

(2009) 07 MAD CK 0100
In the Madras High Court
Case No : C.M.A. No. 2014 of 2004

The New India Assurance Co. Ltd.

APPELLANT

Vs

T.K. Duraiswamy and P. Chinnayan

RESPONDENT

Date of Decision : 21-07-2009

Acts Referred:

Citation : (2009) 07 MAD CK 0100

Hon'ble Judges : S. Palanivelu, J

Bench : Single Bench

Advocate : C. Ramesh Babu, for the Appellant; R. Neelakandan, for the Respondent

Final Decision : Dismissed

Judgement

S. Palanivelu, J.—In the claim petition, the following are stated:

The claimant was working in Telephone Department in Namakkal District and was aged 40 years. He was earning Rs. 6,275/- p.m. On

31.07.2000, at about 10.45 a.m. while he was travelling in TVS Suzuki Motor Cycle bearing Registration No. TN.28 H 1488 as a pillion rider

along with his friend one Babu who was also a pillion rider and the same was driven by one Babu. When the Motor cycle was going near

Thanneermathipatti Branch Road in Gemmedu to Cholakadu Main Road, lorry bearing Registration No. TN 28C 2040 driven by its driver in a

rash and negligent manner dashed against the Motor cycle and the claimant and his friend Babu were thrown away from the vehicle and they

sustained injuries. The claimant was immediately removed to Mohan Kumaralingam Government Medical College Hospital, Salem. The lorry

driver was at fault at the time of accident. Hence, a sum of Rs. 2,00,000/- is

prayed for as compensation.

2. In the counter filed by the appellant/Insurance company, it is stated that in the F.I.R., it has been clearly stated that three persons had travelled in

the Motor Cycle in which the injured was sitting lastly and the travel itself is violation of policy conditions. The claimant had no grip and the

accident took place due to the rash and negligence on the part of one Babu. The insurer and the insured of motor cycle should have been

impleaded as parties since both the drivers are responsible for the accident. The said Babu had also contributed to the accident. He did not

possess any valid driving license and hence the petition has to be dismissed.

3. In the additional counter filed by the appellant/Insurance company, it is stated that due to travelling of three persons in the TVS vehicle, the

driver could not have any control over the vehicle and due to imbalance, the driver of the TVS vehicle dashed against the lorry. The accident was

not due to fault of the lorry driver. The person who rode the motor vehicle should have stopped the vehicle on seeing both sides of the main road

and proceeded. Without taking any caution and following the traffic rules, he dashed against the lorry. The accident took place in the middle of the

main road and hence, the petition has to be dismissed.

4. The learned Tribunal Judge after considering the evidence of record, fastened the liability upon the lorry driver. The learned Counsel for the

appellant Mr. C. Ramesh Babu would very much assail the award passed by the tribunal by stating that the tribunal has lost sight of the fact that

travelling of three person in a motor vehicle is violative of the traffic rules and act and the provisions of Motor Vehicles Act and that only due to

imbalance of the motor cycle, the Babu dashed against the lorry and by no stretch of imagination, the lorry driver can be anchored with the liability

of causing the accident.

5. It is conceded fact that three persons were travelling by the motor cycle. In the First Information Report by Babu, Ex.A.1, he has stated that

while the motor cycle was coming near Thanneermathipatti diversion road, the lorry was driven by its driver in a rash and negligent manner and

without sounding horn, he dashed against the motor cycle. P.W.1, the claimant also would state in line with the allegations in the F.I.R. In the cross

examination, a suggestion was put to him that since three members were sitting

and travelling by the motor cycle, the person who rode the same could not exercise control over it, hence the accident took place for which his answer was in the negative.

6. In this context, the learned Counsel for the appellant would place much reliance upon a Division Bench decision of this Court reported in 2003-

2-L.W. 75 : 2003 (1) M.L.J. 489 2, Managing Director, Tamil Nadu State Transport Corporation v. Abdul Salam and Ors. wherein it is

observed that "when three persons travelled in a motor cycle which is meant for two person, this Court is of the view, the conduct of the persons

who travelled in such a manner are liable for contributory negligence; especially when their action is contrary to the statute".

7. On a later occasion, another Division Bench of this Court had occasion to refer the above said decision and also various decisions of this Court,

Privy council and Supreme Court and come to a conclusion that there should be evidence on record to show that only due to the travelling of three

persons in the motor cycle, the accident took place and if no such evidence is forthcoming, then the insurance company could not be absolved

from its liability. The conclusive portion of the said judgment is as follows:

Kattabomman Transport Corporation Limited Vs. Vellai Duraichi and Others, :

Para 8. In the light of the said conclusion, we have carefully verified the factual details and the ultimate decision arrived at in the first Division Bench

decision, namely, Tamil Nadu State Transport Corporation, Coimbatore Division v. Abdul Salam (cites supra). As observe earlier, except stating

that 3 persons travelled in a motor vehicle, which is prohibited, no specific finding was given to the effect that travelling of three persons in a motor

cycle was responsible for the accident; hence we are of the view that the conclusion in 2003 (1) M.L.J. 489 is to be confirmed to that case. In

other words, merely because there is violation of the provisions of the Act or Rules or the policy conditions, it is not automatic that in every case

the principle of contributory negligence is to be applied mechanically. As rightly observed in the other Division Bench decision, namely, M.

Anandavali Amma v. Arvind Eye Hospital 2002 (2) L.W. 710, unless there is evidence to prove that the accident took place only because of such

act that is taking/travelling more persons in a motor cycle which resulted in an accident, the owner of the other vehicle and its insurer will be liable

to pay compensation. To put it clear, if the appellant-Transport Corporation is able to prove that it is because of the addition of one more (third person in the motor cycle instead of two), the accident occurred, the position would be different. In other words, unless the owner of the vehicle or the Insurance Company is able to prove that the accident took place only because of such act that is taking more persons than the prescribed number, the owner/Insurance Company will be liable to make good the loss/compensation. In the case on hand the materials placed before the Tribunal show that it was the bus driver who had gone to the other side of the road, hit the motor cycle thereby caused the accident. There is no evidence to show that the accident occurred because of travelling of three persons in the motor cycle. In the light of the above said conclusion, we reject the contra argument made by the learned Counsel for the appellant.

8. In the above said judgment, this Court has also referred yet another decision of Division Bench reported in 2002 (3) L.W. 710, *M. Anandavalli*

Amma v. Arvind Eye Hospital in which it is observed that "Merely by lifting a person or two, it cannot be said to be such a fundamental breach

that the owner should, in all events, be denied indemnification. The Division Bench further proceeds to observe as follows:

The Breach of the condition of the policy was somewhat irregular, though, but not so fundamental in nature, so as to put an end to the contract,

unless some factors existed, which, by themselves, had gone to contribute to the causing of the accident. If the Insurance Company is able to prove

that it is because of the presence of the additional persons who were allowed to occupy the vehicle, the accident occurred, the position would be

different. Consequently, we hold that even in cases where more passengers are taken with or without the knowledge or implied consent or even

consent of the owner, unless the Insurance Company is able to prove that the accident took place only because of such act (taking more

passengers) the Insurance Company will be liable to make good the loss/compensation.....

9. In the above said *M. Anandavalli Amma's*, case the Division Bench of this Court has followed the following decisions:

(1) *Canadian Pacific Railway Co. v. Leonard Lochart* AIR 1943 PC 63

(2) *K.R. Sivagami v. Mahaboob Nisa Bi and Ors.* 1981 ACJ 399

(3) B.V. Nagaraju Vs. M/s. Oriental Insurance Co. Ltd., Divisional Officer, Hassan,

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(4) Skandia Insurance Co. Ltd. Vs. Kokilaben Chandravadan and Others,

(5) Shivraj Vasant Bhagwat Vs. Smt. Shevanta Dattaram Indulkar and another,

(6) Branch Manager, National Insurance Co. Ltd. v. Murugesh and Ors. 1998 (1) L.W. 59

10. Thus, it is the consistent view of this Court and settled position on this issue that it is incumbent upon the vehicle owner and the Insurance

Company to establish the fact that travelling by three persons in a motor cycle alone was the main reason for the accident and if such evidence is

lacking in a case, then the Insurance Company shall be required to make good the loss to the claimants.

11. Following the above said principle in this case, it is to be held that since the Insurance Company has not discharged its burden as required by

law in showing that travel by three persons in a motor cycle was alone the cause of accident, it is to be held that the Insurance Company is liable to

pay compensation. It is to be noticed that in order to controvert the allegations in the F.I.R and oral evidence of P.W.1, there is no contra evidence

on behalf of the Insurance Company. In the above circumstances, this Court is of the definite view that the Insurance company has to be held liable

for paying compensation and in this regard, this Court does not find any legal infirmity in the award passed by the tribunal, even though it has not

elaborately dealt with circumstances leading to fasten the liability to pay the compensation upon the Insurance Company.

12. As far as the quantum of compensation as fixed by the tribunal is concerned, Ex.A.4 is the wound certificate issued by the Government

Hospital, Salem while Ex.A.5 is Discharge Summary issued by the same hospital in which it is stated that he was inpatient from 31.07.2000 to

15.08.2000. It is learnt from the above said records that the claimant had suffered a fracture in his left ankle malvelous, besides five other

lacerations and operations on various parts of the body.

13. The doctor P.W.2, an orthopaedician in Government Medical College Hospital would say that the movements in the ankle were restricted that

the fractured bone malunited that he could not work utilising his left leg, that he is not able to squat on the floor that it is impossible for him to walk

to long distance and that he is suffering from permanent disablement to an extent of 25%. However the tribunal has restricted the disability at 15%

and proceeded to assess the compensation as loss of income by applying multiplier method on a notional income of Rs. 70/- per day and Rs.

2100/- per month and calculated Rs. 25,200/- as annual loss of income. Applying the multiplier 15, it has reached Rs. 3,78,000/- in which 15% is

equal to Rs. 56,700/-. The following are the compensation under various heads fixed by the tribunal.

(1) Loss of income (permanent disability) ... Rs. 56,700/-

(2) Pain and suffering ... Rs. 5,000/-

(3) Extra nourishment ... Rs. 5,000/-

(4) Transport expenses ... Rs. 1,000/-

(5) Damage to clothes ... Rs. 500/-

(6) Medical expenses ... Rs. 500/-

Total ... Rs. 68,700/-

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14. This Court does not find any irregularity in assessing the above said quantum of compensation. In all aspects, the award passed by the tribunal

does not suffer from any infirmity and the same is confirmed. The appeal has to face dismissal and the same is dismissed. No costs.