

Sainuddin vs George Thomas

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Court : Kerala

Decided On : Apr-28-2023

Judge : Honourable Mr.Justice Murali Purushothaman

Appeal No. : MACA/2439/2016

Appellant : Sainuddin

Respondent : George Thomas

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR.JUSTICE MURALI PURUSHOTHAMAN FRIDAY, THE 28TH DAY OF APRIL 2023 / 8TH VAISAKHA, 1945 MACA NO. 2439 OF 2016 AGAINST THE AWARD DATED 18.11.2014 IN OPMV 512/2012 OF MOTOR ACCIDENT CLAIMS TRIBUNAL ,ERNAKULAM APPELLANT/PETITIONER: SAINUDDIN S/O. MOIDEEN, KANAN PUTHENPARAMBU, ERNAKULAM. BY ADV SRI.JACOB ABRAHAM RESPONDENT/RESPONDENTS 1 TO 3: 1 GEORGE THOMAS S/O. THOMAS MATHEW, KOCHUPARAMBATHU, VELYANADU, ALAPPUZHA. PIN- 689 590. 2 THOMASKUTTY S/O. JACOB, CHAKKALKANDATHIL PARAMBA, KIDANGARA, ALAPUZZHA- 688 001.

3 THE UNITED INDIA INSURANCE CO. LTD CHANGANASSERRY, KOTTAYAM. BY ADVS. DIPU JAMES S.JAYASREE GEORGE MATHEW SUNIL KUMAR A.G THIS MOTOR ACCIDENT CLAIMS APPEAL HAVING BEEN FINALLY HEARD ON 31.08.2022, THE COURT ON 28.04.2023, DELIVERED THE FOLLOWING: MACA No.2439 of 2016 ..2..

JUDGMENT

This appeal is preferred by the petitioner in O.P.(MV) No.512 of 2012 on the file of the Motor Accidents Claims Tribunal, Ernakulam. The parties in this appeal are referred to as per their status in the claim petition.

2. The petitioner, a fish merchant, sustained injuries in

a road accident occurred on 15.09.2011 when a Tata Sumo car bearing Registration No.KL-04-AA/7881 hit his bicycle. The 1st respondent is the driver, the 2nd respondent is the registered owner and the 3rd respondent is the insurer, of the car. The petitioner claimed an amount of Rs.10,00,000/- (Rupees Ten lakhs) as compensation for the personal injuries sustained by him in the accident. It was contended that the accident happened due to the negligent driving of the car by the 1st respondent.

3. Before the Tribunal, Exts.A1 to A10 were marked on the side of the petitioner and Exts.B1 to B4 were marked on the side of the 3rd respondent. The certificate issued by the

MACA No.2439 of 2016 ..3.. Medical Board was marked as Ext.C1 wherein the Medical Board has certified that the petitioner is having 10% permanent partial disability.

4. The 1st respondent filed a written statement

contending that there was no negligence on his part and that he was having a valid driving license at the time of the accident and the offending vehicle was validly insured with the 3rd respondent. The 2nd respondent, the owner of the car

was set ex parte.

5. The 3rd respondent, the insurer, filed a written

statement contending that the insurance policy mentioned in the claim petition pertains to a private car bearing Registration No. TN-07/F-3135 in the name of one Thomas George and was transferred to the name of the 2nd respondent w.e.f. 24.08.2011 and the vehicle was altered as a transport vehicle - LMV contract carriage and re-registered

as KL-04/AA-7881 without changing the insurance. It is stated that the 2nd respondent was using the said car as a transport vehicle and the vehicle was deliberately insured as MACA No.2439 of 2016 ..4.. a private car under a 'liability only policy', in order to pay

less premium, which is a clear suppression of material facts

and therefore, the 3rd respondent is not liable to indemnify the 2nd respondent or to compensate the petitioner. It is also stated that there is contributory negligence on the part of the petitioner in causing the accident. The 3rd respondent disputed the age, occupation and monthly income of the petitioner and contended that the compensation claimed is excessive.

6. The Tribunal found that the accident happened due to

the negligence of the 1st respondent, the driver of the car. With regard to the liability of the 3rd respondent insurer to indemnify the 2nd respondent owner, the Tribunal found that, as per Ext.B1 insurance policy, the owner has taken only a 'private car - liability only policy' whereas Ext.B4 shows that the vehicle was a contract carriage and there is clear suppression of material facts. The Tribunal held that the owner registered the vehicle as a transport vehicle and took insurance policy for a private vehicle and thus, there is

MACA No.2439 of 2016 ..5.. suppression of material facts at the time of taking the policy which amounts to a void contract between the insurer and the insured. The Tribunal exonerated the 3rd respondent insurer from the liability to indemnify the

2nd respondent. The relevant paragraph of the award is extracted below:

9. The 1st respondent in his written statement stated that the TATA Sumo has valid insurance policy with the 3rd respondent. The 3rd respondent admitted that an insurance policy was taken but the policy was taken for a private car. But later it was changed as transport vehicle as LMV contract carriage. The vehicle was insured by one Thomas George. The owner of the said car has taken a policy for a private car and suppressed the material fact that it is a taxi. In order to take a policy for a taxi, the owner has to pay additional premium and the premium itself will come to Rs. 14,060/-. There is suppression of material facts while taking insurance policy. Therefore, the 3rd respondent

is not liable to indemnify the insured. In order

to prove the said contention of the 3rd respondent, Exts.B1 to B4 were marked. Ext.B1 is the insurance policy taken for TATA Sumo, which is seen issued in the name of one Thomaskutty and taken for a private car. It is MACA No.2439 of 2016 ..6..

only a liability only policy. Ext.B2 is the copy of the AMVI report, which shows that the TATA Sumo bearing Regn.No.KL-04-AA-7881 is a LMV contract carriage. Ext.B3 is the copy of a fitness certificate and Ext.B4 is copy of the contract carriage permit issued to offending vehicle. Exts.B1 to B4 proved that TATA Sumo car is a contract carriage. Ext.B1 proved that the owner has taken a policy for a private car and that too only a liability only policy. It shows that there is clear suppression of material facts. The owner of the said car has suppressed the fact that it is a taxi car and took policy as a private

car. The 3rd respondent has produced judgment

in MACA No.1766/2009 of the Hon'ble High Court of Kerala (National Insurance Company Ltd. Vs. Thankamma and others.) dated 05.10.2009 where the same facts were discussed. In that decision also a LMV contract carriage was insured as a private vehicle and as per the permit, the vehicle was operated as public vehicle. Therefore, necessarily to take insurance for public vehicle, it requires enhanced premium. But what the owner of the vehicle had done is registered the vehicle as a transport vehicle and took a policy as a private

vehicle. That too to suppress the material facts

at the time of taking policy, which amounts to a MACA No.2439 of 2016 ..7.. avoid contract between the insurer and the insured. Therefore, the insurance company has to be exonerated from the liability.

7. The Tribunal, in the absence of evidence as regards

the monthly income of the petitioner, fixed his notional income as Rs.4,000/-. The multiplier was taken as '13'. The Tribunal awarded an amount of Rs.4,26,800/- as total compensation under various heads as per the table given below:

Heads	Amount Claimed	Amount Awarded
Loss of earnings and	150000	
24000 4000x6 loss of earnings to the parents	Partial loss of earnings	0 0
Transport to Hospital	5000	5000 and back to Home
Extra nourishment	15000	1000
Damage to clothes and	1000	500 articles
Attendant Expenses	30000	3500
Medical Expenses	450000	315000
Compensation for pain	30000	25000 and suffering
Compensation for	40000	52800
4000x12 continuing and	x10/100x	permanent/partial
13 disability		
Compensation for	0 0	

MACA No.2439 of 2016 ..8.. disfiguration Compensation for loss 30000 0 of earning power Compensation for 20000 0 future treatment Compensation for 0 0 expectation of life. Compensation for loss 250000 0 of expectation of life/ amenities and enjoyment in life Total 1021000 426800 Claimed Rs.10,00,000/-

The petitioner was allowed to realise the sum of Rs.4,26,800/- with 8% interest per annum from the date of petition till realisation with proportionate costs from respondents 1 and 2, who were made jointly and severally liable to pay the compensation.

8. Aggrieved by the amount of compensation and

exoneration of the insurance company from the liability to pay compensation, the petitioner has preferred this appeal. According to the petitioner, there is no suppression of material facts at the time of taking the policy and the 3rd respondent should have been made liable to indemnify the MACA No.2439 of 2016 ..9.. 2nd respondent and to satisfy the award.

9. Heard Adv. Jacob Abraham, the learned counsel for the petitioner, Adv. George Mathew, the learned counsel for respondents 1 and 2 and Adv. S. Jayasree, the learned counsel for the 3rd respondent.

10. With regard to the liability of the 3rd

respondent/insurer to indemnify the 2nd respondent/owner, it will be relevant to consider the following facts. Ext.B1 certificate of insurance shows that the Tata Sumo car with Registration No. TN-07/F-3135 was insured in the name of Fr. Thomas George, xxxx, Chennai, Tamil Nadu for the period from 19.05.2011 to 18.05.2012 as 'private car - liability only policy'. As per the Endorsement Schedule forming part of Ext.B1, the vehicle has been transferred to Thomas Kutty, the 2nd respondent and the policy of insurance is transferred to Thomas Kutty w.e.f. 24.08.2011. The Registration Number of the vehicle is shown as KL-04/AA-7881. The period of validity of the policy after the transfer is from 24.08.2011 to

MACA No.2439 of 2016 ..10.. 18.05.2012. At the time of the transfer of policy on 24.08.2011, the ownership of the vehicle was with the 2nd respondent and the vehicle was re-registered as KL-04/AA-

7881. Ext.B4 is the copy of the contract carriage permit issued in respect of the said vehicle for the period from 02.09.2011 to 01.03.2016. The date of the accident was

15.09.2011. As on the date of the accident, the vehicle bearing Registration No. KL-04/AA-7881 was having a 'private car - liability only policy' and the vehicle was a contract carriage. The finding of the Tribunal is that there is suppression of material facts while taking the insurance policy inasmuch as the owner has suppressed the fact that the car is a contract carriage and took policy for the vehicle as a private car. The Tribunal held that, since the 2nd respondent suppressed material facts at the time of taking the policy, the contract between the insurer and the insured is void and the insurance company has to be exonerated from the liability.

11. Section 149(2)(b) of the Motor Vehicles Act, 1988

MACA No.2439 of 2016 ..11.. (hereinafter referred to as the 'M.V. Act' for short) provides for an exception to the insurers to avoid liability in spite of the policy having been issued if it is proved that the policy is void on the ground that it was obtained by the non-disclosure of a material fact or by a representation of fact, which was false in some material particular. To avoid liability, the insurer has to prove that (i) the policy is void on the ground that it was obtained by the non-disclosure of a material fact or (ii) by a representation of a fact that was false in some

material particular. The Tribunal found that the 2nd respondent registered the vehicle as a 'transport vehicle' and took a policy as 'private vehicle' and there is suppression of material facts at the time of taking the policy which amounts to a void contract. The said finding of the Tribunal is not correct. The Endorsement Schedule in Ext.B1 policy shows that the insurance policy has been transferred to the 2nd respondent w.e.f. 24.08.2011. The period of validity of the policy is from 24.08.2011 to 18.05.2012. Ext.B4 is the contract carriage permit issued on 03.09.2011 and the period

MACA No.2439 of 2016 ..12.. of validity of the permit is from 02.09.2011 to 01.09.2016. As on the date of transfer of the policy of insurance into the name of the 2nd respondent on 24.08.2011, the vehicle KL- 04/AA-7881 was a private car and not a contract carriage. Section 149(2)(b) of the M.V. Act enables the insurance company to avoid liability when the policy was obtained by non-

disclosure of a material fact. Since the vehicle was a private car as on 24.08.2011, the date of transfer of the policy into the name of the 2nd respondent, it cannot be said that there was non-disclosure of any material facts to the effect that the vehicle was a contract carriage. As on 24.08.2011, the vehicle was not a contract carriage and there was no suppression of material facts to attract Section 149(2)

(b) of the M.V. Act. Since there is no suppression of material

facts in obtaining the policy, the policy is not void under

Section 149(2)(b) of the M.V. Act and therefore, the finding of the Tribunal, to the said extent, is set aside.

12. The vehicle was converted into a contract carriage w.e.f. 02.09.2011 and the accident happened on 15.09.2011.

MACA No.2439 of 2016 ..13.. As on the date of the accident, the vehicle was a contract carriage. Ext. B1 policy of insurance provides for limitations as to use, limits of liability and general exceptions. The limitations as to use read as under: The Policy covers use of the vehicle for any purpose other than a) Hire or Reward b) Carriage of Goods (other than samples or personal luggage) c) Organized Racing d) Pace Making e) Speed Testing and Reliability Trails f) Use in connection with Motor Trade

The conditions of Ext. B1 policy exclude the plying of vehicle for hire or reward viz., use as a contract carriage. Thus, there is a breach of a specified condition of the policy as provided under Section 149 (2) (a) (i) (a) of the M.V. Act, a condition excluding the use of the vehicle as contract carriage. Grant of contract carriage permit under Section 74 of the M.V. Act does not require any no objection certificate from the insurer. However, once the vehicle has been granted a contract carriage permit, the vehicle shall have an insurance policy for a contract carriage. The accident

MACA No.2439 of 2016 ..14.. happened 12 days after the vehicle was converted into a contract carriage. As on the date of the accident, the vehicle had only a 'private car - liability only policy' with a condition excluding its use as a contract

carriage. Thus, there is violation of the conditions of the policy by the insured. Therefore, the liability cannot be fastened on the insurer. However, in the facts and circumstances of the case and considering the beneficial purpose of the enactment of the Motor Vehicles Act and to meet the ends of justice, a direction to pay and recover the compensation deserves to be issued against the insurer.

13. With regard to the quantum of compensation, the

Tribunal has taken the notional monthly income of the petitioner as Rs.4,000/-. Taking the percentage of permanent disability as 10% based on Ext.C1 and the multiplier as '13', the Tribunal has awarded Rs.52,800/- ($4,000 \times 12 \times 10/100 \times 13$) (the actual amount under the head as per the above calculation should come as Rs.62,400/-) as compensation for continuing and permanent/ partial disability. The petitioner

MACA No.2439 of 2016 ..15.. was a fish merchant. In the absence of any evidence regarding the income of the petitioner, the Tribunal can calculate compensation by arriving at a notional income. Going by the dictum laid down in Ramachandrappa v. Manager, Royal Sundaram Alliance Insurance Company Limited [2011 (13) SCC 236], the notional income of a manual labourer in respect of an accident that occurred in 2011, has to be taken as Rs.8,000/-. The Tribunal went wrong in taking the multiplier as '13'. The petitioner was aged 54 years at the time of the accident and the multiplier applicable is '11' in the light of the decision in Sarla Verma v. Delhi Transport Corporation [2009 (6) SCC 121: AIR

2009 SC 3104]. Accordingly, the compensation for continuing and permanent/ partial disability is re-fixed as Rs.1,05,600/- ($8,000 \times 12 \times 11 \times 10/100$). Since the Tribunal has already awarded an amount of Rs.52,800/- as compensation under the said head, the petitioner is entitled to an enhanced amount of Rs.52,800/- (Rs.1,05,600-52,800).

14. Towards loss of earnings, the Tribunal has awarded

MACA No.2439 of 2016 ..16.. an amount of Rs.24,000/- ($4,000 \times 6$), finding that the petitioner was incapacitated to do work for a period of six months. Since the

notional monthly income of the petitioner is re-fixed as Rs.8,000/-, he is entitled to an amount of Rs.48,000/- (8,000x6) towards loss of earnings. After deducting the amount already awarded, the petitioner is entitled to an additional amount of Rs.24,000/- (Rs.48,000- 24,000) under the said head.

15. Towards loss of amenities in life, no amount has

been awarded by the Tribunal. Taking into consideration the nature of injuries sustained by the petitioner and the disability, he is entitled to an amount of Rs.50,000/- under the said head.

16. I find that the compensation awarded under the other heads is just and reasonable. In the result, the petitioner is entitled for an enhanced

amount of Rs.1,26,800/- (Rupees one lakh twenty six thousand and eight hundred only) (Rs.52,800+ 24,000+ 50,000) towards compensation. The 3rd respondent insurance MACA No.2439 of 2016 ..17..

company is absolved from liability of paying the compensation to the petitioner. However, the 3rd respondent shall satisfy and pay the amount of compensation as enhanced by this Court at the first instance and thereafter the 3rd respondent shall be entitled to recover the same from the 2nd respondent in accordance with law. The petitioner can realise the total compensation of Rs.5,53,600/- (Rs.4,26,800 + 1,26,800) together with 8% interest per annum from the date of petition till realisation with proportionate costs from the 3rd respondent insurer at the first instance. The 3rd respondent is directed to deposit the said amount (less the amount, if any, already paid by the 2nd respondent) before the Tribunal within a period of two months from the date of receipt of a certified copy of this judgment.

The appeal is allowed as above. Sd/- MURALI PURUSHOTHAMAN JUDGE SB

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