

(2008) 12 MAD CK 0226

In the Madras High Court

Case No : C.M.A. No's. 2564 and 2565 of 2003

The Branch Manager, National Insurance Co. Ltd.

APPELLANT

Vs

M. Khader Basha, P. Krishnan and S.K. Basha

RESPONDENT

Date of Decision : 02-12-2008

Acts Referred:

Motor Vehicles Act, 1939 — Section 109A

Motor Vehicles Act, 1988 — Section 147(1), 163, 170, 93

Citation : (2008) 12 MAD CK 0226

Hon'ble Judges : V. Periyakaruppiah, J

Bench : Single Bench

Advocate : N. Vijayaraghavan, for the Appellant; P. Mani, for 1st Respondent and V. Murali, for 2nd Respondent, for the Respondent

Final Decision : Dismissed

Judgement

V. Periyakaruppiah, J.—The Civil Miscellaneous Appeal No. 2564 of 2003 is directed against the award passed by the lower Court in M.A.C.T.O.P. No. 1117 of 2001 dated 31.01.2002, preferred by the Insurance Company, in awarding a sum of Rs. 1,00,000/- with subsequent interest and cost in favour of the claimant.

2. The brief facts submitted by the claimant before the lower Court are as follows:

(i) The claimant was working as a Medical Imaging Technologist under Dr. Immanuel of Bharat Scans Pvt. Ltd. at Guindy. He was a healthy man of 27 years old and was earning a sum of Rs. 5,000/- per month. On 14.08.2000 at 10.00 p.m. the claimant was proceeding in a Bajaj Chetak Scooter bearing Registration No. TN 29 V 2075 from Krishnagiri Town to his residence at Krishnagiri, with one pillion rider by name Krishnan. Both of them went to Krishnagiri town to purchase medicines for the claimant's father. While they were crossing Salem ? Bangalore Bye-Pass road, a car coming from Bangalore in a high speed, dashed against the Scooter and thus, the accident happened. The claimant was taken to the Government Hospital, Krishnagiri, first and was later referred to other hospital for better treatment. The claimant took treatment at A.R.K. Nursing

Home as in patient from 14.08.2000. Since he was required to take further treatment, he applied for long leave and this resulted in his termination from the job. Thus, the accident had resulted in loss of earning also. For all the damages caused to the claimant, under various heads, he estimated the claim for a sum of Rs. 7,75,300/-, but restricted his claim to a sum of Rs. 4,00,000/-.

3. The Civil Miscellaneous Appeal No. 2565 of 2003 is directed against the award passed by the lower Court in M.C.O.P. No. 1118 of 2001 dated 31.01.2002, preferred by the Insurance Company, in awarding a sum of Rs. 50,000/- with subsequent interest and cost in favour of the claimant.

4. The brief facts put forth by the claimant before the lower Court are as follows:

(i) The claimant was working as a Manager under Fransis Xavier, Proprietor, M/s. Lords Cable Net Work, Krishnagiri, and was earning a salary of Rs. 3,000/- per month. He was a pillion rider in the scooter driven by the petitioner in M.A.C.T.O.P. No. 1117 of 2001. In the accident that occurred on 14.08.2000 in the Salem ? Bangalore Bye-pass road, this claimant also sustained injuries. The claimant was first treated at the Government Hospital, Krishnagiri, and then at Sri Gokulam Hospital, Salem. The claimant sustained multiple injuries due to which he is unable to sit, stand, squat, bend and walk and thus he is disabled. Though the claimant estimated his claim at a sum of Rs. 3,61,800/-, he restricted it to a sum of Rs. 1,50,000/-.

5. In both the claim petitions, the 1st respondent filed a counter affidavit and contended that only with his permission, the claimant in M.A.C.T.O.P. No. 1117 of 2001 was riding his two wheeler; that the vehicle was insured with the 2nd respondent and that the accident had occurred at the time and in the manner claimed by the claimants in both the O.Ps. The 2nd respondent in both the claim petitions, viz. the insurance company, filed a counter and submitted that the two wheeler was not insured with it at the time of the accident; the driver of the two wheeler did not possess a valid driving licence; that the owner and insurer of the car which hit and ran are the necessary parties and that they are only liable to compensate the loss and that this respondent is in no way responsible to compensate the damage and in any event, the compensation claimed by both the claimants are on the higher side.

6. The lower Court, clubbed both the claim petitions together since they arose out of one and the same accident and after appraisal of the evidence, had passed an award for a sum of Rs. 1,00,000/- and Rs. 50,000/- respectively with subsequent interest and proportionate costs in favour of the claimants in both the claim petitions. Aggrieved against the said award passed by the lower Court, the insurance company had preferred both the appeals.

7. Heard the learned Counsel for the appellant and the respondents/claimants in both the appeals.

8. The learned Counsel for the appellant would submit in his argument that the

lower Court had gone erroneous, both on law and on facts and had passed an award in favour of the claimants to which the insurance company was not at all liable since the owner of the vehicle was also not responsible. The lower Court had not gone into the admission of facts made by the claimants themselves in the petitions that the accident had happened purely due to the rash and negligent driving of the vehicle and dashed against them on their back when they were proceeding in a Bajaj Chetak Scooter belonging to the 1st respondent of the petition.

Therefore, he would submit that the responsibility of payment of compensation cannot be fixed on the owner of the scooter and on the basis of the admission made by the petitioners themselves the owner of the car or the vehicle which dashed against the claimants and its insurance company, if any, were necessarily been made as parties and in their absence, the Tribunal should not pass an order fixing the responsibility on the owner of the scooter. He would also submit that the lower Court had not considered that he was permitted to take defence available to the owner of the vehicle u/s 170 of the Motor Vehicles Act as the owner of the Chetak Scooter did not contest the claim before the lower Court. He would further submit that the quantum of compensation as fixed by the lower Court are also not sustainable in law. He would further submit in his argument that the reference as to the judgment reported in *New India Assurance Company Vs. Shri Satpal Singh and Others*, and *National Insurance Co. Ltd., Madras Vs. V.S.R. Kumaresan and others*, are not relevant to the facts of the present case. He had also pointed out that the lower Court had mis-applied the judgment reported in *National Insurance Co. Ltd., Madras Vs. V.S.R. Kumaresan and others*, , for the purpose of bringing the claimants to the classification as third parties to which the facts of the judgment referred were not applicable. He has also submitted that the lower Court had also faulted in not following the principles laid down in *Oriental Insurance Co. Ltd. Vs. Ruplal Singh and Another*, and 1977 A.C.J. 118 (S.C.) [Minu B. Mehta and Anr. v. Balkrishna Ramchandra Nayan and Anr.] which are aptly applicable to the facts and circumstances of the case. Therefore, he would submit in his argument that both the claim petitions made by the claimants should have been dismissed as they had placed their claim against wrong persons and therefore, both the appeals have to be allowed with costs throughout.

9. The learned Counsel for both the claimants would submit in their common arguments that the claimants while riding on the Bajaj Chetak Scooter bearing Registration No. TN 28 V 2095 belonging to the 2nd respondent herein and at that time the car, which came in a high speed, from behind them, dashed against the scooter in Salem ? Bangalore Bye-pass road at Krishnagiri and that way how the accident had happened and therefore, the owner of the scooter would be automatically liable u/s 163 of the Motor Vehicles Act and since both the claimants are third parties to the vehicle involved in the accident and the second respondent herein had insured his vehicle with the appellant herein, both the claimants are entitled to claim compensation from the insurance company, the

appellant herein. He would further submit in his argument that the lower Court even though had granted Rs. 1,00,000/- towards compensation for the claimant in M.A.C.T.O.P. No. 1117 of 2001 and a sum of Rs. 50,000/- for the claimant in M.A.C.T.O.P. No. 1118 of 2001, such award amounts are being moderate and just the said award of compensation may not be set aside since the appellant is under the liability to pay the same. He would further submit that the lower Court had correctly followed the judgments reported in New India Assurance Company Vs. Shri Satpal Singh and Others, and National Insurance Co. Ltd., Madras Vs. V.S.R. Kumaresan and others, and had fixed the compensation which is not liable to be questioned. More over, he would submit that the lower Court had rightly rejected the arguments of the defence that the claimants should have been directed to approach the Collector for compensation for the "hit and run" motor accident.

10. I have given anxious consideration to the arguments advanced on either side. The claimants in both the claim petitions have filed the petitions seeking compensation for the injuries sustained by them when they were proceeding in the Bajaj Chetak Scooter bearing registration No. TN 28 B 2095 belonging to the 2nd respondent herein due to the dashing of a car from their backside. Since the owner and the insurer of the said car could not be identified, they have impleaded the second respondent, the owner of the Bajaj Chetak Scooter and his insurer, the appellant herein, in the claim petitions. The lower Court, had referred the judgments reported in National Insurance Co. Ltd., Madras Vs. V.S.R. Kumaresan and others, for the purpose of binding the 2nd respondent and the appellant herein for payment of compensation and held that the driver of the Bajaj Chetak Scooter belonging to the 2nd respondent and the pillion rider are third parties in the eye of law. The lower Court had also come to the conclusion that the claimant in both the petitions are considered to be third parties even though they were riding the scooter belonging to the 2nd respondent on the strength of the judgment reported in National Insurance Co. Ltd., Madras Vs. V.S.R. Kumaresan and others, . The relevant passage dealing with third parties would be as follows:

5. ...Section 93(d) defines "third party" thus

"third party" includes the Government.

This is not very helpful and the definition is not exhaustive. But it is now well accepted that the insurer or the insurance company, being one party to the contract; the insured or the policy holder being another, the claims made by others in respect of the negligent use of the motor vehicle would be claims made by third parties. The concept entertained by the learned Counsel for the insurance company, appellant herein, that the expression "third party" would cover only a person, who was outside the vehicle and on the road, is too restricted one to be accepted.

When the facts of the case discussed in the said judgment made in C.M.A. No. 187 of 1982 would go to show that the person who was travelling in a bus while

gone for a test drive, sustained injuries in the accident and he was considered to be a third party even though he travelled in the bus. So far as this case is concerned, the facts are entirely different. The admitted case of the claimants are that they were riding on the scooter belonging to the second respondent, an unidentified car, had hit against them on their back and fled away. The entire rash and negligence was pleaded only against the driver of the said unidentified car. The claimant in M.A.C.T.O.P. No. 1117 of 2001 who was driving the Bajaj Chetak Scooter was not said to have driven the scooter in a rash and negligent manner.

11. According to the judgment of our Supreme Court reported in 1977 A.C.J. 118 (S.C.), (Minu B. Mehta and Anr. v. Balkrishna Ramchandra Nayan and Anr.) it has been categorically found that the compensation cannot be awarded without proof of negligence and if it is done so it would lead to strange results. The relevant passage would run as follows:

22. The liability of the owner of the cars to compensate with the victim in a car accident due to the negligent driving of his servant is based on the law of tort. Regarding the negligence of the servant the owner is made liable on the basis of vicarious liability. Before the master could be made liable it is necessary to prove that the servant was acting during the course of his employment and that he was negligent.

12. The aforesaid judgment of our Apex Court would guide us to the concept that the claimant could claim compensation from the insurer with whom the owner of the vehicle had insured his vehicle which caused the accident due to the rash and negligent driving of the driver of the insured who was liable to pay the compensation. In other words, the insured who is the owner of the vehicle should have been under the liability to pay compensation to the claimant so as to bind its insurer under the contract of indemnification. So far as this case is concerned, the admitted case of the claimants would be that the rash and negligence for the cause of the accident was purely due to the driving of the driver of the unidentified car which hit on their backside and fled away from the scene of occurrence. It is not the case of the claimants that the driver of the two wheeler belonging to the 2nd respondent herein had driven the two wheeler in a rash and negligent manner and caused the accident. Even otherwise, if it is the case of the claimants that the driver of the two wheeler was rash and negligent and caused the accident, he is the claimant himself in M.A.C.T.O.P. No. 1117 of 2001. He cannot claim compensation against his own tortious act and thereby make the 2nd respondent liable to pay the same under vicarious liability. Moreover, there was no such relationship in between the claimant in M.A.C.T.O.P. No. 1117 of 2001 (the driver of the two wheeler) at the time of the accident in order to create vicarious liability. In all respects, the claims made by the claimants are not sustainable in law. However, as the quantum of compensation awarded by the Tribunal, is concerned, it is seen that the appellant herein had not disputed the quantum arrived at by the Tribunal in favour of the claimant in both the claim

petitions. So far as the claimant in M.A.C.T.O.P. No. 1117 of 2001 is concerned, the lower Court had awarded a sum of Rs. 1,00,000/- as compensation with subsequent interest at 9% per annum. For that the lower Court had calculated Rs. 70,000/- towards 35% disability and a sum of Rs. 20,000/- towards medical expenses on the basis of Ex.A.4 series and a sum of Rs. 10,000/- towards pain and sufferings. The calculation for 35% disability at Rs. 70,000/- would show that a sum of Rs. 2,000/- per 1% was calculated by the lower Court which is acceptable. The over all calculation of compensation at Rs. 1,00,000/- is also in accordance with the damages caused to the claimant. So far as the claimant in M.A.C.T.O.P. No. 1118 of 2001 is concerned, the lower Court had awarded a sum of Rs. 10,000/- towards medical expenses; Rs. 5,000/- for pain and suffering and Rs. 25,000/- for permanent disability even though disablement was not proved through medical evidence. On a overall computation the lower Court had calculated a sum of Rs. 50,000/- towards compensation instead of Rs. 40,000/-. Therefore, the said compensation should have been for a sum of Rs. 40,000/- only. Even though the quantum of compensation as calculated and awarded by the lower Court is found to have equivalent to the damages sustained by the respective claimants, the discussion held supra, it is found that the owner of the car which had hit and run and its insurer who are liable for payment of compensation are not before the Court in order of fasten the liability. The owner of the Bajaj Chetak Scooter (2nd respondent herein) and its insurer, the appellant herein, are not liable to pay compensation. The fastening of the liability on the owner of the two wheeler, the 2nd respondent herein, and the insurer who is the appellant in these appeals, is ex facie found in correct. They are not the persons liable to pay the compensation and the award passed against them are not sustainable. The finding of the lower Court that "any person" as defined u/s 147(1) of the Motor Vehicle Act would bring the appellant and the second respondent is to its fold herein so as to fasten the liability is not in accordance with law. The right thing for the claimants to claim compensation is explained in Oriental Insurance Co. Ltd. Vs. Ruplal Singh and Another, a judgment of Patna High Court, Ranchi Bench. The relevant passage is as follows:

The proper remedy in such event is to take recourse to Section 109?A of the Motor Vehicles Act, 1939 and the appellant can agitate this matter before the Collector, if so advised. But in any view of the matter the insurance company is not at all liable to compensate the claimant for the death of his son in this road accident.

Therefore, the remedy available to the claimants is only before the District Collector, u/s 163 of the Motor Vehicles Act, 1988.

13. For the foregoing discussions, it is found that the appellant and the 2nd respondent are not liable to compensate the claimants and the award passed by the lower Court directing them to pay the compensation are not in accordance with law and, therefore, they are liable to be set aside. Accordingly both the awards are set aside and the respective appeals are allowed with costs.

14. It is brought to the notice of this Court that the awarded amount in both the claim petitions were deposited before the lower Court and the claimants have withdrawn 50% of the same. By virtue of the order passed in these appeals, the appellant is entitled to recover the same from the claimants through due process of law. The claimants are entitled to proceed u/s 163 of Motor Vehicles Act before the relevant District Collector for getting compensation and the time taken in these proceeding are excluded for the purpose of taking such action.