



IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 19TH DAY OF JUNE, 2020

BEFORE

THE HON'BLE MR. JUSTICE H.P. SANDESH

M.F.A.No.11489/2012 (MV)

BETWEEN:

THE ORIENTAL INSURANCE
COMPANY LIMITED
I FLOOR, SUVARNA TOWERS
No.70/5, NEAR BDA COMPLEX
GOVINDARAJANAGAR, VIJAYANAGAR
BENGALURU
BY THE MANAGER
REGIONAL OFFICE
THE ORIENTAL INSURANCE COMPANY LIMITED
LEO SHOPPING COMPLEX
Nos.44/45, RESIDENCY ROAD
BENGALURU-560 025

... APPELLANT

(BY SRI. RAVISHANKAR A, ADVOCATE)

AND:

1. SHRI. K.M. HARISH KUMAR
S/O. SHRI MANJUNATHA
AGED ABOUT 15 YEARS
SINCE MINOR, IS REPRESENTED BY HIS MOTHER
SMT. MALLAJAMMA
W/O. SHRI MANJUNATHA
AGED ABOUT 36 YEARS
R/AT DEVARAHALLI VILLAGE
HULIKUNTE POST
KORATAGERE TALUK
TUMAKURU DISTRICT-572 129

2. SHRI. SIDDARAJU
S/O LATE SHRI MADALIAH
AGED ABOUT 32 YEARS
R/AT BELAGAVADI
KALLADEVANAHALLI HOBLI
MAGADI TALUK
RAMANAGARA DISTRICT 562 120 ... RESPONDENTS

(BY SRI. JAWAHAR BABU, ADVOCATE FOR R1
R1 IS MINOR AND REPRESENTED BY HIS MOTHER
R2 IS SERVED AND UNREPRESENTED)

THIS M.F.A IS FILED UNDER SECTION 173(1) OF MV ACT AGAINST THE JUDGMENT AND AWARD DATED 30.06.2012 PASSED IN MVC.NO.20/2010 ON THE FILE OF THE ADDITIONAL SENIOR CIVIL JUDGE AND MACT-XIII, MADHUGIRI, AWARDED A COMPENSATION OF RS.3,03,777/- WITH INTEREST @ 6% P.A. (EXCEPT FUTURE MEDICAL EXPENSES) FROM THE DATE OF PETITION TILL REALIZATION.

THIS M.F.A. HAVING BEEN HEARD AND RESERVED FOR JUDGMENT ON 15.06.2020, THIS DAY THE COURT PRONOUNCED THE FOLLOWING:

J U D G M E N T

Though this matter is listed for admission, with consent of learned counsel appearing for the parties, the same is taken up for final disposal.

2. This appeal is filed by the Insurance Company challenging the Judgment and Award passed

in MVC No.20/2010 dated 30.06.2012 on the file of Additional Senior Civil Judge and MACT XIII at Madhugiri ('the Tribunal' for short), questioning the fastening of the liability on the Insurance Company.

3. Heard learned counsel for the appellant/ Insurance Company and learned counsel for respondent No.1/claimant.

Respondent No.2/ owner is served, but unrepresented.

4. The brief facts of the case are that, the claim petition was filed on behalf of one Master Harishkumar, a minor, represented by his mother, claiming compensation for the injuries sustained by him in a road accident that occurred on 08.03.2009. It is stated that the minor-claimant while he was traveling as a pillion rider in a two wheeler - TVS Victor GX bearing registration No.KA-02-EQ-5375, had

sustained injuries due to rash and negligent riding by its rider. In the accident, he has sustained the fracture of right femur and the fracture of both bones of right leg. The claimant was examined by Dr.Suresh P.A. as P.W.2. The Doctor has assessed the disability at 30% to the whole body.

5. The Tribunal, after considering both oral and documentary evidence available on record, allowed the claim petition partly granting the compensation of Rs.3,03,777/- with 6% interest per annum from the date of petition till its realization and directing this appellant to pay the compensation. Being aggrieved by the Judgment and Award of the Tribunal, the present appeal is filed mainly on two grounds. The first ground is, the policy issued by the Insurance Company is an 'act only policy' (liability only policy) and the provisions of the Motor Vehicles Act, 1988 ('the Act' for short) does not make it

mandatory to cover the risk for a pillion rider in a two wheeler. Since no premium was collected towards personal accident cover in respect of a two wheeler, covers the risk for its owner-cum-driver only and not its pillion rider. The other ground is, the Tribunal while calculating the compensation, was wrongly awarded a sum of Rs.1,57,500/- under the head 'Loss of income on account of disability' as against Rs.67,500/- as the whole body disability was only 30% and that the compensation granted under this head is in excess by Rs.90,000/-.

6. Learned counsel appearing for the appellant/Insurance Company would submit that the Tribunal has committed an error in fastening the liability on the Insurance Company and failed to take note of the fact that the policy issued in respect of the subject matter of the vehicle involved in the accident is only an act policy and the same does not cover the

risk of the pillion rider, who traveled in the motorcycle and premium was paid only towards third party liability and for driver-cum-owner. The Pillion rider does not come within the meaning of third Party.

7. Learned Counsel appearing for the appellant/Insurance Company in support of his arguments, he relied upon the following judgments:

- (i) in the case of ***Oriental Insurance Company Limited v. Sudhakaran K.V. and others*** reported in ***(2008) 7 Supreme Court Cases 428;***
- (ii) in the case of ***Dr.T.V.Jose v. Chacko P.M. alias Thankachan and others*** reported in ***AIR 2001 Supreme Court 3939;*** and
- (iii) in the case of ***United India Insurance Co. Ltd., Shimla v. Tilak Singh & Ors.*** reported in ***AIR 2006 Supreme Court 1576.***

Learned counsel while referring to these three judgments would submit that the Insurance Company is not liable and the Tribunal has committed an error in fastening the liability on the Insurance Company by making an observation that this is a two wheeler with seating capacity of two including the driver, there has been coverage towards third party liability and there is separate personal expenditure coverage for registered owner-cum-driver. When the seating capacity of the vehicle is two and there is separate premium for owner-cum-driver, then the liability has the coverage of the petitioner (claimant) in respect of the said vehicle. The said observation is erroneous and hence, it requires the interference of this Court.

8. Further, the learned counsel would submit that in respect of other ground urged before this Court with regard to the quantum of compensation, he has pointed out that the Tribunal while calculating the

compensation particularly on the head of 'Loss of income on account of disability' has committed an error in taking the loss of income as Rs.10,500/- instead of Rs.4,500/- per annum. There was a calculation error that has been committed by the Tribunal while awarding the compensation. Hence, it requires interference to modify the quantum of compensation.

9. Per contra, learned counsel for respondent No.1/claimant would submit that though the policy is an act policy, which has been marked as Ex.R2, it is clear that the premium of Rs.300/- was collected towards third party liability and also collected an additional amount of Rs.50/- covering the liability in respect of the owner-cum-driver and when the amount has been collected to the tune of Rs.300/- towards third party risk, the pillion rider comes within the purview of third party. Hence, the Insurance

Company is liable to pay the compensation and the Tribunal has not committed any error in fastening the liability on the Insurance Company and it does not require any interference.

10. The learned counsel with regard to the quantum of compensation is concerned would contend that the Tribunal has not committed any error in awarding the compensation and the compensation awarded to the tune of Rs.3,03,777/- is just and reasonable. Hence, it does not require any interference by this Court.

11. Having heard the arguments of the learned counsel for the appellant/Insurance Company and the learned counsel for respondent No.1/Claimant and keeping in view the rival contentions, the points that arise for the consideration of this Court are:

- (i) Whether the Tribunal has committed an error in calculating the 'loss of income on account of disability' and it requires interference of this Court?
- (ii) Whether the Tribunal has committed an error in fastening the liability on the Insurance Company in the absence of any premium is paid covering the liability of the pillion rider?
- (iii) What order?

Point No.(i):

12. Before coming to the aspect of liability, this Court has to examine with regard to the quantum of compensation and whether the Tribunal has committed an error in calculating the 'loss of income on account of disability'. No doubt, on perusal of Judgment and Award of the Tribunal, there is an error while calculating the 'loss of income on account of

disability' and the Tribunal has taken the notional income of Rs.15,000/- per annum and the Doctor has assessed the disability to the extent of 30% for the whole body, the same is not in dispute. In paragraph No.10 of the Judgment, it is clearly shown that, 30% disability is taken by the Tribunal while calculating the 'loss of income on account of disability'. Taking the disability of 30% would be $15000 \times 30 / 100 = 4500$ and the relevant multiplier is 15, then, $15000 - 4500 = 10500 \times 15 = \text{Rs.}1,57,500/-$ as 'loss of income on account of disability', the same is an error apparent on the face of the record. The Tribunal instead of taking Rs.4,500/-, it has taken Rs.10,500/- while calculating the 'loss of income'. However, it has to be taken note of the fact that the injured is a minor boy, who is aged about 13 years, had sustained three fractures i.e., fracture of right femur and the fracture of both bones of right leg. The appellant also does not dispute the

fact that the Doctor has assessed the whole body disability at 30%.

13. This Court would like to refer to the Judgment of the Apex Court in the case of ***Mallikarjun v. Divisional Manager, National Insurance Company Limited and another*** reported in ***(2014) 14 Supreme Court Cases 396***. In the said Judgment, the Apex Court while calculating the just and fair compensation, particularly, children who have suffered the disability held that, considering the relevant factors, precedents and approach of various High Courts, appropriate compensation on all other heads in addition to actual expenditure for treatment, attendant, etc. should be, if disability is above 10% and up to 30% to whole body, Rs.3 lakhs; up to 60%, Rs.4 lakhs; up to 90%, Rs.5 lakhs; and above 90%, it should be Rs.6 lakhs. It is further held that, for permanent disability up to 10%, it should be Rs.1

lakh, unless there are exceptional circumstances to take a different yardstick.

14. Having taken note of the principles laid down in the Judgment referred supra with regard to the quantum of compensation, particularly, in case of children suffering disability, a table has been laid down proportionate to the percentage of disability. In the facts and circumstances of the present case, there is no dispute that the claimant, who is a minor, aged 13 years old has suffered fracture of femur and fracture of both bones of right leg and the Doctor has assessed the disability at 30%. In terms of this Judgment, the injured is entitled for Rs.3 lakhs on the head of disability itself. No doubt, the claimant has not filed any appeal before this Court for enhancement of compensation and even in the absence of the appeal, this Court can take note of the same and even though there is an error in calculating the

compensation on the head of 'loss of income on account of disability', in all, total compensation of Rs.3,03,777/- was awarded by the Tribunal. In these circumstances of the present case, this Court would come to the conclusion that the error in calculating the 'loss of income on account of disability' may not come into the aid of the appellant to calculate the same and if it is re-calculated and allowed only Rs.67,500/- as contended by the learned counsel for the appellant, it would be an injustice to the person, who has suffered injuries with 30% disability. The Court has to take note of the fact that while awarding the compensation, the compensation should be just and reasonable as held by the Apex Court in the case referred supra. Hence, it does not require any interference of this Court.

Point Nos.(ii) and (iii):

15. The main contention of the learned counsel for the appellant/Insurance Company is that, the Tribunal has committed an error in fastening the liability on the Insurance Company. Even though there was no specific premium paid in respect of the pillion rider, the premium was paid covering only the third party and owner-cum-driver. The interpretation of the Tribunal is that when the seating capacity of the vehicle is two and there is separate premium for owner-cum-driver, then the liability has the coverage of the petitioner in respect of the said vehicle is, erroneous.

16. Learned counsel appearing for respondent No.1/claimant would contend that the premium of Rs.300/- was collected towards third party liability and additional amount of Rs.50/- was collected from owner-cum-driver. Hence, the Insurance Company is

liable to pay the compensation. Now, this Court has to examine whether the Tribunal has committed an error in fastening the liability on the Insurance Company.

17. Before considering the rival contentions of both the parties, this Court would like to refer to the document – Ex.R2. On perusal of Ex.R2-policy, which has been marked through the witness of Insurance Company, on top of the policy, it is clearly mentioned that Motor Insurance Certificate cum Policy Schedule motorized – two wheelers liability only policy – zone A. Learned counsel while referring to the words mentioned on top of the policy would submit that the policy is an act policy and the same does not cover the liability in respect of the pillion rider.

18. On the other hand, learned counsel would contend that the Basic TP cover Rs.300/- was

collected and this claimant, who is the pillion rider, comes within the purview of third party. Hence, the Company is liable to pay the compensation.

19. Learned counsel appearing for the appellant/Insurance Company, in his arguments, he vehemently submits that the Apex Court in the Judgment reported in **(2008) 7 Supreme Court Cases 428** in the case of ***Oriental Insurance Company Limited v. Sudhakaran K.V. and others***, laid down the law regarding gratuitous passenger and third party.

20. On perusal of this Judgment, the Apex Court has dealt with regard to Section 147 of the Act and also dealt with regard to the definition of third party. The learned counsel also brought to the notice of this Court that the Apex Court in this Judgment held that such a pillion rider is not to be treated as a

“third party” under Section 147 of the Act. It is further held that such a pillion rider would be covered only in case additional cover is purchased under the contract of insurance. The legal obligation arising under Section 147 of the Act cannot be extended to an injury or death of the owner of the vehicle or a pillion rider traveling thereon.

21. The Apex Court also discussed with regard to the pillion rider will become a gratuitous passenger and he cannot be third party. The Insurance policy did not cover the risk of injury or death of such a passenger and thus, it was not liable to reimburse the owner of the vehicle. The Apex Court has framed a question as to whether a pillion rider on a scooter would be a “third party” within the meaning of Section 147 of the Act and held that the pillion rider is not a third party.

22. Learned counsel would submit that the Apex Court in the case of **United India Insurance Co. Ltd., Shimla v. Tilak Singh & Ors.** (supra), extended the same principles to other categories of vehicles also.

23. In this regard, this Court would like to extract the relevant paragraph Nos.18 and 21, as hereunder:

"18. Thus, even under the 1939 Act the established legal position was that unless there was a specific coverage of the risk pertaining to a gratuitous passengers in the policy, the insurer was not liable. We find that clause (ii) of the proviso to Section 95(1) has been eliminated while drafting section 147 of the 1988 Act. Under sub-section (1)(b) under the 1988 Act, compulsory policy of insurance required under the statute must now provide against any liability which may be incurred by the owner of the vehicle "in respect of the death of or bodily injury to any person including owner of the goods or authorised representative carried in the vehicle or damage to any

property of a third party caused by or arising out of the use of the vehicles in a public place."

21. *In our view, although the observations made in Asha Rani's case (supra) were in connection with carrying passengers in a goods vehicle, the same would apply with equal force to gratuitous passengers in any other vehicle also. Thus, we must uphold the contention of the appellant-insurance company that it owed no liability toward the injuries suffered by the deceased Rajinder Singh who was a pillion rider, as the insurance policy was a statutory policy, and hence it did not cover the risk of death of or bodily injury to gratuitous passengers."*

24. On perusal of the principles laid down in the judgment, it is clear that the Insurance Company is not liable to pay the compensation to the pillion rider and the policy was a statutory policy and the same did not cover the risk of the death of or bodily injury to gratuitous passenger.

25. Further, the learned counsel would submit that the Apex Court in the case of **Dr.T.V.Jose v.**

Chacko P.M. alias Thankachan and others (supra), has held that the liability of Insurer to third parties i.e, gratuitous passengers – Third party Policy does not cover liability to gratuitous passengers who are not carried for hire or reward – Terms and conditions of comprehensive Policy relating to private cars, cannot apply to third party policy. In absence of terms and conditions governing third party policy it cannot be accepted that it covers liability to occupants of vehicle, private car Insurance Company not liable to reimburse the owner of vehicle.

26. This Court would like to extract the relevant paragraph of the Apex Court judgment of the above case, particularly Paragraph No. 19, which discussed with regard to the coverage of the risk of third party hereunder:

"19. In this case only the first sheet of the policy is on record. This clearly shows that

the policy is a third party policy. The terms and conditions governing this Policy are not on record. What was shown to Court was terms and conditions of a comprehensive policy relating to private cars. These cannot apply to this policy. In the absence of terms and conditions governing this policy it is not possible to accept the submission of Mr. Iyer that this policy covered liability to occupants of the car. As has been set out hereinabove, the law on this subject is clear, a third party policy does not cover liability to gratuitous passengers who are not carried for hire or reward. The 8th Respondent Company will, therefore, not be liable to reimburse the Appellant."

27. On perusal of the principles laid down in the Judgment, it is clear that the policy is a third party policy and not the comprehensive policy and the third party policy does not cover liability to gratuitous passenger, who is not carried for hire or reward. In the case on hand, the policy issued is only an act

policy and premium is paid only for third party and for owner-cum-driver and not the pillion rider.

28. This Court would like to refer to the Judgment of the Apex Court in the case of ***National Insurance Company Ltd. v. Balakrishnan and Anr.*** reported in ***AIR 2013 Supreme Court 473***. In this case, the Apex Court held that if specific premium is not paid in respect of the pillion rider, the act policy liability is only in respect of the liability policy and the same does not cover the risk of the pillion rider. The Apex Court in this Judgment referring to Section 147(1) of the Act, in respect of private vehicle, if any person traveled in the private vehicle held that the risk of a passenger in a private car is covered under comprehensive/package policy and the Insurance Company is liable to third party risk of an occupant of a private Car is not covered under an act policy. Hence, it is clear that the risk of an occupant of a

private car or pillion rider is not covered under an act policy. Unless specific premium is paid in respect of the pillion rider and further held that the act policy liability is only in respect of the liability policy and the same does not cover the risk of the pillion rider.

29. Having taken note of the principles laid down in the Judgment referred supra and the facts of the case, it is clear that the injured minor was proceeding in the motorcycle as pillion rider and the same is not in dispute. On perusal of Ex.R2, it is specific that it is only an act policy and when the act policy was issued it does not cover the risk of the pillion rider unless specific premium is collected in respect of the pillion rider. No doubt, as contended by the learned counsel for the claimant that an amount of Rs.300/- was collected in respect of third party risk and also additional amount of Rs.50/- was collected

covering the liability in respect of owner-cum-driver and not in respect of the pillion rider.

30. Learned counsel appearing for the appellant/Insurance Company rightly contended that the pillion rider does not come within the purview of third party. The Apex Court in ***Oriental Insurance Company Limited v. Sudhakaran K.V. and others*** (supra), the deceased was traveled as a pillion rider on a scooter and it is categorically held that such a pillion rider is not to be treated as a "third party" under Section 147 of the Act. It is further held that such a pillion rider would be covered only in case additional cover is purchased under the contract of insurance. It is further held that, the legal obligation arising under Section 147 of the Act cannot be extended to an injury or death of the owner of the vehicle or a pillion rider traveling thereon. It is also held that the pillion rider become a gratuitous

passenger and on perusal of the written statement, it is also specifically contended that the policy does not cover the risk of the pillion rider and in support of the said contention also, the witness has been examined before the Tribunal and proved the defence that the policy does not cover the risk of the pillion rider. Hence, it is clear that the appellant/Insurance Company owed no liability towards the injuries suffered by the injured, who was a pillion rider, as the Insurance Policy was a statutory policy, and hence it did not cover the risk of death of or bodily injury to a gratuitous passenger. The injured was, indisputably, not the driver of the vehicle, he was a pillion rider and the premium paid in respect of the owner-cum-driver and also in respect of the third party. The Apex Court has held that the pillion rider cannot be treated as a third party under Section 147 of the Act. The very contention of the learned counsel for the claimant is

that the Insurance Company is liable to pay the compensation cannot be accepted.

31. The Tribunal failed to appreciate the facts of the case on hand and erroneously came to the conclusion that the vehicle is a two wheeler with seating capacity of two including the driver, there has been coverage towards third party liability and there is separate personal expenditure coverage for registered owner-cum-driver. It is erroneously further observed that, when the seating capacity of the vehicle is two and there is separate premium for owner-cum-driver, then the liability has the coverage of the appellant in respect of the said vehicle. The said approach is erroneous and there is no separate premium in respect of the pillion rider and premium is paid only in respect of third party and also in respect of owner-cum-driver and the policy was misinterpreted while fastening the liability on the Insurance Company. In

the absence of premium not paid in respect to the pillion rider and when the policy is an act policy that means liability policy, the Tribunal ought not to have held that the Insurance Company is liable to pay the compensation and the said erroneous approach requires to be set aside and the liability has to be modified by answering point No.2 as 'affirmative'.

32. In view of the discussions made above, I pass the following:

ORDER

- (i) The appeal is allowed in part.
- (ii) The judgment and award passed in MVC No.20/2010 dated 30.06.2012 on the file of Additional Senior Civil Judge and MACT XIII at Madhugiri, in respect of the liability fastened on the Insurance Company is set aside and the same is modified and held that

the respondent No.2 (owner/insured) is liable to pay the compensation.

- (iii) The owner/respondent No.2 is directed to pay the compensation within eight weeks.
- (iv) Office is directed to refund the amount in deposit, if any, in favour of the Insurance Company.
- (iv) The Registry is directed to send the Trial Court records, forthwith.

**Sd/-
JUDGE**

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