

(2007) 07 MAD CK 0107

In the Madras High Court

Case No : C.M.A. No's. 718, 719 and 720 of 2002

The New India Assurance Company Ltd.

APPELLANT

Vs

Nagarajan and Others

RESPONDENT

Date of Decision : 21-07-2007

Acts Referred:

Citation : (2009) ACJ 913 : (2008) 1 MLJ 430

Hon'ble Judges : S. Palanivelu, J

Bench : Single Bench

Advocate : S. Jayasankar, for the Appellant; C. Prakasam, for the Respondent

Judgement

S. Palanivelu, J.—Insurance Company has filed this appeal, aggrieved over the award of Rs. 1,50,000/-, Rs. 2,85,000/- and Rs. 3,50,000/-

, made in MACT O.P. No. 324,325 and 329 of 1996, on the file of Motor Accident Claims Tribunal (Sub-Court, Tiruppur, for the injuries

sustained by first respondents/claimants.

2. One of the claimants, namely, Shanmugasundaram lodged an FIR with the police, stating that on 20.01.1996, at about 11.00 p.m., while he was

going by his motorcycle, bearing registration No. TN 38 2434, along with his colleagues Ponnuchamy and Nagarajan near Karuperumal Temple in

Jallipatti, a lorry, bearing registration No. TN 41 Y 1444, came from the opposite direction and on seeing the lorry approaching in a hectic speed,

he stopped the motorcycle, but the lorry dashed against the motorcycle, causing injuries to the trio.

3. Before the Tribunal, in the counter filed by the appellant, it was pleaded that the driver of the lorry was not negligent, whereas the person, who

was driving the motorcycle, was careless enough and he was the cause for the

accident. Besides raising stiff opposition with regard to the manner of accident, as alleged by the claimants, the appellant had taken another plea that as the claimants violated the rule i.e., all the three claimants travelled by the motorcycle, the insurance company was not liable to compensate them.

4. The claimants deposed as to the accident, who, in same tone, stated that on seeing the lorry coming with high speed, they stopped the motorcycle and, in spite of that, the lorry dashed against the motorcycle. Even in the First Information Report, it was stated that the first informant stopped the motorcycle on seeing the lorry.

5. It is noteworthy to mention here that the driver of the lorry admitted the offence before the Court of Judicial Magistrate and paid a fine of Rs.

1,000/-. Hence, negligence on the part of the driver has been established.

6. There is no debate with regard to the insurance coverage of the lorry with the appellant company at the time of accident. But, the appellant very much assails the claim of the claimants, contending that since there was violation of the policy conditions, the claimants are not entitled for any compensation.

7. Appellant examined R.W.1, who is its official. He deposed in similar lines as that of the counter. But, the appellant company had not produced the policy copy of the vehicle. Any way, it is common knowledge that in a two wheeler, two persons have to travel and in this connection, the settled position of law has to be followed.

8. In certain cases, this Court had occasions to discuss the liability of the insurance company, for payment of compensation to the aggrieved parties, under the circumstance where the number of passengers were exceeding the prescribed limit. The liability to compensate in case of overload of the vehicle was dealt with, following various decisions in detail. In the earlier judgments of this Court, it has been held that even though the liability is disowned by the insurance company, a duty is cast on it, to show that it is because of the presence of additional persons, who were allowed in the vehicle, the accident occurred - while absolutely no evidence was adduced in that regard.

9. While dealing with a case in identical circumstances, a Division Bench of this Court, in *M. Anandavalliamma and Others Vs. Aravind Eye*

Hospital and Another, , after following the decisions of the Hon''ble Supreme Court in regard to the said aspect, including the one in B.V.

Nagaraju Vs. M/s. Oriental Insurance Co. Ltd., Divisional Officer, Hassan, , held as follows:

19. ...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 breach of the condition of the policy was somewhat irregular, though, but not so fundamental in nature, so as to put an end to

intricate, 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 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. It has to be noted that in the case on hand, it is not the

contention of the Insurance Company that the accident had occurred because two persons, over and above the prescribed limit in the policy, were

traveling at the relevant time in the vehicle....

10. Following the principle laid down in Canadian Pacific Railway Co. v. Leonard Lockhart AIR 1943 PC 63, another Division Bench of this

Court in K.R. Sivagami v. Mahaboob Nisa Bi 1981 ACJ 399 (Mad), ruled that when a taxi was authorised to carry only five passengers, the

driver unauthorisedly carried two more passengers and that as the taxi which was authorised to carry only five passengers carried seven

passengers, the accident can be taken to be due to negligence of the driver. In that case, the Court held that non-observance of the rules relating to

the number of passengers to be carried can only be said to be an improper performance of the driver''s duties and even assuming that the permit

condition does not allow to take more than the permitted number of passengers is taken as a prohibition or restriction, that relates only to the

manner of performance of the driver''s duties in the course of his employment and that cannot in any way limit the sphere of his employment.

11. The illuminating and authoritative judicial pronouncements on this subject pave way to conclude that unless it is proved by the insurance

company that due to the excess of passengers than the prescribed limit the accident occurred, the insurance company could not wriggle out of its

liability and simply the reason of carrying the individuals more than the stipulated number of persons will not be a ground or defence for the

insurance company to assail the claim for compensation by the affected parties.

12. Coming to the case on hand, the insurance company had not established that due to the overload on the two wheeler, the accident occurred.

Conversely, it is proved that the driver of the lorry was negligent at the time of accident and it is also noticed that one of the claimants, who was

driving the motorcycle, stopped the vehicle, on seeing the lorry. So, viewed from any angle, the insurance company could not be absolved of the

responsibility and, instead, it is liable to make good the loss for the claimants.

13. The next aspect to be gone into is, the quantum of compensation, awarded by the Tribunal. It is apposite to mention here that the Tribunal had

not appreciated the features in the disability certificates and the oral testimony of the doctor, who examined the claimants. The award of the

Tribunal relating to medical aspect is woefully silent.

14. It is deplorable to note that while awarding the compensation, the learned Presiding Officer of the Tribunal ignored oral testimony of the doctor

and the disability certificates issued by him, which are available in the records, which has necessitated this Court to furnish the details, available in

his evidence.

15. P.W.4 is an Orthopedician, working in the O.P.Department of Coimbatore Medical College Hospital. He issued Exs.A-13, A-15 and A-17,

disability certificates, for the claimants. He examined Nagarajan, claimant/first respondent in C.M.A. No. 718 of 2002, and found malunion and

fractures in his right leg, namely, calcaneum and patella. He further stated that the movements of right leg were restricted; there was loss of muscle

and that the injured could not climb upstairs and undertake any work using his right leg. He assessed the disability of the claimant at 30%.

16. The doctor, after examining Shanmugasundaram, claimant/first respondent in C.M.A. No. 719 of 2002, found malunion and fractures in

mandible, zygomatic arch, left clavicle and proximal phalynx finger No. 4 in right

hand as well. He opined that the jaw movements were painful; the movements in right hand got restricted; loss of muscle in the mandible region; movements of shoulders were restricted and that the injured could not be active, as before the accident. He assessed his disability at 40%.

17. P.W.4 also examined another claimant, namely, Ponnusamy, claimant in C.M.A. No. 720 of 2002, and issued Ex.A-17, disability certificate, mentioning that three fractures malunited were found in his femur, in right leg tibia and in right leg fibula and that the claimant sustained a crush injury in his right foot. He opined that movements of right hip, right knee and right leg ankle were restricted; there was a shortening of right leg by 1 c.m. and also a fracture in right femur fixed with intramedullary nail malunited and that the injured cannot walk freely and climb upstairs. He assessed the disability at 60%.

18. The Tribunal, while awarding compensation, took into consideration the proposed loss of income, pain and suffering and medical expenses alone and did not take into account the loss of amenities, extra nourishment, expenditure for personal attendants and transport expenses. But, the claimants also have not preferred any appeals, assailing the award of the Tribunal.

19. Viewing the case with regard to the quantum of compensation, it appears that in two of the claim petitions, the Tribunal awarded somewhat excessive compensation, under the point ""To what compensation, the claimants are entitled ? "".

20. As far as the claimant/first respondent in C.M.A. No. 718 of 2002 is concerned, his monthly wages were about Rs. 3,000/-, by working as a Dyer in a dyeing company. The Tribunal assessed Rs. 2,500/- per month, as the monthly income of this claimant. Adopting multiplier 17, it calculated the total loss of income at Rs. 5,10,000/-. However, viewing the disability at 30%, the Tribunal fixed Rs. 1,53,000/-, as loss of income.

A sum of Rs. 2,382/- towards "medical expenses" and another sum of Rs. 5,000/- towards "pain and suffering" were awarded. However, the total compensation was restricted to Rs. 1,50,000/-, which, I feel, is proper and, hence, there is no need to disturb the finding of the Tribunal, in this regard.

21. Regarding the claimant/first respondent in C.M.A. No. 719 of 2002, the

Tribunal, calculating the monthly income at Rs. 3,500/- and applying the multiplier 17, assessed the total loss of income at Rs. 7,14,000/-. It is in evidence that the claimant was running a power-loom unit, earning a sum of Rs. 5,000/- per month. However, this Court feels that a sum of Rs. 2,500/- may be fixed as monthly income of this claimant, for the purpose of awarding compensation. Accordingly, the annual loss of income comes to Rs. 30,000/-. If the multiplier 17 is adopted, the amount comes to Rs. 5,10,000/-. Since the claimant suffered permanent disability at 40%, the total loss of income can be ascertained at Rs. 2,04,000/-.

Towards "medical expenses", a sum of Rs. 3,500/- may be awarded as against Rs. 3,423/-, entertained by the Tribunal. Towards "pain and suffering", a sum of Rs. 5,000/- was awarded by the Tribunal, which, in my view, is just and proper. Hence, a total compensation of Rs. 2,12,500/- is awardable to this claimant, as against Rs. 2,85,000/-, awarded by the Tribunal.

22. As regards C.M.A. No. 720 of 2002, the Tribunal, calculating the annual loss of income of the claimant at Rs. 30,000/- and adopting the multiplier 16, assessed the total loss of income at Rs. 4,80,000/-, which, I feel, is on higher side. The testimony of the claimant shows that he was earning about Rs. 3,000/- per month, by weaving. Hence, for the purpose of compensation, loss of monthly income may be fixed at Rs. 1,750/- and annual loss of income at Rs. 21,000/-. If the multiplier 16 is adopted, the total loss of income shall come to Rs. 3,36,000/-. Since the claimant has sustained permanent disability at 60%, a sum of Rs. 2,01,600/- may be awarded. The medical bills show that the claimant spent Rs. 64,413/- for his treatment, for which a sum of Rs. 65,000/- may be awarded. Towards "pain and suffering", the Tribunal awarded Rs. 5,000/-, which, in my view, is proper. Hence, a total sum of Rs. 2,71,600/- is to be awarded to this claimant, as against Rs. 3,50,000/-, awarded by the Tribunal.

23. In the result, C.M.A. No. 718 of 2002 is dismissed and C.M.A. Nos. 719 and 720 of 2002 are allowed in part. No costs. Both the appellant and the respondents/claimants are at liberty to withdraw the balance amount.