

(2017) 02 MAD CK 0008
In the Madras High Court
Case No : 91 of 2017

The New India Assurance Company Ltd., represented by its Branch Manager APPELLANT

Vs

Rajan @ Thatesh Rajan, & Anr. RESPONDENT

Date of Decision : 21-02-2017

Acts Referred:

Constitution of India, Article 227 -
Power of superintendence over all courts by the High Court
Code of Civil Procedure, 1908, <a href=3859 — Order 41Rule
33>Order 41Rule 33

Citation : (2017) 02 MAD CK 0008

Hon'ble Judges : N.Kirubakaran

Bench : SINGLE BENCH

Advocate : N.Kirubakaran

Final Decision : Dismissed

Judgement

1. This Civil Miscellaneous Appeal has been preferred by the appellant-Insurance Company against the award of Rs.2,24,120/- (Rupees Two

Lakhs Twenty Four Thousand One Hundred and Twenty only) for the injuries sustained by the first respondent, in the accident occurred on

28.03.1999, when he was travelling as a pillion rider in the motorcycle driven by one Narayana Perumal and hit down by an Ambassador car

belonging to the second respondent insured with the appellant-Insurance Company.

2. Heard Mr.M.Ramaratnam, learned Counsel for the appellant- Insurance Company and Mr.C.Ramesh, learned Counsel for the second

respondent/owner of the offending vehicle.

3. Insofar as the first respondent/claimant is concerned, the appeal has already

been dismissed vide order of this Court dated 14.08.2015.

4. Though Mr.R.Ramaratnam, learned Counsel for the appellant-Insurance Company would argue that the accident occurred because of the rash

and negligent driving of the two wheeler, the Tribunal based on the evidence of P.W.1 - witness, namely, the pillion rider in the two wheeler/victim

and Ex.P.1 - F.I.R and Ex.P.2 - charge sheet filed against the driver of the offending vehicle and Ex.P.3 - judgment passed in C.C.No.4207 of

1999, dated 15.12.1999, pleading guilty by the driver of the Ambassador car, rightly found that the accident occurred because of the rash and

negligent driving of the driver of the Ambassador car.

5. Further, the learned Counsel for the appellant-Insurance Company would submit that there was no driving licence possessed by the rider of the

two wheeler and the insurance policy was also not marked. However, the burden of proof regarding the absence of driving licence is on the

appellant-Insurance Company and it is a settled law. No earnest efforts have been taken by the appellant- Insurance Company either to summon

the rider of the two wheeler or the officials from the Regional Transport Office which has got jurisdiction to prove that there was no driving licence

on the part of the rider of the two wheeler. Moreover, there is no contra evidence adduced by the appellant-Insurance Company and therefore,

the appellant-Insurance Company miserably failed to prove that the rider of the two wheeler did not possess a driving licence.

6. It is also contended by the learned Counsel for the appellant-Insurance Company that there was no valid insurance policy for the Ambassador

car. However, the appellant-Insurance Company is the best person to produce the documents to show that there is no insurance policy taken from

the appellant-Insurance Company by the owner of the Ambassador car. As already observed, no officer was examined on the side of the

appellant-Insurance Company to prove the said fact and therefore, it is not open to the appellant-Insurance Company to contend that there was no

insurance policy for the offending vehicle.

7. The first respondent/claimant sustained injuries in the accident. Ex.P.4 is the Treatment Certificate dated 02.05.2003, would reveal the injuries

sustained by the first respondent/claimant and the surgeries underwent by him in the Hospital and the same is extracted hereunder:

TREATMENT CERTIFICATE

Mr.Rajan 02-05-2003

Saral

Saral PO Male 29 years

The above patient was admitted in the hospital on 28-03-1999 with the diagnosis of:

Fracture shaft of femur (left)

Compound comminuted fracture both bones left leg.

Fracture left medial malleolus

following a road traffic accident. He was treated with

Open reduction and internal fixation with K nail for left femur

Close reduction and DAF (Dynamic Axial Fixator) for fracture both bones left leg and

Close reduction and multiple K wire fixation for medial malleolus on 28-03-1999. He was discharged from the hospital on 17-04-1999.

Again he was admitted for 13-06-1999 non union of medial malleolus and treated with tension band wiring done on 14-06-1999 and discharged on 19-06-1999.

On 03-07-1999 the delayed union of left femur the K nail for removed and LRS fixator application was done. He was discharged on 11-07-1999.

On 23-11-1999 the DAF from left leg was removed.

Again he was admitted on 02-02-2000 for delayed union of left femur and treated with LRS application was done and discharged on 03-02-2000.

On 04-04-2000 the metal exit was done (LRS removal was done).

8. From the above, it is clear that the first respondent/ claimant was operated for more than four times and he sustained injuries to an extent of

50% as deposed by P.W.2 - Doctor, who issued Ex.P.7 - Disability Certificate. However, the Tribunal determined the disability after seeing the

first respondent/ claimant/P.W.1 at 34%. Though the disability was fixed by P.W.2 - Doctor at 50%, the Tribunal unilaterally on its own, reduced

the disability at 34% in the absence of any contra medical evidence and therefore, the determination of disability at 34% is set aside and the disability at 50% as per the evidence of PW.2 - Doctor is confirmed.

9. Though the disability at 50% has been sustained, the loss of earning power is not 50% and he was a coolie and the disability sustained by the first respondent/claimant would have reduced his earning power to an extent of 34% and therefore, this Court determines the loss of earning power of the first respondent/claimant at 34%.

10. Despite a sum of Rs.3,000/- (Rupees Three Thousand only) was claimed to have been earned by the first respondent/claimant, the Tribunal in the absence of any evidence regarding the monthly income, determined the same at Rs.2,000/- (Rupees Two Thousand only) and applied the multiplier "17" as the age of the first respondent/claimant was 32 years and arrived at the loss of income at Rs.1,38,720/- (Rupees One Lakh Thirty Eight Thousand Seven Hundred and Twenty only) [Rs.2,000/- X 12 X 17 X 34/100] and the same is confirmed.

11. A sum of Rs.3,600/- (Rupees Three Thousand and Six Hundred only) was awarded towards pain and sufferings and the same is too meagre and therefore, this Court awards a sum of Rs.25,000/- (Rupees Twenty Five Thousand only) towards pain and sufferings.

12. A sum of Rs.3,600/- (Rupees Three Thousand and Six Hundred only) was awarded towards extra nourishment and the same is too meagre and therefore, this Court awards a sum of Rs.20,000/- (Rupees Twenty Thousand only) towards extra nourishment.

13. A sum of Rs.78,200/- (Rupees Seventy Eight Thousand and Two Hundred only) was awarded by the Tribunal towards medical expenses based on Exs.P.5 and P.6 - Medical Bills and the same is confirmed.

14. No amount was awarded by the Tribunal transportation charges and loss of amenities and therefore, this Court awards a sum of Rs.10,000/- (Rupees Ten Thousand only) each, under the said heads and totally, a sum of Rs.20,000/- (Rupees Twenty Thousand only) is awarded towards transportation charges and loss of amenities.

15. The rate of interest awarded by the Tribunal at 9% per annum remains unaltered.

16. Accordingly, the first respondent/claimant is entitled to a sum of

Rs.2,81,920/- (Rupees Two Lakhs Eighty One Thousand Nine Hundred and Twenty only) and rounded off to Rs.2,82,000/- (Rupees Two Lakhs and Eighty Two Thousand only) along with interest at the rate of 9% per annum from the date of petition till date of realisation and proportionate costs.

17. Even though this appeal has been preferred by the appellant-Insurance Company against the award of Rs.2,24,120/- (Rupees Two Lakhs

Twenty Four Thousand One Hundred and Twenty only) awarded by the Tribunal, this Court, on reappreciating the evidence and applying the

current proposition of law, suo motu enhances the compensation to Rs.2,81,920/- (Rupees Two Lakhs Eighty One Thousand Nine Hundred and

Twenty only) even in the absence of appeal/cross appeal invoking Order 41 Rule 33 of the Code of Civil Procedure and Article 227 of the

Constitution of India, for which, this Court has got power and jurisdiction as declared by the Honourable Supreme Court in Nagappa v. Gurudayal

Singh and others reported in 2004 (2) TNMAC 398 (SC) : 2003 (2) SCC 274.

18. In the result,

(i) This Civil Miscellaneous Appeal is dismissed;

(ii) The first respondent/claimant is entitled to a sum of Rs. 2,81,920/- (Rupees Two Lakhs Eighty One Thousand Nine Hundred and Twenty only)

and rounded off to Rs.2,82,000/- (Rupees Two Lakhs and Eighty Two Thousand only) along with interest at the rate of 9% per annum from

the date of petition till date of realisation and proportionate costs;

(iii) The first respondent/claimant is directed to submit his Personal Savings Bank Account Number along with the copy of his passbook to the

Tribunal forthwith;

(iv) The appellant-Insurance Company is directed to deposit the entire award amount along with accrued interest and costs, less the amount

deposited, if any, to the credit of M.C.O.P.No.1144 of 2003, by the Motor Accident Claims Tribunal - cum - II Additional Sub Court,

Tirunelveli, within a period of four weeks from the date of receipt of a copy of this judgment;

(v) On such deposit, the Tribunal is directed to transfer the entire award amount along with accrued interest and costs directly to the Personal

Savings Bank Account Number of the first respondent/claimant, through RTGS/

NEFT system, after getting his Account Details, within a period of two weeks thereafter;

(vi) The first respondent/claimant is directed to pay the additional Court Fees, if any, within a period of two weeks from the date of receipt of a copy of this judgment;

(vii) Since the award of the Tribunal is suo motu enhanced by this Court, the Registry is directed to send a copy of this judgment to the first respondent/claimant free of costs; and

(viii) In the facts and circumstances of the case, there shall be no order as to costs.