involved in the accident in order to enable them to prosecute the appeal along with it, it came to the knowledge of the appellant that the deceased in the accident, in respect of whose death the claim petition was filed, was himself the owner of the lorry. Suppressing the said fact and by impleading the fourth respondent as the owner of the lorry and by deliberately playing a fraud on the Court the award has been obtained. On coming to know about the fraud the appellant ordered an investigation to be done into the matter and after investigation the Investigator

had submitted a report and as per the report the deceased was the Registered owner and policy holder of the lorry. It is further stated in the affidavit that two other claim petitions in M.C.O.P. Nos. 110 and 111 of 1992, were filed by two persons who were injured in the same accident, before the District Court, Nilgiris at Uthagamandalam and in the said claim petitions the deceased has been shown and impleaded as the owner of the lorry. But the said petitions were dismissed as notice could not be served on the deceased-Arul who was the second respondent in those petitions. The insurer is liable in respect of a third party claim alone and not towards the death of the owner of the lorry. In the said circumstances, the petitions have been filed to raise additional grounds and adduce additional evidence.

7. The second respondent has not chosen to file any counter affidavit controverting the averments contained in the affidavits filed in support of the above Civil Miscellaneous Petitions.

8. Heard Mrs. Kala Ramesh learned Counsel for the appellant and Mr. Suresh Viswanath learned Counsel for the second respondent.

9. The learned Counsel for the appellant relied upon the following decisions:

(i) United India Insurance Co. Ltd. Vs. Rajendra Singh and Others, .

(ii) National Insurance Co. Ltd., Chandigarh Vs. Nicolletta Rohtagi and Others, .

(iii) Order dated 17.01.2001 passed by Mr. Justice K.P. Sivasubramaniam in C.M.A. Nos. 1672 of 1998 and 1098 of 2000.

By relying upon the said decisions, the learned Counsel for the appellant submitted that the policy taken in respect of the vehicle in question is only a third party policy and the insurer is liable to pay compensation only in respect of third party claims alone. The learned Counsel submitted that the maintainability of the claim petition itself is in question. Since the petition has been filed against the provisions of the Motor Vehicles Act the appeal is maintainable. The learned Counsel submitted that the petitions for raising additional grounds and adducing additional evidence have to be allowed as no counter affidavit has been filed by the second respondent and once the petitions are allowed all the defences available can be raised by the appellant. By referring to the investigation report which is sought to be produced as Annexure-A, the learned Counsel submitted that the Registration Certificate relating to the lorry involved in the accident stands in the name of the deceased-Arul and in the records obtained from the Fire Service Department the deceased-Arul is shown as the owner of the lorry and in the First Information Report the name of the driver has not been mentioned. The learned Counsel further submitted that in the goods carriage permit and in the MVI report the deceased has been shown as the owner of the lorry and in the claim petitions-M.C.O.P. Nos. 110 and 111 of 1992 sought to be produced as Annexures B and C the owner of the lorry has been shown as the deceased-Arul and he has been impleaded as the second respondent. Relying

upon the above said documents the learned Counsel submitted that when the second respondent herein has not chosen to file any counter statement denying the averments contained in the affidavit and also the fact that the deceased was the owner of the lorry the above petition should be allowed. She further submitted that the Civil Miscellaneous Appeal itself has to be allowed and remitted back to the Tribunal or in the alternative permission may be given to the appellant to file a Review Application before the Tribunal.

10. Per contra Mr. Suresh Viswanath learned Counsel for the second respondent submitted that neither the Registration Certificate nor the Insurance Policy pertaining to the lorry in question, namely TDS 4147, has been produced before the Tribunal. Though a counter affidavit was filed by the insurer, the averment in the claim petition that one Muthuselvam (second respondent in M.C.O.P.) was the owner of the lorry has not been denied. According to the learned Counsel by merely perusing the Insurance Policy the insurer could have verified and found out as to in whose name the vehicle is registered and who was the policy holder but the insurer had not been diligent enough to verify those particulars and had kept quiet till the filing of the above petitions pending the appeal. According to the learned Counsel the conditions stipulated in Order 41 Rule 27 of the CPC have not been established to receive additional evidence. The learned Counsel submitted that the investigation report is not an authorised one as the Investigator is only a private investigator. According to the learned Counsel unless permission is obtained by the insurer u/s 170 of the Motor Vehicles Act the insurer is not entitled to raise other defences not available to it as per the provisions of the said Act. The learned Counsel relied upon the following decisions,

(i) 2005 (1) LW 669 (Supreme Court) (A.C. Ananthaswamy and Ors. v. Boraiah (dead) by LRs.).

(ii) Gayatri Devi and Others Vs. Shashi Pal Singh, . and submitted that fraud must be specifically pleaded and proved and the plea of fraud cannot be countenanced without any basis.

11. I have carefully considered the submissions made on either side and the materials available on record.

12. In the decision reported in United India Insurance Co. Ltd. Vs. Rajendra Singh and Others, while considering the question as to whether the Motor Accidents Claims Tribunal has power to recall its own award if it is convinced that it had been obtained by a party by fraud or misrepresentations, has observed as follows:

15. It is unrealistic to expect the appellant Company to resist a claim at the first instance on the basis of the fraud because the appellant Company had at that stage no knowledge about the fraud allegedly played by the claimants. If the Insurance Company comes to know of any dubious concoction having been made with the sinister object of extracting a claim for compensation, and if by that

time the award was already passed, it would not be possible for the Company to file a statutory appeal against the award. Not only because of the bar of limitation to file the appeal but the consideration of the appeal even if the delay could be condoned, would be limited to the issues formulated from the pleadings made till then.

16. Therefore, we have no doubt that the remedy to move for recalling the order on the basis of the newly-discovered facts amounting to fraud of high degree, cannot be foreclosed in such a situation. No court or tribunal can be regarded as powerless to recall its own order if it is convinced that the order was wangled through fraud or misrepresentation of such a dimension as would affect the very basis of the claim.

17. The allegation made by the appellant Insurance Company, that the claimants were not involved in the accident which they described in the claim petitions, cannot be brushed aside without further probe into the matter, for the said allegation has not been specifically denied by the claimants when they were called upon to file objections to the applications for recalling of the awards. The claimants then confined their resistance to the plea that the application for recall is not legally maintainable. Therefore, we strongly feel that the claim must be allowed to be resisted, on the ground of fraud now alleged by the Insurance Company. If we fail to afford to the Insurance Company an opportunity to substantiate their contentions it might certainly lead to a serious miscarriage of justice.

18. In the result, we allow these appeals, set-aside the impugned orders and quash the awards passed by the Tribunal in favour of the claimants. We direct the Tribunal to consider the claims put forth by the claimants afresh after affording a reasonable opportunity to the appellant Insurance Company to substantiate their allegations. Opportunity must be afforded to the claimants also to rebut the allegations.

13. In the decision reported in National Insurance Co. Ltd., Chandigarh Vs. Nicolletta Rohtagi and Others, in paragraph 31 it is observed as follows:

So far as obtaining compensation by fraud by the claimant is concerned, it is no longer res integra that fraud vitiates the entire proceeding and in such cases it is open to an insurer to apply to the Tribunal for rectification of award.

14. In the order dated 17.01.2001 passed by Mr. Justice K.P. Sivasubramaniam in C.M.A. Nos. 1672 of 1998 and 1098 of 2000 the Learned Judge by following the decision reported in United India Insurance Co. Ltd. Vs. Rajendra Singh and Others, has observed as follows:

11. In the present case, the liability has been fixed on the Insurance Company by the Tribunal on an assumption as though the Insurance cover was available to the vehicle. According to the Insurance Company it was only later, after the award has been passed it was found that the copy of the policy furnished by the

claimant was found to be fabricated. Therefore, in the interest of justice and as pointed out by the Supreme Court that the Insurance Company is dealing with the public money, there has to be a proper adjudication as to whether the policy procured from the claimant was genuine or not. Both sides have to be provided with opportunity to substantiate their contentions.

Having observed so, the Learned Judge allowed C.M.A. No. 1098 of 2000 and remanded it for fresh enquiry to the Tribunal and to communicate its finding to this Court.

15. The learned Counsel for the second respondent relied upon the following observation of the Apex Court made in *Gayatri Devi and Others Vs. Shashi Pal Singh*, :

16. The learned Counsel for the respondent relied upon the judgement of this Court in *S.P. Chengalvaraya Naidu (dead) by L.Rs. Vs. Jagannath (dead) by L.Rs. and others*, and *United India Insurance Co. Ltd. Vs. Rajendra Singh and Others*, , to contend that there was a fraud played upon the Court and the fraud unravels everything. As a general proposition, the proposition is right. But fraud must necessarily be pleaded and proved. In the entire history of litigation nothing was pleaded, much less proved, as fraud. We cannot countenance the plea of fraud without any basis.

He also relied upon the following observation of the Apex Court made in 2005 (1) LW 669 (referred to *supra*):

5. ... The present suit has been instituted to set aside the *ex parte* decree on the ground that the decree was obtained by fraud and misrepresentation. Fraud is to be pleaded and proved. To prove fraud, it must be proved that representation made was false to the knowledge of the party making such representation or that the party could have no reasonable belief that it was true. The level of proof required in such cases is extremely higher. An ambiguous statement cannot *per se* make the representor guilty of fraud. To prove a case of fraud, it must be proved that the representation made was false to the knowledge of the party making such representation.

6. In the present case, there is no evidence of fraud. The present case is a matter of non-service of summons. In the present case, there is a bare allegation of fraud.

The learned Counsel also relied upon the following observation of the Apex Court contained in paragraph 32 made in 2002 (4) C.T.C. 243 (referred to *supra*):

32. For the aforesaid reasons, our answer to the question is that, even if no appeal is preferred u/s 173 of 1988 Act by an insured against the award of a Tribunal, it is not permissible for an insurer to file an appeal questioning the quantum of compensation as well as finding as regard negligence or contributory negligence of the offending vehicle.

16. The learned Counsel for the second respondent vehemently contended that it is not permissible for the appellant to file an appeal questioning the quantum of compensation as well as finding as regards the negligence or contributing negligence of offending vehicle, even though no appeal has been preferred by the insured against the award of the Tribunal. He further contended that as laid down by the Apex Court in the above said two decisions viz. 2005 (1) L W 669 (SC) (referred to supra) and Gayatri Devi and Others Vs. Shashi Pal Singh, fraud must be specifically pleaded and proved and plea of fraud cannot be countenanced without any basis and according to the learned Counsel there is absolutely no basis in this case for countenancing the plea of fraud put-forth by the appellant.

17. The learned Counsel for the appellant submitted that the claimants / respondents 1 and 2 herein by suppressing the fact that the lorry involved in the accident was owned by their deceased son and the Insurance Policy also stood in his name and by falsely alleging that the vehicle was owned by the third respondent-Muthuselvam have played a fraud upon the Tribunal and obtained a decree and as laid down by the Apex Court in 2002 (4) C.T.C. 243 (referred to supra) fraud vitiates the entire proceeding and in such cases it is open to an insurer to apply to the Tribunal for rectification of award but in this case though the insurer had not approached the Tribunal with a Rectification Petition the above appeal has been filed and petitions have been filed to adduce additional evidence and to adduce additional grounds and this Court in the interest of the justice and to avoid miscarriage of justice has to set-aside the award and permit the appellant to approach the Tribunal by way of a Rectification Petition or Review Application irrespective of the expiry of the period of limitation.

18. It is pertinent to point out that though various averments and allegations have been made in the affidavit filed in support of the above Civil Miscellaneous Appeal and it has been specifically alleged that the lorry bearing Registration No. TDS 4147 involved in the accident was owned by the deceased son of respondents 1 and 2 and he was driving the vehicle in question and the third respondent was not the owner of the vehicle the allegations have not been denied by respondents 1 and 2 by filing a counter affidavit. Therefore the contentions put forth by the learned Counsel for the appellant, which are based on the law laid down by the Apex Court and this Court in the decisions cited supra merit acceptance.

19. As laid down by the Apex Court in the decision reported in United India Insurance Co. Ltd. Vs. Rajendra Singh and Others, if the Insurance Company comes to know about any of the dubious concoction having been made with the sinister object of extracting a claim for compensation, and if by that time the award was already passed and even if any appeal is filed by the Insurance Company, the consideration of the appeal would be limited to the issues formulated from the pleadings made till then. Therefore, the remedy to move for recalling the order on the basis of the newly-discovered facts amounting to fraud

of high degree, cannot be foreclosed in such a situation. No Court or Tribunal can be regarded as powerless to recall its own order if it is convinced that the order was obtained by fraud or misrepresentation and especially when the Insurance Companies are dealing with the public money. Therefore this Court is of the considered view that the appellant should be given an opportunity to establish the alleged fraud committed by the claimants by raising appropriate pleadings and adducing available evidence before the Tribunal.

20. In the considered view of this Court to avoid miscarriage of justice it is just and proper to allow the appeal. In the result, the appeal is allowed and the appeal is remanded for fresh enquiry to the Tribunal. The Tribunal shall consider the claims put forth by the claimants afresh after affording a reasonable opportunity to the appellant-Insurance Company to substantiate their allegations by additional pleadings and by adducing oral and documentary evidence and opportunity must be afforded to the claimants also to rebut the allegations. It is made clear that while disposing of the claim afresh, the Tribunal shall not be influenced by any of the observations, if any, made by this Court on the merits of the allegations.

21. In view of the above, no orders are necessary in C.M.P. Nos. 3565 of 1999 and 19696 of 2000. The Tribunal is further directed to dispose of the claim petition as expeditiously as possible preferably within a period of three months from the date of receipt of a copy of this judgement. The parties are directed to appear before the Tribunal on 29.01.2007. No costs. Consequently the connected CMPs are closed.