(1991) 08 KL CK 0031

High Court Of Kerala

Case No: M.F.A. No. 815 of 1988

Cheriya Mohammed and Another		APPELLANT
	Vs	
Kamsakutty and Another		RESPONDENT

Date of Decision: Aug. 12, 1991

Acts Referred:

- Motor Vehicles Act, 1988 - Section 95

Citation: (1992) ACJ 782

Hon'ble Judges: K.P. Radhakrishna Menon, J; K.K. Usha, J

Bench: Division Bench

Advocate: K.P. Dandapani, for the Appellant; T.M. Abdul Latif and S. Parameswaran, for the Respondent

Final Decision: Allowed

Judgement

K.K. Usha, J.

This appeal arises out of the judgment of the Motor Accidents Claims Tribunal, Manjeri in O.P. (M.V.) No. 306 of 1986. The appellants herein are the driver and owner of the lorry involved in the accident. First respondent is the injured who filed the O.P. claiming compensation u/s 110-A of the Motor Vehicles Act. The petitioner in the O.P. has filed a cross-objection claiming enhancement of the compensation as awarded to him by the Motor Accidents Claims Tribunal.

2. The injured was carrying on the business of buying and selling ash. The accident had occurred on 22.1.1977 when the injured was travelling in a lorry belonging to the 2nd appellant carrying a load of ash from Palakkad to Perinthalmanna. Due to rash and negligent driving of the 1st appellant, the lorry capsized at a place called Amminikkad on Perinthalmanna-Manjeri Road and the claimant sustained very serious injuries. He had to undergo prolonged treatment. Exh. A-3 certificate would show that his permanent partial disability has been assessed at 55 per cent. The

medical evidence is that he will always be confined to bed and he will not be in a position to sit even on a wheelchair for a long time. The injured who was aged 25 when the accident took place claimed a total amount of Rs. 1,25,000/- as compensation under different heads. The Tribunal found that the accident occurred due to the rash and negligent driving of the 1st appellant and awarded a total amount of Rs. 45,000/- as compensation to the injured with 6 per cent interest thereon from the date of the petition.

3. The vehicle involved in the accident was covered by an ''Act policy''. But it was contended on behalf of the insurance company that the vehicle being a goods vehicle, the insured is not liable to be indemnified by the insurer as per the terms of the policy in respect of the compensation awarded to the injured who was a passenger in the said goods vehicle. This contention was accepted by the Tribunal and it was held that the insurance company was not liable to indemnify the 2nd appellant. In view of the above finding, appellant Nos. 1 and 2 alone were made liable to pay the compensation granted to the claimant.

4. Even though several grounds have been taken by the appellants, mainly arguments were addressed on their contention that the Tribunal erred in exonerating the insurance company. According to the appellants, the Tribunal should have found that the injured who is the owner of the goods loaded in the lorry and was accompanying the goods should have been treated as a passenger carried in pursuance of a contract of employment as provided u/s 95(1)(b) of the Motor Vehicles Act. In order to substantiate the above contention, the appellants relied on a Division Bench decision of this court in The New India Assurance Co. Ltd. and etc. Vs. K.T. Jose and Others etc., . In the above case the claimant hired a public carrier goods vehicle for transporting paddy belonging to him in the course of his business and while he was travelling in the lorry which carried his goods, the lorry met with an accident and he sustained injuries. The insurance company contended that the claimant being only a passenger of public carrier goods vehicle is not required to be covered u/s 95 of the Motor Vehicles Act. After considering elaborately the relevant provisions in the Act and conflicting decisions on the point of different High Courts this court held as follows:

(17) We have already indicated that law countenances passengers travelling in goods vehicle. The owner of the goods carried in a goods vehicle or his employee or his agent can be permitted to travel in the goods vehicle. While doing so they cannot be said to be travelling gratuitously. The owner of the goods pays hire for the goods vehicle to carry his goods. Where it becomes necessary for him to travel in the goods vehicle for the purpose of loading, unloading or taking care of the goods, the contract between him and the owner of the vehicle must necessarily imply permission for him or his agent to travel in the vehicle. This implied condition would also have been taken into consideration in fixing the hire. Hence it is clear that owner of goods travelling in a goods vehicle is a passenger for hire and, therefore,

his case is covered by the exception to the second proviso. In any view of the case, he must be regarded as a passenger travelling in the vehicle for reward. It has been argued before us that owner of the goods must also be taken to be a passenger travelling in the vehicle by reason of or in pursuance of contract of employment. No doubt the expression ''employment'' would ordinarily mean engaging a person in service. Concise Oxford Dictionary explains the word ''employ'' as ''use thing or one''s power, time'' and the word ''employment'' as ''one''s regular trade or profession''. One may engage a lorry for conveying goods. It can also be said that one employs a lorry for conveying goods. It is unnecessary to pronounce on this aspect. In either view, the insured is compulsorily liable to take out insurance policy against any liability in respect of the death of or bodily injury to the owner of the goods travelling in the lorry. Hence under an ''Act policy'' the insurer is liable to indemnify in regard to such a liability.

5. The facts of the case in Omana v. David 1987 ACJ 905 (Kerala), relied on by the Tribunal are different. There, the claimant was not a hirer of the goods vehicle but was a gratuitous passenger at the time of the accident. Therefore, it is contended on behalf of the appellant that the above decision will not help the insurance company to absolve itself from liability in the present case.

6. The counsel appearing on behalf of the insurance company, on the other hand, made an endeavour to sustain the finding of the Tribunal relying on decisions of other High Courts taking a different view from The New India Assurance Co. Ltd. and etc. Vs. K.T. Jose and Others etc., . This reference was made to the decision of the Madras High Court in Commonwealth Assurance Co. Ltd. v. V.P. Rahim Khan Sahib 1971 ACJ 295(Madras), G. Dhyanand v. Zaamni Bi 1982 ACJ 399 (Madras), C. Narayanan v. Madras State Palm Gur Sammelan 1974 ACJ 479 (Madras) and South India Ins. Co. Ltd. v. P. Subramanium 1972 ACJ 439 (Madras) and then to the decisions of the Punjab and Haryana High Court in Oriental Fire and Genl. Ins. Co. Ltd. v. Gurdev Kaur 1967 ACJ 158 (P&H), Oriental Fire and Genl. Ins. Co. Ltd. v. Kasturi Lal 1968 ACJ 227 (P&H), Des Raj Angra v. Oriental Fire and Genl. Ins. Co. Ltd. 1985 ACJ 401(P&H) and Baldev Raj Vs. Dharmo Rani and Others, , in support of his contention that the insurance company has no liability to cover the risk of the owner of the goods travelling in the vehicle carrying the goods. He further relied on the decision in Indian Mutual Genl. Ins. Society Ltd. v. Manzoor Ahsan 1977 ACJ 85 (Calcutta) of the Calcutta High Court, taking the same view, following Oriental Fire and Genl. Ins. Co. Ltd. v. Gurdev Kaur (supra). The above view taken by the High Courts of Madras, Punjab and Haryana has been considered by the Division Bench of this court in New India Assurance Co. Ltd. v. K.T. Jose (supra). Counsel for the 2nd respondent, on the other hand, relied on the decision in Hindustan Ideal Insurance Corporation Ltd. v. Manne Chimperamma 1974 ACJ 13(AP), of Andhra Pradesh High Court in support of his argument. But, facts of the above decision would show that their Lordships were considering an insurance policy with specifically excluded coverage of owner of the goods travelling in the vehicle. Same is the case reported in Baldev Raj v. Dharmo

Rani (supra).

7. Two other decisions referred to by the learned counsel appearing on behalf of the second respondent are Harishankar Tiwari v. Jagru 1987 ACJ 1 (MP), a decision of the Madhya Pradesh High Court and Bandaiah v. Ningappa 1985 ACJ 746(Karnataka), a decision of the Karnataka High Court. The decision of the Madhya Pradesh High Court is relied on by the second respondent, apparently by a mistake. The dictum in the above judgment is against the contention taken by the insurance company. In para 5 of the above judgment, it has been held that the hirer while paying hire charges for carrying the goods in the vehicle and while he or his employee is required to travel with the goods for its safety in the vehicle, it will be deemed that the hirer was carried in the vehicle for reward while his employee was carried in the vehicle in pursuance of his employment. In coming to the above conclusion, their Lordships of the Full Bench of the Madhya Pradesh High Court had referred to and followed the decision of this court in State Insurance Department, State Insurance Officer, Trivandrum v. Sosamma Mani 1978 ACJ 504 (Kerala). In Bandaiah v. Ningappa (supra) what was being considered by their Lordships of the Karnataka High Court was whether the insurance company will be liable for the injury suffered by passengers carried in the goods vehicle by the driver without the permission of the owner. The above decision is also not applicable to the facts of the present case.
8. We are not persuaded by the arguments put forward by learned counsel appearing on behalf of the second respondent that the decision reported in The New India Assurance Co. Ltd. and etc. Vs. K.T. Jose and Others etc., requires to be reconsidered.

9. In the light of the above discussion, we are inclined to hold that the second respondent is liable to indemnify the 2nd appellant in the matter of the compensation to be paid to the first respondent.

10. It was then contended on behalf of the second respondent that there is no pleading or proof by the claimant to the effect that he travelled in the lorry in pursuance of a contract of employment. This aspect is also covered by the decision in The New India Assurance Co. Ltd. and etc. Vs. K.T. Jose and Others etc., The owner of the goods travelling in a goods vehicle is a passenger for hire and therefore his case is covered by the explanation to the second proviso to Section 95. Under these circumstances, it is unnecessary to find whether there is pleading or proof to the effect that the claimant travelled in pursuance of a contract of employment. The above contention of the second respondent also is therefore rejected.

11. The claimant has filed a cross-objection contending that the amount awarded by the Tribunal cannot be said to be an adequate compensation for the serious injury and disability suffered by him as a result of the accident. According to him, he should have been granted Rs. 51,500/-towards permanent disability affecting his health and earning capacity suffered by him instead of Rs. 27,000/-. PW 2, who is the

Associate Professor of Orthopaedics, Calicut Medical College, has, in his evidence, stated that as a result of the injury suffered by the claimant in the accident, he will be compelled to be bedridden. Even if he is carried and placed on a wheelchair, he will not be able to sit for a long time. The permanent partial disability of the claimant is assessed at 55 per cent as is evident by Exh. A-3. Under these circumstances, it should be held that he is totally disabled to earn anything during the rest of his life. Taking into consideration his age at the time of the accident (he was aged 25), his health and earning capacity before the accident, we feel that the compensation granted by the Tribunal, namely, Rs. 27,000/- is not at all adequate. We are of the view that the claimant would have been entitled to an amount not less than Rs. 60,000/- as compensation on this count, if his monthly earning capacity is assessed at Rs. 250/-. But, since the claimant himself has limited his claim to Rs. 51,500/- we hold that he is entitled to an amount of Rs. 51,500 as compensation for his loss of earning capacity.

12. While the claim made under the head of pain and suffering was Rs. 20,000/-, the Tribunal has granted Rs. 10,000/-. Exh. A-3 would show that the claimant was admitted to the hospital on 22.1.1977 with fracture spine L1, fracture of the frontal bone, fracture clavicle right, fracture of humerus left and multiple injuries. He was discharged from the hospital only on 19.3.1977. At the time of issue of the certificate, it is mentioned in Exh. A-3 that he had got paraplegia with moderate recovery of the muscles of thigh and footdrop, angulation of left humerus by 15, retention of urine with overflow and bed sores on his back. The description of the injury suffered by him at the time of the accident and the continued suffering as is evident from Exh. A-3 would certainly entitle him for more than what was granted by the Tribunal under the head of pain and suffering. We are of the view that the claimant is entitled to Rs. 20,000/- as compensation for pain and suffering undergone by him as a result of the injury sustained in the accident.

13. It was further contended by the claimant in his cross-objection that he is entitled to interest at the rate of 12 per cent and the interest granted at 6 per cent by the Tribunal is totally unjustified. He relied on the decision in G. Padmanabhan Nair v. General Manager, K.S.R.T.C. 1989 ACJ 873(Kerala), in support of his contention for granting 12 per cent interest. We feel that the above claim is also justified.

14. In the result, we allow the appeal to the extent of holding that the second respondent insurance company is liable to indemnify the second appellant in the matter of his liability to compensate the first respondent for the injuries suffered by him in the accident. In the cross-objection filed by the claimant, we hold that the claimant is entitled to compensation to the extent of Rs. 51,500/- under the head of loss of earning capacity due to the disability caused by the accident instead of Rs. 27,000/- granted by the Tribunal and Rs. 20,000/- under the head of pain and suffering instead of Rs. 10,000 granted by the Tribunal. We also hold that the claimant is entitled to 12 per cent interest on the amount awarded to him as

compensation from the date of the petition till realisation. Pursuant to an order issued by this court on 7.11.1988 in C.M.P. No. 27386 of 1988, the 2nd appellant had deposited an amount of Rs. 10,000/- which was allowed to be withdrawn by the 1st respondent, claimant. The 2nd respondent, insurance company, shall reimburse the above amount to the 2nd appellant.

The appeal and cross-objections are allowed to the above extent, but without any order as to costs.