

(2008) 11 KL CK 0037

In the High Court Of Kerala

Case No : M.A.C.A. No"s. 612 and 613 of 2006

Pournami

APPELLANT

Vs

Sandhya Sundheer and Another

RESPONDENT

Date of Decision : 25-11-2008

Acts Referred:

Central Motor Vehicles Rules, 1989 — Rule 123
Motor Vehicles Act, 1988 — Section 128, 149, 166
Penal Code, 1860 (IPC) — Section 279, 337, 338

Citation : (2009) ACJ 1291 : (2008) 4 ILR (Ker) 757

Hon'ble Judges : Harun-ul-Rashid, J;C.N. Ramchandran Nair, J

Bench : Division Bench

Advocate : N. Neelakantan Elayath and P.V. Elias, for the Appellant; K.K.M. Sheriff, A.A. Ziyad Rahman, C.K. Thanu Pillai, T.K. Thanu Pillai, T.K. Shaij Raj, Sukul Khader and Smitha Sukumar, G.P., for the Respondent

Judgement

C.N. Ramchandran Nair, J.—The Director General of Police, Thiruvananthapuram and the Transport Commissioner, Thiruvananthapuram are impleaded as additional respondents in these appeals. Government Pleader takes notice for additional respondents.

2. The appellants are husband and wife who while travelling along with their two children aged four years and two years on a motor bike met with an accident on 12.4.2002 causing injury to three of them. The bike in which the appellants were travelling from Perumbavoor towards east in the Munnar Road was knocked down by a car. While both the appellants and one child sustained injuries, the other child escaped unhurt. Since injury to the child was minor in nature, the insurance company offered compensation and settled the liability. However, when the appellants filed separate claim petitions, the same was resisted by the insurance company of the offending vehicle, among other things, on the ground that accident is on account of contributory negligence of the rider of the bike by taking more than one pillion rider on the motor bike. Learned Motor Accidents Claims Tribunal though determined compensation of Rs. 2,06,500 to the

appellant in M.A.C.A. No. 613 of 2006 and Rs. 29,500 to the appellant in M.A.C.A. No. 612 of 2006, it exonerated the owner and insurer of the offending vehicle on the ground that the accident was on account of contributory negligence on the part of the rider of the bike, in taking more than one pillion rider in violation of Section 128 of the Motor Vehicles Act, 1988. The appeals are filed against the order of the Tribunal dismissing the claim petitions. We have heard counsel appearing for the appellants, standing counsel for insurance company and counsel appearing for the registered owner of the car.

3. Counsel for the appellant contended that the order of the Tribunal is not tenable because the accident was caused on account of the negligence of the driver of the car which is evident from the criminal case charged against the driver of the car u/s 279 read with Sections 337 and 338, Indian Penal Code. It is also conceded that the driver of the car pleaded guilty to the charges levelled against him, remitted fine and escaped. The Tribunal relied on the Division Bench judgments of Madras High Court in Managing Director, Tamil Nadu State Transport Corporation, (Coimbatore Division-I) Ltd. Vs. Abdul Salam, Jameela, Laila, Sainabha, Kabeer, Meharaj and P. Selvaraj, and that of Karnataka High Court in P.S. Somaiah and Another Vs. The Director, Bangalore Diary and Others, and held that the accident is on account of contributory negligence by the rider of motor bike and so much so, compensation is not payable by the insurer or insured of the offending vehicle.

4. Contributory negligence is a defence available to the respondents in a claim petition filed u/s 166 of the Motor Vehicles Act. However, it is for the respondents to prove contributory negligence if the claim petition has to be successfully resisted. Section 128 of the Motor Vehicles Act prohibits the rider of a motor cycle from taking more than one pillion rider on it. For easy reference, we extract hereunder Section 128 of the Motor Vehicles Act:

128. Safety measures for drivers and pillion riders.--(1) No. driver of a two-wheeled motor cycle shall carry more than one person in addition to himself on the motor cycle and No. such person shall be carried otherwise than sitting on a proper seat securely fixed to the motor cycle behind the driver's seat with appropriate safety measures.

5. A motor bike with seating capacity for two is obviously designed to carry only two passengers. In the first place, there is No. space in the bike to be shared by any other person. If the rider sacrifices his comfortable seat at least in part to accommodate a third passenger, certainly, he will not be able to control the bike. Besides this, since the bike is designed to carry only two passengers, additional weight on account of third passenger will affect its stability. However, in violation of Section 128 of the Motor Vehicles Act, three passengers and very often children are taken in two-wheelers along with rider and pillion rider as in this case. The Supreme Court in the decision in National Insurance Co. Ltd. Vs. Anjana Shyam and Others, , held that the insurance company's liability u/s 149 of Motor Vehicles Act even to third parties is not in excess of the seating capacity

of the vehicle involved in the accident. So much so, under No. circumstances more than two persons travelling in a bike involved in the accident are entitled to compensation. Even though Section 128 of the Motor Vehicles Act bars the driver of a motor bike from taking more than one pillion rider and though the provision is more often violated than observed, the motor vehicle and the police authorities do not take serious note of this. May be only petty traffic cases are booked against such people and matter is settled on payment of paltry sum of fine.

6. In view of the large number of accidents involving two-wheelers, we feel in public interest, the government authorities should be ordered to enforce the law strictly. No. purpose will be served by booking petty cases and releasing the offenders on collection of small amounts of fine. Even though strict enforcement of law involves absolute prohibition against the rider of the motor bike taking more than one pillion rider, considering ground realities we feel a small baby can be permitted to be carried in the lap of the pillion rider without sacrificing any seating space in the bike which is only for two passengers. We, therefore, direct the Director General of Police and the Transport Commissioner to instruct the police and the motor vehicle authorities to seize two-wheelers taking more than one pillion rider and at the maximum a small baby and take stern action against those committing violation of Section 128 of the Motor Vehicles Act. We make it clear that vehicles found to be used in violation of the said section should not be allowed to continue the journey with more than one pillion rider and at the maximum with one small baby who can be accommodated in the lap of the pillion rider, i.e., without sharing seating space with the child. First offence should be entered in the R.C. and for repeated offence serious action should be taken like prosecution before court, cancellation of registration, etc. whichever is permissible under law.

7. Incidentally, it has also come to our notice that the motor bikes in the market do not have protective safety measures in terms of Rule 123 of the Central Motor Vehicles Rules, 1989 (hereinafter referred to as "the Rules") which is as follows:

123. Safety devices in motor cycle.--No. motor cycle which has provision for pillion rider shall be constructed without provision for a permanent hand grip on the side or behind the driver's seat and a foot rest and a protective device covering not less than half of the rear wheel so as to prevent the clothes of the person sitting on the pillion from being entangled in the wheel.

We have noticed that there is No. hand grip on either side of the motor cycle or behind the driver's seat, but it is seen fixed behind the seat of pillion rider which is not what is expected under Rule 123 of the Rules. Compliance of Rule 123 of the Rules will involve fixing of hand grip in between two seats, that is, between the seat of the rider and pillion rider and not behind both seats. If it has to serve the purpose, it should be in the middle of the two seats or at least on either side of the pillion rider and certainly not behind the pillion rider. The Transport Commissioner will issue instructions to the Regional Transport Officers prohibiting registration of two-wheelers which do not comply with Rule 123 of the Rules. The

Transport Commissioner is also directed to get a survey conducted regarding the two-wheeler generally brought for registration and the compliance of such vehicles to Rule 123 of the rules.

8. So far as entitlement of compensation for the appellants is concerned, we agree with the view taken by the Tribunal that contributory negligence is presumed when the motor bike involved in the accident is overloaded with two additional passengers over and above the permitted two passengers. However, in this case we notice that the children travelling along with the parents in the bike were of tender age and their weight would not have made the vehicle unstable. Therefore, on facts we estimate contributory negligence at 25 per cent and uphold entitlement of the appellants for getting the balance compensation fixed by the learned Tribunal from the insured and the insurer of the offending vehicle. Since the offending vehicle was the car and the driver remains charge-sheeted and pleaded guilty, the insurer and insured are liable to pay compensation. Since the Apex Court has held that third party claim has to be borne by the insurer even if the vehicle was carrying more than the permitted number of passengers, the insurer is liable to pay compensation to the appellant.

The appellants are, therefore, entitled to 75 per cent of the compensation which the insurance company is directed to deposit with 7.5 per cent interest from the date of application till date of deposit. The appeals are disposed of as above. The Government Pleader will communicate this judgment to the additional respondents. The additional respondents are directed to file report regarding the action taken by them within 1 month from today. Post on 5.1.2009 to report compliance.