

(2007) 04 MAD CK 0294

In the Madras High Court

Case No : C.M.A. (MD) No. 894 and C.M.P. (MD) No. 11311 of 1999

S.V. Durairajan and Another

APPELLANT

Vs

Poonjolai Janaki and Others

RESPONDENT

Date of Decision : 23-04-2007

Acts Referred:

Motor Vehicles Act, 1988 — Section 149(2), 170

Citation : (2009) ACJ 776

Hon'ble Judges : P.R. Shivakumar, J

Bench : Single Bench

Advocate : R.S. Ramanathan, for the Appellant; G. Ethirajulu, for the Respondent

Final Decision : Dismissed

Judgement

P.R. Shivakumar, J.—This civil miscellaneous appeal is directed against the award dated 28.1.1999 passed by learned Motor Accidents Claims Tribunal (Second Additional Subordinate Judge), Trichy in M.C.O.P. No. 1360 of 1996 whereby a sum of Rs. 2,52,000 was awarded as compensation to the claimants therein, for the death of one Arumugam, the husband of the claimant No. 1 and father of the other claimants. The said amount was directed to be paid by the owner and insurer of the offending vehicle who are the appellants herein with interest at the rate of 12 per cent per annum from the date of claim till realization and proportionate cost.

2. It was the case of the respondents-claimants before the Tribunal that one Arumugam, the husband of the respondent claimant No. 1 was knocked down by the lorry bearing registration No. TMT 7279 on 22.5.1996 at about 5.30 p.m., while he was trying to cross the road near Thuvaakudi in his TVS-50 moped. The further contention of the respondents-claimants before the Tribunal was that the deceased proceeded in the direction of west to east and was trying to cross the road at the place of accident; that the above said lorry which also came in the very same direction was driven by its driver at a high speed with rashness and

negligence and that due to such reckless driving of the lorry by its driver, same hit the deceased as a result of which, he died on the spot instantaneously. The further contention of the respondents-claimants before the Tribunal was that the deceased was a businessman running an industrial establishment in the name of "Subramaniam Industries" in which contract works for the boiler company had been undertaken; that the deceased was having an annual income of Rs. 1,25,000; that the respondents-claimants, wife and children of the deceased, suffered loss of support and dependency due to the death of the deceased in the accident and hence were entitled to claim compensation from the appellants; that as per the assessment of the respondents-claimants, they were entitled to recover a sum of Rs. 4,00,000 with future interest and costs from the appellant-respondent No. 1 in his capacity as the owner of the offending vehicle and that the respondent No. 2 being the insurer of the offending vehicle at the relevant point of time was liable to shoulder the liability of the insured, namely, the owner of the offending vehicle (appellant No. 1) and make payment of compensation on behalf of the appellant-respondent No. 1.

3. In support of the above said contentions made in the claim petition, the respondents-claimants examined two witnesses as PWs 1 and 2 and relied on three documents marked as Exhs. A1 to A3.

4. The appellant-respondent No. 1 did not file a separate counter-statement, but adopted the counter-statement filed by the appellant-respondent No. 2. They jointly resisted the claim made by the claimants denying the petition averments regarding the manner in which the accident took place, negligence on the part of the driver of the lorry, the age and occupation of the deceased, income of the deceased and the reasonableness of the amount claimed as compensation under various heads. It was the further contention of the appellants-respondents before the Tribunal that the negligence of deceased was the sole cause of the accident and hence the respondents-claimants were not entitled to claim any compensation based on the theory of fault; that the petition was bad for non-joinder of necessary parties insofar as the insurer of the moped was not made a party to the proceedings and that the petition was liable to an outright dismissal with costs. No witness was examined and no document was marked on the side of the appellants-respondents before the Tribunal.

5. The Claims Tribunal, after recording evidence, heard the arguments advanced on either side, considered the materials on record and upon such a consideration, found the driver of the lorry to be at fault and held the appellants-respondents, as the owner and insurer of the offending vehicle, liable to compensate the legal representatives and dependants of the deceased. Holding that the deceased was aged about 65 years at the time of accident and was having an annual income of Rs. 72,000, the Tribunal assessed the dependency at Rs. 48,000, applied the multiplier "5" and awarded a total sum of Rs. 2,52,000 as compensation which amount was directed to be paid with an interest at the rate of 12 per cent per annum from the date of claim till realization.

6. Challenging the award of the Tribunal, the owner and insurer of the offending vehicle have brought forth this civil miscellaneous appeal before this Court.

7. The arguments advanced on either side have been heard and this Court paid its anxious considerations to the same.

8. Learned Counsel for the respondents has raised a preliminary objection regarding the maintainability of a joint appeal by the insured and the insurer. His further contention is that the insurer cannot maintain an appeal challenging the award of the Tribunal on merits and that in the absence of written permission to the Tribunal read with Section 170 of the Motor Vehicles Act, 1988, the challenge that can be made by the insurer should be restricted to the grounds available to such insurer u/s 149(2). In short, the preliminary objection raised on behalf of the respondents seems to be that a joint appeal by the owner of the offending vehicle and the insurer is not maintainable. In support of his contention on the preliminary objection, the learned Counsel for the respondents relied on two judgments *Chinnama George and Others Vs. N.K. Raju and Another*, and *R. Mannakatti v. M. Subramanian* 2006 ACJ 862 (SC).

In the former case, Hon^{ble} Supreme Court made the following observations:

Admittedly, none of the grounds as given in Sub-section (2) of Section 149 exist for the insurer to defend the claims petition. That being so, no right existed in the insurer to file appeal against the award of the Claims Tribunal. However, by adding N.K. Raju, the owner as co-appellant, an appeal was filed in the High Court which led to the impugned judgment. None of the grounds on which the insurer could defend the claims petition was the subject-matter of the appeal as far as the insurer is concerned. We have already noticed above that we have not been able to figure out from the impugned judgment as to how the owner felt aggrieved by the award of Claims Tribunal. The impugned judgment does not reflect any grievance of the owner or even that of the driver of the offending bus against the award of the Claims Tribunal. The insurer by associating the owner or the driver in the appeal, when the owner or the driver is not an aggrieved person, cannot be allowed to mock at the law which prohibits the insurer from filing any appeal except on the limited grounds on which it could defend the claims petition. We cannot put our stamp of approval as to the validity of the appeal by the insurer merely by associating the insured. Provision of law cannot be undermined in this way. We have to give effect to the real purpose to the provision of law relating to the award of compensation In respect of the accident arising out of the use of the motor vehicle and cannot permit the insurer to give him the right to defend or appeal on grounds not permitted by law by a backdoor method. Any other interpretation will produce unjust results and open the gates for the insurer to challenge any award. We have to adopt a purposive approach which would not defeat the broad purpose of the Act. The court has to give effect to true object of the Act by adopting a purposive approach.

In the latter case, the Hon^{ble} Supreme Court extracted two passages from an

earlier judgment of that court pronounced in National Insurance Co. Ltd., Chandigarh Vs. Nicolletta Rohtagi and Others, and observed that in view of the principles laid down therein the insurer could not prefer an appeal, even if the owner of the vehicle joined him as a party-appellant.

9. As an answer to the above contention raised by the respondents-claimants that a joint appeal by the owner and insurer of the offending vehicle is not maintainable, learned Counsel for appellant-respondent No. 2 relied on the judgment of the Hon"ble Supreme Court pronounced in Narendra Kumar and Another Vs. Yarenissa and Others, , wherein it was observed as follows:

(7)...even in the case of a joint appeal by insurer and owner of offending vehicle, if an award has been made against the tortfeasors as well as the insurer, even though an appeal filed by the insurer is not competent, it may not be dismissed as such. The tortfeasor can proceed with the appeal after the cause-title is suitably amended by deleting the name of the insurer.

(Emphasis supplied)

The learned Counsel also relied on a common judgment of the Hon"ble Apex Court pronounced in H.S. Ahammed Hussain and Another Vs. Irfan Ahammed and Another, . In the said judgment, the Hon"ble Supreme Court has expressed the similar view and held that in such cases, the appeal preferred by the insured should be proceeded on merit after deleting the insurer from the array of parties and judgment may be delivered.

10. Learned Counsel for the respondent-appellant No. 2 would contend that the application of the ratio found in the judgments relied on by the claimants can be applied only in cases wherein the real appellant happened to be the insurance company and in order to get over the difficulty of maintaining the appeal by the insurance company on grounds other than those stipulated u/s 149(2) of the Motor Vehicles Act, the insured, owner of the vehicle has been formally made a party-appellant. Taking the court to the observations made in the case of National Insurance Co. Ltd., Chandigarh Vs. Nicolletta Rohtagi and Others, , that had been relied on in R. Mannakatti v. M. Subramanian 2006 ACJ 862 (SC), the learned Counsel for the appellant No. 2 would contend that the relevant paras 25 and 26 of the said judgment of the Hon"ble Supreme Court simply dealt with the right of the insurance company to file an appeal on grounds other than those mentioned in Section 149(2) of the Motor Vehicles Act in the absence of an order being obtained from the Tribunal u/s 170 of the Act permitting the insurer to avail the grounds of defence available to the insured. It is his further contention that in the said case, the Hon"ble Apex Court did not lay down a strict proposition that a joint appeal by the insurer and the insured is not maintainable in all circumstances and that the only definite proposition was that the insurer, in the absence of permission u/s 170 of Motor Vehicles Act was not entitled to maintain an appeal on merits.

11. This court, after going through the said passages, is convinced with the

rationale in the submissions made by the learned Counsel for appellant No. 2. The Hon''ble Supreme Court in Narendra Kumar and Another Vs. Yarenissa and Others, , in unambiguous terms, has observed that a joint appeal preferred by the insurer and the insured, owner of the offending vehicle, cannot be rejected and that the proper course to be adopted in such cases is to decide the appeal of the insured, owner of the offending vehicle, after deletion of the insurer's name from the cause-title.

12. In H.S. Ahammed Hussain and Another Vs. Irfan Ahammed and Another, , relying on Narendra Kumar and Another Vs. Yarenissa and Others, , the Hon''ble Supreme Court has made the following observation:

(4)...we do not find any merit in the submission that the joint appeal by the insurer as well as the insured was not maintainable. In such an eventuality, the course which a court should adopt is as noticed in the case of Narendra Kumar (supra), to delete the name of the insurer from the cause-title and proceed with the appeal of the insured and decide the same on merits.

(Emphasis supplied)

13. The judgment cited supra and the judgment in R. Mannakatti v. M. Subramanian 2006 ACJ 862 , are the judgments of co-equal benches of the Hon''ble Apex Court. A reading of the observation made in R. Mannakatti's case (supra) reveals that the actual appellant in the said case was the insurer and the owner of the offending vehicle had been simply joined by the insurer as a party-appellant. That happened to be the reason why the Hon''ble Supreme Court in the said case chose to observe that the appeal by the insurer on grounds other than those mentioned in Section 149(2) of the Motor Vehicles Act was not maintainable even if the owner of the vehicle was associated as a party-appellant. When the above said observation is considered in the light of the observations made by the Hon''ble Supreme Court in Narendra Kumar's case (supra) and H.S. Ahammed Hussain 's case (supra), one can come to a conclusion that though it may appear at the first instance to be conflicting, a close study of the said judgments will reveal that it is not so. In case of joint appeals by the owner of the offending vehicle and the insurer, a test is to be applied to find out who is the real appellant. If the real appellant happens to be the insurer, then the case of R. Mannakatti v. M. Subramanian 2006 ACJ 862, should be applied and the appeal should be dismissed as not maintainable. If it transpires that the insured, owner of the offending vehicle, was not a pro forma appellant but a real appellant, then the ratio enunciated in Narendra Kumar's case (supra) and H.S. Ahammed Hussain's case (supra) should be applied and the case must be proceeded and decided on merit, after deletion of the insurer from the array of parties.

14. There would not be any difficulty in coming to the conclusion that the insurance company is the real appellant and the insured, owner of the offending vehicle, has simply been made to join with the insurance company as a party

appellant, if the owner of the offending vehicle did not contest the case before the Tribunal and remained ex parte, coupled with the fact that the insurance company did not get the necessary permission u/s 170 of the Act before the Tribunal. In such cases, it can be easily inferred that the insurance company, in order to get over the difficulty of maintaining its appeal on merits, has simply co-opted the owner of the vehicle as a party appellant. Then such appeal shall fail as the same cannot be maintained. Difficulty may arise when the insured, owner of the vehicle, did in fact contest the claim before the Tribunal and he joins with the insurer in preferring an appeal against the award. In such cases, when the insured, owner of the vehicle, comes forward with a plea that his appeal can be heard and decided after deleting the insurance company from the array of parties, the same shall be a point to be taken in favour of the maintainability of the appeal by the insured. The reason being no proceedings shall be defeated for the reason that there is mis-joinder of parties. Simply because the insured, owner of the offending vehicle, has chosen to join with the insurer and files a joint appeal challenging the award as a person aggrieved by the award, he cannot be penalised and denied his right of appeal. In such an eventuality, the court must lean towards the maintainability of the appeal by the insured, owner of the offending vehicle and decide the case on merit, of course after deleting the name of the insurer from the array of parties. On the other hand, if no such prayer for permitting to proceed with the appeal on behalf of the owner of the offending vehicle alone after deleting the name of the insurer from the array of parties is forthcoming, it can be informed that the insurer and not the insured who is the real appellant and the appeal has to be held not maintainable. If the appeal is filed engaging a single advocate, that too, an insurance panel lawyer then the same will give as to a presumption, of course a rebuttable one that the real appellant is the insurer.

15. Applying the above test to the instant case, this Court comes to the conclusion that the insurer and not the insured, who is the actual appellant in this case for the following reasons:

The appeal was originally filed engaging one and the same advocate to represent the insured and the insurer. At that point of time, Madurai Bench of Madras High Court had not been constituted. Subsequently, after the constitution of Madurai Bench and transfer of the appeal to this Bench, fresh vakalat was filed by Mr. R.S. Ramanathan, Advocate for the appellant insurer alone. No fresh vakalat was filed for the insured-appellant No. 1. In fact, it was Mr. R.S. Ramanathan, Advocate holding vakalat for the insurer alone, who came forward with the plea that the appellant No. 1 could be permitted to proceed with the appeal after deleting the name of the insurer from the array of parties. This court, after going through the records, is able to find that the said advocate has not been authorised to represent the insured, appellant No. 1. After the constitution of Madurai Bench and consequential transfer of the appeal to this Bench, for several hearings, there was no representation for the appellants. At last only on 19.7.2006 Mr. R.S. Ramanathan, the present counsel for the appellant No. 1 filed

a fresh vakalat on behalf of the insurer alone. The absence of representation on behalf of appellant No. 1, viz., the insured, owner of the offending vehicle, remained a continuing affair. It was only Mr. R.S. Ramanathan, learned Counsel for the appellant No. 2 who raised the above said contentions that the appellant No. 1, owner, could be permitted to pursue the appeal after deleting the name of the insurer from the array of parties. From the said fact, it would be quite clear that the real appellant is the insurance company and not the insured, owner of the vehicle. Therefore, it is a fit case in which it can be held that the real appellant is the insurer and not the insured, owner of the offending vehicle. Therefore, the ratio enunciated in Narendra Kumar's case and H.S. Ahammed Hussain 's case is not applicable to the instant case. The principle laid down in R. Mannakatti 's case alone can be applied to the facts of this case. In view of the above said observation, this Court comes to the further conclusion that the real appellant is the insurer-appellant No. 2 who has simply added the insured as a co-appellant (appellant No. 1) and that hence the appeal is not maintainable.

16. In view of the finding that the appeal is not maintainable, there is no need to consider the other aspect of the case on merits and in fact, such a consideration after recording a finding that the appeal is not maintainable, shall be improper and unsustainable. For all the reasons stated above, this Court is of the view that the appeal is not maintainable and hence the same deserves dismissal in limine with costs.

17. In the result, this civil miscellaneous appeal is dismissed with costs. Consequently, connected miscellaneous petition is also dismissed.