

The Oriental Insurance Co. Ltd. Vs Nithiyanantham, Muthamil Selvi and Samprince D.T (R3 remained exparte before the lower court)

Court: Madras High Court (Madurai Bench)

Date of Decision: Aug. 1, 2011

Hon'ble Judges: K.B.K. Vasukic, J

Bench: Single Bench

Advocate: K. Bhaskaran, for the Appellant; S.M. Mohan Gandhi -R1 and 2 R3, for the Respondent

Final Decision: Allowed

Judgement

Honourable Ms. Justice K.B.K. Vasuki

1. The second respondent-insurer is the appellant herein. The appeal is filed against the award of compensation of Rs.3,51,000/-in favour of the

petitioners/claimants 1 and 2 for the death of one Samuel Sudhakaran, who was the victim of the fatal accident occurred at 9.00 am on 30.7.2003

in front of Seeniyammal Agri Farm near Chettiyapatti Pirivu on Madurai to Dindigul Main Road.

2. The date, time and place of the accident and the involvement of the motor cycle bearing Regn. No. TN 59-S-8892 owned and driven by the

first respondent and insured with the second respondent at the time of the accident and also involvement of one lorry in the accident, death of

Samuel Sudhakaran, who is the son of the petitioners 1 and 2 therein, due to his injuries sustained in the accident, age of the deceased and the

claimants 1 and 2, avocation of the deceased and dependency of the claimants upon the deceased, are not so seriously denied.

3. The first respondent/owner-cum-driver of the motor cycle did not contest the claim petition. The claim petition was contested only by the

second respondent insurance company and the second respondent-insurance company has in its counter denied the manner of the accident as

narrated in the claim petition. According to the second respondent, the two wheeler in which the deceased was traveling as pillion rider, was being

ridden by the first respondent at slow speed on the extreme left side of the highway by taking all necessary precautions and it was the lorry, which

was coming in a rash and negligent manner in the opposite direction and the lorry overtook the vehicle proceeded ahead of it and in doing so, came

on the right side and dashed against the two wheeler throwing of both rider and pillion rider and sped away without stopping and both the victims

were rushed to a private hospital at Dindigul and the complaint was lodged by the first respondent against the driver of the lorry and the police was

not able to trace out the lorry and filed final report closing the case as undetected and submitted the same to the criminal court as the first

respondent-rider of the motor cycle is not responsible for the accident, the second respondent is not liable to pay compensation for the death of

the pillion rider of the motor cycle.

4. Both the claim petitioners and the second respondent in support of their respective contentions, have examined the first petitioner and the so

called eye witness as P.W.1 and P.W.2 and have produced the copy of the FIR, certificate of participation and merit certificate issued by SSI

Limited, Transfer Certificate of the deceased and his post mortem certificate as Exs.P1 to P5. The Sub Inspector of Police, Dindigul, who is the

Investigating Officer in the criminal case arising out of the accident and the private investigator who was engaged by the insurance company and

held private enquiry are examined as R.W.1 and R.W.2 and his report is filed as Ex.R1.

5. The Claims Tribunal, having found that the driver of the lorry and rider of the motor cycle are responsible for the accident in equal ratio,

assessed and awarded the compensation at Rs.3,51,000/-and held the second respondent liable to pay half of the compensation. Hence, this

appeal by the second respondent/insurer.

6. The learned counsel for the appellant/second respondent and the respondents/claimants 1 and 2 have in this appeal reiterated the same stand as

taken before the Tribunal.

7. Heard the rival submissions made on both sides.

8. The liability of the second respondent/insurance company to pay any compensation to the petitioners 1 and 2 is based upon the act of rash and

negligence of the rider of the motor cycle insured with the appellant/insurer, as such, the initial burden is upon the claimants to prove the manner of

the accident as due to any act of negligence on the part of the rider of the motor cycle. P.W.1 the first claimant is not the eye witness of the

accident. P.W.2 is purported to be eye witness of the accident and it is his evidence that he was at the time of the accident walking on the road

and at that time, he saw the bike going in front of him at high speed and dashed against the lorry coming in the opposite direction and the pillion

rider was thrown away and sustained grievous injury and he along with other persons present there, informed city hospital ambulance and

ambulance came and took both the injured to city hospital and the accident occurred only due to rash and negligent driving of the first respondent.

However, he has in the course of his cross examination, admitted that he was brought to the court only by the first claimant who was given the

particulars about P.W.2 by Ambadurai Police Station. If that is so, particulars about PW2 as one of the eye witnesses of the accident, must be

available in Ambadurai Police Station. But the Investigating Officer-Cum-Sub Inspector of Police of the concerned police station, as R.W.1 in his

evidence has categorically stated that P.W.2 Karuppanan son of Vellaiappan was not examined as one of the witnesses in the course of his

investigation. Further, P.W.2 has in the course of his cross examination, not able to give the registration number of either of the two vehicles

involved in the accident. As such, in my considered view, no reliance can be attached to PW2 evidence.

9. On the contrary, the Sub Inspector of Police, who investigated the case as RW1, has definitely stated that the lorry driver is responsible for the

accident and the lorry came at high speed and attempted to overtake the vehicle ahead of it and in the course of which, dashed against the two

wheeler and the lorry could not be traced out and the final report is accordingly submitted before the concerned court. The Private Invigilator

engaged by the insurance company has also on the basis of the police record submitted his report Ex.R1 to the effect that the lorry driver was

responsible for the accident and the lorry could not be traced out and it was the case of hit and run. Curiously enough, both R.Ws.1 and 2 were

not cross examined on the side of the claimants. The evidence of both R.W.1 and RW2 was closed without cross examination by reason of the

absence of the claimants. In that event, the evidence of RW1 and RW2 remains undenied and uncontroverted, as such, the stand taken by the

second respondent/ insurance company that lorry driver is responsible for the accident and it came and dashed against the two wheeler, is but

acceptable.

10. Further, Ex.P1 FIR produced on the side of the claimants is registered only against the lorry driver on the basis of the complaint given by the

first respondent and the manner of the accident is narrated in the complaint in the same manner as narrated in the counter filed by the second

respondent. It is nobody's case that any other complaint is pending against the rider of the two wheeler in connection with the same occurrence.

The claimants having produced Ex.P1 FIR as one of the documents on their side, cannot be permitted to deny the contents of the document, which

is supporting the theory of second respondent insurer, to be untrue. As rightly argued by the learned counsel for the second respondent, the

tribunal has to greater extent accepted the second respondent theory and suddenly jumped into a conclusion that both the lorry driver and the rider

of the motor cycle are equally responsible for the accident. The conclusion so arrived at by the tribunal is not spoken by either of the parties and is

also not based on any evidence and is hence, factually unsustainable. As the evidence discloses the manner of the accident as due to rash and

negligence of the lorry driver and without any contributory negligent act on the part of the rider of the motor cycle, the question of holding the

second respondent partially liable to pay compensation, does not arise in this case.

11. Regarding the quantum of the compensation, the same is assessed at Rs.7,02,000/-and apportioned equally between two vehicle owners at

Rs.3,51,000/-each. The Tribunal has fixed the notional income of the deceased after considering the educational and technical qualifications and

age of the deceased at Rs. 5,000/-per month and Rs.60,000/-per annum and assessed the loss of dependency by adopting the multiplier of 18 at

Rs.10,80,000/-and after deducting 1/3rd amount for the personal expenses, arrived at loss of dependency at Rs.7,02,000/-. In my considered

view, adoption of 1/3 towards personal expenses of bachelor and adoption of multiplier of 18 is not proper. As per the Apex Court judgment, the

deduction shall be 50% in cases of claim by or on behalf of bachelor and the multiplicand to be hence adopted is Rs.2,500/-per month and

Rs.30,000/-per year. Regarding the multiplier, the same is to be adopted, according to the age of the deceased or the claimants, whichever is high

and in this case, the age of the mother is to be taken into account and one more aspect to be considered in this connection is the possibility of

reduction in the family contribution in the event of his getting married. Thus, considering the age of the mother as 49 years and the multiplier to be

adopted is, pertaining to age group between 45 to 50 and having regard to the age of the deceased and the possibility of his getting married, the

multiplier can be reasonably fixed at 12 and the loss of dependency is hence assessed at Rs.30,000/-x 12 = Rs.3,60,000/-, with which, additional

compensation under other heads to be added is as follows:

Funeral expenses - Rs. 5000/-

Transport expenses - Rs. 5000/-

Loss of love and - Rs.20,000/-

affection

Thus, the total compensation comes to Rs.3,90,000/-.

12. As the accident is, in the foregoing para, held due to rash and negligent driving of the lorry driver, the second respondent/insurer is not liable to

pay any compensation and as the lorry owner and insurer are not made parties herein, the claimants are hence not entitled to get any compensation

in this claim petition.

13. In the result, the Civil Miscellaneous Appeal is allowed by setting the aside the award 31.8.2009 made in M.C.O.P.No.558 of 2004 on the

file of the Motor Accident Claims Tribunal cum I Additional District Judge, Madurai and the claim petition is dismissed with liberty given to the

claimants to make the claim against the owner and insurer of the offending vehicle. No costs.