(2002) 06 MAD CK 0207

Madras High Court

Case No: None

M. Anandavalliamma and Others		APPELLANT
	Vs	
Aravind Eye Hospital and Another		RESPONDENT

Date of Decision: June 20, 2002

Citation: (2004) 2 ACC 144

Hon'ble Judges: K. Gnanaprakasam, J; A.S. Venkatachalamoorthy, J

Bench: Division Bench

Judgement

A.S. Venkatachalamoorthy, J.

By a common judgment, the Motor Accident Claims Tribunal, Dindigul (Principal District Judge, Dindigul), disposed of M.C.O.P. Nos. 1260 of 1994, 55 and 56 of 1995 and other claim petitions on 28.2.1997.

2. C.M.A. No. 1228 of 1997 has been filed by claimants in M.C.O.P. No. 1260 of 1994, claiming enhanced compensation over and above what has been awarded by the Tribunal, C.M.A. No. 88 of 1998 has been filed by the claimant in M.C.O.P. No. 55 of 1995, claiming enhanced compensation over and above the amount awarded by the Tribunal. C.M.A. No. 327 of 1998 has been filed by the claimant in M.C.O.P. No. 56 of 1995 claiming enhanced compensation, C.M.A. Nos. 1331, 1337 and 1333 of 1998 have been filed by the insured (owner of the vehicle), questioning the correctness of the judgment of the Tribunal, exonerating the Insurance Company with reference to M.C.O.P. Nos. 1260 of 1994, 55 and 56 of 1995 respectively.

3. Dr. Premachandran, Dr. Reshmi and Dr. Shanthi, working in Aravind Eye Hospital, Madurai, on the fateful day that was on 8.7.1994 at about 1.30 p.m., along with others, proceeded from Madurai in a Tempo Traveller mini van bearing registration No. TN-59 A3906 to render service in an Eye Treatment Camp that was being conducted by Aravind Eye Hospital, Madurai at Sundarapuram near Coimbatore. At about 3.30 p.m., the van reached the place called Palakanuthu and because of rash and negligent driving of the driver of the vehicle, it dashed against a tree and in the

accident, Dr. Premachandran died while Dr. Reshmi and Dr. Shanthi sustained injuries.

4. In M.C.O.P. No. 1260 of 1994, the claimants, viz., the mother, widow and the minor son of Dr. Premachandran claimed that they should be paid a compensation of Rs. 20,00,000/-. In M.C.O.P. No. 55 of 1995, Dr. Reshmi has claimed a sum of Rs. 5,00,000/- by way of compensation. Dr. Shanthi, the claimant in M.C.O.P. No. 56 of 1995 claimed a sum of Rs. 10,00,000/- by way of compensation.

The respondent No. 1 in all the above M.C.O.Ps., viz., Aravind Eye Hospital, represented by its Secretary was absent and hence it was set ex parte. The respondent No. 2, viz., United India Insurance Co. Ltd., Madurai, resisted the claims, contending that the accident did not take place due to rash and negligent driving of the driver of the vehicle. According to respondent No. 2, the driver was driving the vehicle slowly and cautiously, but however, because of the heavy rain and failure of the brake, the driver was not able to control it and only in those circumstances, the vehicle dashed against the tree. Hence, the accident occurred only due to the act of God. That apart, the respondent No. 2 also contended that the respondent No. 1 violated the terms and conditions of the policy inasmuch as in the said vehicle, viz., Tempo Traveller mini van, more persons were carried contrary to the terms and conditions of the policy and hence, only the respondent No. 1 is solely liable to pay the compensation, if any.

5. At the trial, witnesses were examined by both sides and several exhibits were marked. The Tribunal, after elaborately considering the materials available on record, came to the conclusion that the claimants in M.C.O.P. No. 1260 of 1994, viz., the appellants in C.M.A. No. 1228 of 1997 would be entitled for a sum of Rs. 10,00,000/- by way of compensation. The Tribunal fixed the compensation payable to the claimant in M.C.O.P. No. 55 of 1995, viz., the appellant in C.M.A. No. 88 of 1998 as Rs. 45,500/-. So far as the claimant in M.C.O.P. No. 55 of 1995 (appellant in C.M.A. No. 327; of 1998), the Claims Tribunal fixed the compensation at Rs. 67,500/-.

The Tribunal also held that since the insured carried more passengers in the said vehicle than prescribed in the terms and conditions of the policy, the Insurance Company is not liable to pay any amount and that the entire compensation has to be paid only by the insured, viz., the owner of the vehicle.

6. The following questions arise for consideration in this appeal:

(a) Whether the accident occurred due to rash and negligent driving of the vehicle in question by its driver?

(b) What is the amount of compensation payable to the claimants in M.C.O.P. No. 1260 of 1994, viz., the appellants in C.M.A. No. 1228 of 1997?

(c) What is the amount of compensation payable to the claimant in M.C.O.P. No. 55 of 1995, the appellant in C.M.A. No. 88 of 1998?

(d) What is the amount of compensation payable to the claimant in M.C.O.P. No. 56 of 1995, the appellant in C.M.A. No. 327 of 1998?

(e) Whether the Insurance Company is absolved of its liability on the ground that the vehicle carried more persons than what is allowed/ prescribed in the policy?

Issue No. 1

7. The admitted case is that a team consisting of doctors from Aravind Eye Hospital, Madurai, were proceeding in the Tempo Traveller mini van bearing registration No. TN-59 A3906, in the afternoon of 8.7.1994 to a place called Sundarapuram near Coimbatore to attend an Eye Treatment Camp to render free services to the needy poor. When the van was nearing the village called Semmadaipatti, there was heavy downpour and the claimants would contend that the van after crossing G.V.G. Mill, negotiating a bend and the driver of the van who drove it in a rash and negligent manner, dashed against a tamarind tree on the left hand side and in the accident, Dr. Premachandran and the driver died and others got injured. A complaint was lodged before the police and Exh. P-7 is the F.I.R. As to how the accident took place, has been explained by the injured occupants of the van as P.Ws. 1 to 11. Their testimonies infuse confidence and no material contradictions have been pointed out among their testimonies which would persuade this Court to come to a conclusion that the accident took place due to rash and negligent driving of the driver of Tempo Traveller mini van. Learned Counsel for the Insurance Company has not succeeded in persuading this Court to come to a different conclusion than the one arrived at by the Tribunal.

Issue No. 2

8. There are three appellants in C.M.A. No. 1228 of 1997 (claimants in M.C.O.P. No. 1260 of 1994), who are the mother, widow aged 29 years and son aged 3 years of Dr. Premachandran respectively. It is claimed by them that the deceased Premachandran was a doctor working in the said Aravind Eye Hospital and getting a salary of Rs. 8,786/-. In support of the same, the claimants have examined the widow; viz., Dr. Reshmi as P.W. 1 and the salary certificate of Dr. Premachandran has also been marked as Exh. P-3. The said witness has deposed before Court that before the accident, the deceased appeared for examination, viz., Diploma in National Board in Ophthalmology and was waiting for the results. In fact, after the accident, results were published and Dr. Premachandran got through the same successfully. According to P.W. 1, doctors with said Diploma are being paid a sum of Rs. 10,051/- as salary. This witness has also testified to the effect that the deceased, who was at that time aged 33 years, was hale and hearty and would have survived beyond 70 years of age and during which period, apart from working in the hospital, he would have earned by his private practice also. Because of the loss of her husband, she would claim that the family consisting of the appellants, lost a valuable contribution from him and further, the appellant No. 3, who is a young boy

as well as the others are put to hardship and irreparable loss. The appellants would claim that the maximum multiplier has to be applied and a sum of Rs. 20,00,000/- as total compensation should be awarded.

9. Learned Counsel appearing for the Insurance Company would contend that as far as the amount of compensation payable is concerned, there is no clear evidence and that the amount of compensation fixed by the Tribunal at Rs. 10,00,000/- is just and proper. The learned Counsel would further submit that the deceased Dr. Premachandran was getting only a salary of Rs. 8,786/- at that time and in the absence of clear evidence with regard to his contribution to the family, the Court can at best take only 2/3rd of the said amount as the amount which he would have contributed for the family and as he was aged 35 years at that time, the reasonable multiplier that could be adopted is 15 and on that basis, one can arrive at only a figure of Rs. 10,00,000/-. According to the learned Counsel, no interference is called for with reference to the amount of compensation fixed.

10. There is no dispute that Dr. Premachandran was working in Aravind Eye Hospital and drawing a salary of Rs. 8,786/- as evidenced by Exh. P-3. Equally, there is no dispute that before the accident, late Dr. Premachandran appeared for an examination, i.e., Diploma in National Board in Ophthalmology. P.W. 1, the wife of the victim, would claim that the results were announced subsequent to the accident and Dr. Premachandran was declared as having successfully passed out. Her further evidence is to the effect that her husband Dr. Premachandran would have got increment and drawn a sum of Rs. 10,051/- per month from the date of obtaining the said Diploma. Keeping in mind that the young and efficient doctor, who was working in a well-known hospital and also had very bright prospects of improving his practice privately, we are inclined to proceed on the basis that he would be earning about Rs. 11,000/- per month and would have contributed a sum of Rs. 8,000/- to the appellants per month (adopting unit method), in the peculiar facts and circumstances of this case. Adopting the multiplier of 17 as he was only aged 33 years at that time, we arrive at a figure of Rs. 16,32,000/-. With this, we add the conventional compensation under various heads, viz., loss of love and affection, loss of consortium, loss to the estate and funeral expenses, a sum of Rs. 40,000/- and arrive at Rs. 16,72,000/-, which we round it to Rs. 16,75,000/-. Thus, we come to the conclusion that the appellants in C.M.A. No. 1228 of 1997 and claimants in O.P. No. 1260 of 1994 would be entitled for a sum of Rs. 16,75,000/- (Rupees sixteen lakhs and seventy-five thousand only) with interest at 9 per cent per annum from the date of the petition.

Issue No. 3

11. The question is, what is the amount of compensation, that has to be fixed for injured-claimant, viz., Dr. A.R. Reshmi. The claimant, as P.W. i, has deposed before the Court that at the time of accident, she was studying P.G. course in Aravind Eye Hospital and getting a stipend of Rs. 1,200/-. According to her, she sustained serious

injuries in the said accident and her hip bones got fractured and that there was multiple injuries also. After the accident, she was an inpatient for two months. She has testified before Court that because of the injuries, even after treatment, she is not in a position to conduct surgeries continuously. Exh. P-73 is the X-ray taken and Exh. P-75 is the disability certificate issued by the doctor, according to which, she has suffered 25 per cent permanent partial disability. P.W. 16, the doctor has deposed before Court about the nature of injuries sustained by the appellant. He has stated that her left hip muscle has lost its capacity to the extent of one grade and that she also gets pain in the left hip joint and the spinal cord. According to the doctor, claimant-appellant would find it difficult to climb the steps freely and she would not be able to operate the instruments which she has to do with her left leg at the time of surgery. This Court carefully examined the testimonies of P.W. 1, the appellant, P.W. 16, the doctor as well as Exhs. P-73 to P-75 and is satisfied that she sustained injuries at the time of the accident and that she is entitled to receive the compensation.

As far as compensation is concerned, this Court is inclined to award a sum of Rs. 30,000/- for medical expenses; a sum of Rs. 5,000/- for transportation; a sum of Rs. 10,000/- for nourishment; a sum of Rs. 50,000/- for pain and suffering; a sum of Rs. 75,000/- for permanent partial disability, a sum of Rs. 1,75,000/- for loss of earning capacity and a sum of Rs. 10,000/- for loss of earnings, and in all, we fix the compensation at Rs. 3,55,000/-.

Issue No. 4

12. The appellant was also one of the persons who travelled in the ill-fated vehicle and sustained injuries in the accident. The appellant herein, viz., Dr. Shanti as P.W. 2, has narrated not only the entire accident but also the nature of injuries sustained by her. According to P.W. 2, she was an in-patient in the Government Hospital, Dindiguland thereafter she was in Jawahar Hospital, a private hospital at Madurai and thereafter at Coimbator Medical Centre. In view of the accident, she is not able to walk as she was doing earlier. In the accident, she sustained fracture in three places. The right leg is now shortened by one inch and because of which, she is not able to peddle the instrument which she has to do at the time of conducting surgery. Apart from that, she is also not in a position to sit for a long time and discharge her duties. P.W. 17 was the doctor, who assisted at the time of surgery by Dr. Venkat, conducted on P.W. 2. According to the doctor, she has suffered 50 per cent of permanent disability. Exh. P-32 is the disability certificate issued in that regard. Because of the fracture and subsequent injuries, there is considerable risk in the movement of ankle and that her right leg has become shortened by two inches and that she would not be in a position to conduct operations for a long time. This Court carefully examined the testimonies of P.Ws. 2 and 17 and exhibits filed in support of the claim and is of the opinion that a sum of Rs. 3,90,000/- would be proper compensation that can be awarded. We examined the documents produced

to show the extent of expenses incurred towards medical treatment and we are inclined to accept to the tune of Rs. 55,000/-. The various exhibits filed by the claimants, evidencing the expenses incurred for medical treatments have to be accepted and a sum of Rs. 55,000/- has to be fixed under that head. Apart from that, a sum of Rs. 5,000/- each can be awarded for transport and nourishment. Coming to pain and suffering, fixation of Rs. 75,000/- would meet the ends of justice. For permanent partial disability, a sum of Rs, 70,000/-can be awarded. Considering the peculiar circumstances of the case, towards loss of earning power, a sum of Rs. 1,75,000/- is awarded. Because she was an inpatient for five months, a sum of Rs. 5,000/- has to be awarded as loss of stipend.

The appellant shall be entitled for a compensation of Rs. 3,90,000/- with interest at 9 per cent annum from the date of the petition.

13. The next question arises for consideration is as to whether, in view of the fact that a medical squad consisting of 16 persons were taken in the ill-fated van and which is contrary to one of conditions that is found in the conditions of the policy, the Insurance Company is absolved from liability.

14. The earliest ruling which has direct relevance to the case is the one reported in Canadian Pacific Railway Co. v. Leonard Lockhart AIR 1943 PC 63. In the said judgment, the Court pointed out that there is a clearcut distinction between a restriction or a limitation which pertains to the sphere of employment and those which relate to the manner of performance of His duties within the sphere of his employment. A restriction relating to the number of passengers to be carried only be taken to be a restriction relating to the maimer of performance of the driver''s duties and it does not relate to the sphere of the employment.

15. The above ruling came to be referred to and relied on by a Division Bench of this Court in the case reported in K.R. Sivagami v. Mahaboob Nisa Bi 1981 ACJ 399 (Mad). In that case, the taxi was authorised to carry only five passengers, but 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 ruled that the driver of the vehicle has carried more than the permitted load of passengers and this is contrary to the conditions of the permit under which the vehicle was allowed to be used as a tourist taxi. The Court held that the 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 not 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.

16. Yet another citation which will be of much use is reported in B.V. Nagaraju Vs. M/s. Oriental Insurance Co. Ltd., Divisional Officer, Hassan, . That was a case where according to the terms of insurance policy, the insured vehicle was authorised to take six workmen excluding the driver. But, at the time of accident, it carried nine persons. The Insurance Company raised a similar contention, viz., that it is not liable to indemnify. Rejecting the said contention, the Supreme Court observed as under:

It is plain from the terms of insurance policy that the insured vehicle was entitled to carry 6 workmen, excluding the driver. If those 6 workmen when travelling in the vehicle, are assumed not to have increased any risk from the point of view of the Insurance Company on occurring of an accident, how could those added persons be said to have contributed to the causing of it is the poser, keeping apart the load it was carrying. Here, it is nobody''s case that the driver of the insured vehicle was responsible for the accident....Merely by lifting a person or two, or even three, by the driver or the cleaner of the vehicle, without the knowledge of the owner, cannot be said to be such a fundamental breach that the owner should, in all events, be denied indemnification. The misuse of the vehicle 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....

At the conclusion, the Supreme Court has referred to the ruling in Skandia Insurance Co. Ltd. v. Kokilaben Chandravadan 1987 ACJ 411 (SC) and observed that is paved the way towards reading down the contractual clause. In that case, the Court was considering the breach of condition of excluding driving of vehicle of the insured-owner by a person not duly licensed and as to the extent of vicarious liability of the owner in case of an accident in the light of Sections 96(2)(b)(ii) and 84 of the Motor Vehicles Act, 1939.

The Supreme Court in Skandia''s case (supra), observed as under:

When the option is between opting for a view which will relieve the distress and misery of the victims of accidents or their depedants on the one hand arid the equally plausible view which will reduce the profitability of the insurer in regard to the occupational hazard undertaken by him by way of business activity there is hardly any choice. The Court cannot but opt for the former view. Even if one were to make a strictly doctrinaire approach, the very same conclusion would emerge in obeisance to the doctrine of reading down'' the exclusion clause in the light of the "main purpose'' of the provision so that the "exclusion clause'' does not cross swords with the "main purpose; highlighted earlier. The effort must be to harmonize the two instead of allowing the exclusion clause to snipe successfully at the main purpose. The theory which needs no support is supported by Carter''s ''Brunch of Contract'' vidu Para 251. To quote:

Notwithstanding the general ability of contracting parties to agree to exclusion clauses which operate to define obligations there exists a rule, usually referred to as the ''main purpose rule'', which may limit the application of wide exclusion clauses defining a promisor''s contractual obligations. For example, in Glynn v. Margetson and Co. (1893) AC 351, Lord Halsbury, L.C. stated : ''It seems to me that in constructing this document, which is a contract of carriage between the parties, one must in the first instance look at the whole instrument and not at one part of it only. Looking at the whole instrument, and seeing what one must regard...as its main purpose, one must reject words, indeed whole provisions, if they are inconsistent with what one assumes to be the main purpose of the contract.

Although this rule played a role in the development of the doctrine of fundamental breach, the continued validity of the rule was acknowledged when the doctrine was rejected by the House of Lords in Suisse Atlantique Societe d'' Armement Maritime SA v. N.V. Rotterdamsche Kolen Centrale (1967) 1 AC 361. Accordingly, the wide exclusion clauses will be read down to the extent to which they are inconsistent with the main purpose, or object of the contract.

17. A Division Bench of the Bombay High Court in the decision reported in Shivraj Vasant Bhagwat Vs. Smt. Shevanta Dattaram Indulkar and another, , had occasion to consider a case in which the clause in the insurance policy was that carrying of passengers in the vehicle except employees not exceeding six in number, where ten employees were taken in the motor truck, whereas the policy also contemplated that maximum of only six persons can be carried. There the Insurance Company claimed that inasmuch as there is violation of terms and conditions of the policy, it is not liable in any way to pay compensation. There the Court ruled thus:

The terms of the policy of insurance has to be construed strictly and to be read down to advance the main purpose of the contract. The main purpose of the policy is to indemnify the damage caused to the vehicle and the inmates, who are injured. It is plain from the terms of the insurance policy that the insured vehicle was entitled to carry six workmen excluding the driver. If six persons travelling in the vehicle are assumed not to have increased any risk from the point of view of the Insurance Company on occurring of an accident, how could these added persons be said to have contributed to the causing of it. Admittedly, all the 11 persons in the truck were working as labourers on the quarry of the appellant, who is also the owner of the truck. Merely because 4 to 5 labourers more than the agreed six labourers were taken in the truck, it cannot be said to be such fundamental breach that the owner should in all events be denied the indemnification.

18. In Branch Manager, National Insurance Co. Ltd. v. Murugesh 1998 (1) LW 59, a learned Single Judge of this Court had occasion to consider a similar point. There also as against permitted six persons, 13 persons travelled in a lorry, which is in violation of condition of the policy. The learned Single Judge considered various rulings on that point and came to the conclusion as under:

If we approach the question in this background, it cannot be said that there was any wilful breach of any of the conditions of the policy. While disowning the liability, a duty is also cast on the Insurance Company to show that it is because of the presence of the additional persons who were allowed to be in the lorry, the accident happened. Absolutely no evidence was adduced in that regard.

19. Coming to the case on hand, as many as 16 persons were taken in the ill-fated van, when the terms and conditions of the policy prescribe or restrict the maximum number as 14. From the cases cited supra and other rulings, it could be seen that in most of the cases, the driver took additional passengers without the knowledge of the owner that is insured and in the rest, it is not clear as to whether the owner had knowledge. As far as the present case is concerned, the insured is none else than the Arvind Eye Institute. It cannot be said, in this case, that the driver took two extra persons without the knowledge of the insured or to benefit him in any manner. Then the question is, whether it would make any difference. We may straightaway say, the answer is in the negative. 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 travelling at the relevant time in the vehicle. At this juncture, we may refer to a passage from the judgment of the Supreme Court in Skandia Insurance Co. Ltd. v. Kokilaben Chadravadan (supra), wherein the Court observed as under:

Ordinarily it is not the concern of the Legislature whether the owner of the vehicle insures his vehicle or not. If the vehicle is not insured any legal liability arising on account of third party risk will have to be borne by the owner of the vehicle. Why then has the Legislature insisted on a person using a motor vehicle in a public place to insure against third party risk by enacting Section 94? Surely the obligation has not been imposed in order to promote the business of the insurers engaged in the business of automobile insurance. The provision has been inserted in order to protect the members of the community travelling in vehicles or using the roads from the risk attendant upon the user of motor vehicles on the roads. The law may provide for compensation to victims of the accidents who sustain injuries in the

course of an automobile accident or compensation to the dependants of the victims in the case of a fatal accident. However, such protection would remain a protection on paper unless there is a guarantee that the compensation awarded by the Courts would be recoverable from the persons held liable for the consequences of the accident. A Court can only pass an award or a decree. It cannot ensure that such an award or decree results in the amount awarded being actually recovered, from the person held liable who may not have the resources. The exercise undertaken by the Law Courts would then be an exercise in futility. And the outcome of the legal proceedings which by the very nature of things involve the time cost and money cost invested from the scarce resources of the community would make a mockery of the injured victims, or dependants of the deceased victim of the accident, who themselves are obliged to incur not inconsiderable expenditure of time, money and energy in litigation.

20. Following the rulings stated supra, this Court is inclined to hold that Insurance Company is certainly liable to compensate the claimants to the extent indicated above.

21. In this view of the matter, we hold:

(a) The appellants in C.M.A. No. 1228 of 1997 and claimants in M.C.O.P. No. 1260 of 1994 would be entitled for a sum of Rs. 16,75,000/- (Rupees sixteen lakhs and seventy-five thousand only) with interest at 9 per cent per annum from the date of the petition.

(b) The appellant in C.M.A. No. 88 of 1998 and the claimant in M.C.O.P. No. 55 of 1995 would be entitled for a sum of Rs. 3,55,000/- (Rupees three lakhs and fifty-five thousand only) with interest at 9 per cent per annum from the date of the petition.

(c) The appellant in C.M.A. No. 327 of 1998 and the claimant in M.C.O.P. No. 56 of 1995 would be entitled for a sum of Rs. 3,90,000/- (Rupees three lakhs and ninety thousand only) with interest at 9 per cent per annum from the date of the petition.

(d) The Insurance Company is liable to compensate the claimant-appellants.

(e) C.M.A. Nos. 1228 of 1997, 88 and 327 of 1998 are allowed to the extent indicated above.

(f) C.M.A. Nos. 1331, 1333 and 1337 of 1998 are allowed.