
(2016) 05 KL CK 0024

High Court Of Kerala

Case No: MACA. No. 876 of 2012 (Against the award in OP(MV) 494 of 2008 of Ist Additional Motor Accidents claims Tribunal/Ist Additional District Judge, Kozhikode dated 30-11-2011)

Oriental Insurance
Company Limited

APPELLANT

Vs

Saleena

RESPONDENT

Date of Decision: May 27, 2016

Acts Referred:

- Motor Vehicles Act, 1988 - Section 166

Citation: (2017) 1 ACC 845 : (2017) ACJ 206 : (2016) 4 KerLJ 466 : (2016) 4 KLT 685 : (2017) 1 TAC 482

Hon'ble Judges: Mr. C.T. Ravikumar and Mr. K.P. Jyothindranath, JJ.

Bench: Division Bench

Advocate: Sri. O.D. Sivadas, Advocate, for the Respondent; Sri. Mathews Jacob (Sr.) and Sri. P. Jacob Mathew, Advocates, for the Appellant

Final Decision: Partly Allowed

Judgement

Mr. K.P. Jyothindranath, J. - This appeal is preferred against the award dated 30.11.2011 in O.P.(M.V.) No. 494/2008 on the file of the Ist Additional Motor Accidents Claims Tribunal, Kozhikode. The Tribunal allowed the claim. The appellant is the Oriental Insurance Company Limited, who was the third respondent in the claim petition. Aggrieved by the above referred award, the Insurance Company came up with this appeal.

2. The facts relevant for consideration of this appeal is as follows:

The first respondent filed a claim petition before the M.A.C.T., Kozhikode claiming a total compensation of Rs. 2 lakhs. The case of the petitioner therein was that she sustained injuries in an accident occurred on 10.9.2006 while she was travelling in a car which was hit by a jeep bearing registration No. KL-56/1185. The appellant herein is the insurer of

the said jeep. In the claim petition, it was alleged that the accident occurred due to the negligence of the driver of the jeep. The further case of the petitioner therein was that she sustained injuries in the accident and was taken to the Medical College Hospital, Kozhikode for treatment. It was also the case of the petitioner that she was pregnant at that point of time and her pregnancy was aborted. The Tribunal marked Exts.A1 to A7 documents. No oral evidence was adduced. After considering the materials, the Tribunal awarded a total sum of Rs. 1,20,276/- and directed the appellant herein to deposit the amount before the Tribunal. Aggrieved by the said award and direction, this appeal is preferred.

3. When the appeal came up for hearing, the main contention of the learned counsel for the Insurance Company is that the claimant may be pregnant at that point of time. But there is nothing before the court to show that the alleged abortion was the direct impact of the alleged accident. It is the further submission of the learned counsel that even though the accident occurred on 10.9.2006, she was seen treated only on 16th of the said month and thereafter admitted in the hospital only on 18.9.2006. Under such circumstances, the petitioner failed to prove that the abortion, if any, was the direct result/impact of the accident. It is also brought to our notice that a sum of Rs. 1 lakh was awarded towards compensation for loss of unborn child. It is also the submission of the learned counsel that admittedly the foetus was aged only 50 days. If that is so, the foetus can by no stretch of imagination, be treated as an unborn child and no amount should have been awarded on the head of compensation towards loss of unborn child. It is also the submission that by going through the award, it can be seen that various decisions are referred by the Tribunal wherein it is categorically stated that only after 20 weeks (five months) a foetus can be considered as a child or can be considered for compensation purposes. The learned counsel appearing for the Insurance Company also specifically stated before us that in the written statement in paragraph 10 it is categorically stated that: "the petitioner has to establish that the alleged abortion happened due to the accident. The wound certificate is not produced by the petitioner." Under such circumstances, the Tribunal erred in awarding the said amount.

4. The learned counsel appearing for the respondent/petitioner submitted before us that here is a case where so many persons sustained injuries in a motor vehicle accident. The case of the claimant is that she was pregnant at the time of accident. Along with the other persons, who got injured in the accident, she was also taken to the Medical College Hospital, Kozhikode. But surely, compared to the other persons, there was no serious external injuries sustained to the petitioner. Under such circumstances, after giving first aid, she was allowed to go back home and being a pregnant lady, immediately she went to the house. But thereafter developed bleeding and soon she approached a local Gynecologist which fact will be evident from Ext.A7. In Ext.A7, it is categorically written that there is a history of RTA and there was no other reason for an unusual bleeding and the doctor also recorded the said alleged cause in the medical certificate. There is nothing to disbelieve the doctor. It is also a fact that she was scanned as directed by the

doctor and its report was marked as Ext.A7 series of documents. Thereafter, she was immediately taken to the Medical College Hospital as evidenced and proved by Exts.A2 and A3 documents. As per Ext.A2 document, it can be seen that she was admitted in the hospital and thereafter the pregnancy was aborted. Based on all these documents and appreciating the materials, the court below found that the abortion was the direct impact of the accident in question which occurred when the appellant was travelling as a passenger in the car involved in the accident. It is the submission that just like in any other case when in the wound certificate the history/allegation is given as RTA and a treatment was evidently taken and as part of the treatment an abortion was done there is nothing to interfere with the award passed treating abortion as the direct impact of the accident on the ground that there is burden upon the petitioner to prove that such an abortion was due to the direct impact of the accident.

5. After considering the submission of both counsel, we had gone through the schedule of compensation attached to the award. It is seen that towards compensation for loss of unborn child, a sum of Rs. 1 lakh is seen awarded. It is an admitted case of the petitioner that the age of the pregnancy was only about 50 days. The Tribunal quoted a passage from the decision in **Oriental Insurance Company Limited v. Santhilal Patal reported in [2007 (4) ACD 835]** (Andhra Pradesh High Court) which reads as follows:

"To decide whether a child in the womb of the mother can be called as a person, it is pertinent to discuss the different stages of birth of a child in the womb of a mother. Technically the term developing ovum is used for the first seven to ten days after conception, i.e. until implantation occurs. It is called an "embryo" from one week to the end, of the second month and later it is called "foetus". It becomes an infant only when it is completely born. The life may enter immediately on the date of conception in the form of a small cell, which gets multiplied, but physically a mother can feel the movement of child only when the foetus is twenty weeks old i.e. five months, as the cell changes the structures and texture to become an eye, legs, bones, blood, head etc. and only when the child makes movements touching the internal walls of the womb, then the actual life does take its physical form, therefore, there may be controversy as regards the exact date of the entering the foetus but there cannot be any controversy as regards the life of the unborn child if a woman is carrying seven months pregnancy, as in many instances premature delivery takes place during the seventh month of pregnancy and the child still survives.

An unborn child aged five months onwards in the mother's womb till its birth can be treated as equal to a child in existence. The unborn child to whom the live birth never comes can be held to a "person" who can be the subject of an action for damages for his death".

6. As we have already stated in this case, the pregnancy was only aged 50 days. As per the definition of "foetus" in the Oxford Advanced Learner's Dictionary "foetus" means a young human or animal before it is born, especially a human more than eight weeks after

fertilization. Thus, surely it can be seen that in our case it cannot be called as a foetus but only an embryo in its advanced developing stage, nearly approaching the stage of foetus. Quickening of the child will be only after 20 weeks i.e. by about five months. As per the definition in Taber's Cyclopedic Medical Dictionary "embryo" means "In mammals, the stage of prenatal development between fertilised ovum and fetus. In humans, this stage begins on day 4 after fertilisation and continues through gestational week 8". As already stated admittedly the gestation period is only that of 50 days. In this case, the doctor who conducted evacuation is not examined. Ext.A7 seen contain the Transabdominal Sonography report. In the impression column it is written as "intra uterine pregnancy of 50 days gestation, presenting anembryonic". Anembryonic means embryo missing. There is nothing to show that whether it was a spontaneous abortion or not. When as per Ext.P7, there is no embryo, there is no question of loss of embryo. Thus, it can be seen that the compensation awarded towards loss of unborn child by the Tribunal is not correct and will not sustain.

7. Surely, we are not suspecting the claim of the petitioner that she was involved in a motor vehicle accident. It is also a fact that in the above award it can be seen that a copy of an earlier award by the same Tribunal is seen produced. The negligence or liability of the Insurance Company is not under dispute. It is also proved by the petitioner that she was treated from Medical College Hospital. It is also the case of the petitioner that the history given as RTA. The evidence adduced by the petitioner regarding the nexus between the abortion and the accident may not be up to the mark as discussed above. But still it is a fact that she was a passenger in the vehicle involved and was treated thereafter. It is also seen proved that she was pregnant may be it is anembryonic pregnancy. Under such circumstances, considering all these aspects, we are not inclined to interfere with the finding of the Tribunal to the effect that she was in the vehicle involved in the accident as well as she is entitled for compensation. Thus, it is a fact that she was admitted in the Medical College Hospital for two days after the accident. Thus considering all these aspects, just compensation is assessed as Rs. 25,000/-. Thus, considering all these aspects Rs. 25,000/- is awarded as just compensation in this case. The said amount will carry interest at the rate of 8% from the date of petition till realization. We also not disturbing the cost of Rs. 3,000/- awarded by the Tribunal while allowing the petition in part. The appeal allowed in part as stated above. If the Insurance Company has already deposited an amount over and above the amount due to the petitioner, by virtue of this judgment, such amount can be released to the Insurance Company.

8. With the above modification of the award passed by the Tribunal, this appeal partly allowed.

9. No order as to costs.