IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED 27.11.2015

CORAM

THE HONOURABLE MR.JUSTICE T.RAJA

C.M.A. NO.249 OF 2010

R.Annamalai .. Appellant/Petitioner

Versus
1.M.Vinayagam
2.United India Insurance Company Ltd.,
Rep.by its Branch Manager,
235, Gandhi Market Road, Arni. .. Respondents/Respondents

PRAYER: Civil Miscellaneous Appeal filed under Section 173 of Motor Vehicles Act, 1988, against the judgment and decree dated 30.10.2009 made in M.C.O.P.No.110 of 2006 on the file of the Motor Accident Claims Tribunal [Sub Court], Arni.

For Appellant : Mr.P.Satheesh Kumar
For Respondent-1 : Mr.K.Goviganesan
For Respondent-2 : M/s.R.Sreevidhya

J U D G M E N T

This Civil Miscellaneous Appeal is directed against the impugned order passed in M.C.O.P.No.110 of 2006 dated 30.10.2009 awarding a sum of Rs.66,755/- with interest at the rate of 7.5% from the date of the petition till the date of realisation for the multiple injuries suffered by the appellant, namely, R.Annamalai at the age of 60, when the accident took place on 24.03.2006, at about 3.30a.m., in Pudupalam to Onnupuram Road near Sadasiva Chettiar lands.

2.Learned counsel for the claimant / appellant aggrieved by the insufficient compensation awarded by the Tribunal contended that the Tribunal refused to apply the principles of pay and recovery by relying on the judgment of this Court in the case of Bajaj Allianz General Insurance Co. Ltd., Chennai vs. Samiyathaal and others reported in 2014 [1] TN MAC 122. He has also relied upon yet another judgment of this Court in the case of Iffco Tokio General Insurance Co. Ltd. vs. S.Kannadasan reported in 2014 [1] TN MAC 663 for a proposition that the question whether the insurer is liable to be exonerated to pay compensation to third party is no more res integra in view of the Division Bench decision reported in 2009 [2] TN MAC 103 [DB] [United India Insurance Company Ltd. vs. S.Saravanan].

3.Section 149[4] & [5] of the Motor Vehicles Act, would reflect the divine intention of the Legislature to protect the interest of the third parties, vis-a-vis se disputes between the insured and insurer. The ratio laid down by this Court in 2012 [1] TN MAC 226 [ICICI Lombard General Insurance Company vs. Annakkilli] is that insurer cannot be totally exonerated from its liability to pay compensation to third party. The reason is insurer can avoid its liability only to insured. On this basis, the learned counsel for the appellant sought for giving a direction to the Insurance Company to pay and recover the same from the owner of the vehicle, who is also a party to the proceedings.

4.In regard to the quantum, the learned counsel for the claimant / appellant would submit that the claimant suffered multiple injuries in the accident which took place on 24.03.2006 in the road leading to Pudupalam to Onnupuram Road near Sadasiva Chettiar lands. In view of the multiple injuries sustained by him all over his body and fracture in the right fore hand, he was unable to get back his right hand as normal one to attend the day-to-day house hold routines. The Doctor, who has given treatment, has certified 35% disability.

5.When the evidences were also produced before the Tribunal, instead of awarding suitable compensation, the Tribunal has fixed only Rs.1000/- per percentage and thereby awarded a sum of Rs.35,000/- [Rs.1000 x 35] towards disability. The Tribunal again has wrongly fixed Rs.2,500/- towards pain and suffering, when it was a clear case of the claimant that he had taken treatment as inpatient for 3 days in C.M.C. Hospital at Vellore and subsequently, he continued to take treatment as out patient. Therefore, he prayed an increase of suitable compensation on this head.

6.Learned counsel for the Insurance Company opposing the above contentions would submit that the prayer made by the claimant / appellant that the principles of pay and recovery should be applied against the Insurance Company is out of question, the reason is such principles are always applied in the absence of the driver and the owner. But in the present case, the driver being the owner of the vehicle, he was got red-handed and he was also prosecuted before the Tribunal.

7.In this regard, it is relevant to extract the law fixed by the judgment of this Court in 2014 [1] TN MAC 122 [Bajaj Allianz General Insurance Co. Ltd., Chennai vs. Samiyathaal and others], wherein it is held as follows;

"8.......as per the dictum laid down by the Apex Court in the celebrated case of National Insurance Co. Ltd., vs. Swaran Singh, 2004 [1] TN MAC 104 [SC], wherein the Three-Judges of the Hon'ble Supreme Court has dealt with the licence and had settled the principles, even where the Insurer is able to prove breach on the part of the insured concerning the Policy condition regarding holding of a valid licence by the driver, the Insurer would not be allowed to avoid its liability unless the said breach of condition is so fundamental. According to the learned counsel it does not make a difference between a fake licence or a expired licence and no licence."

"10.Therefore, as per the dictum laid down in National Insurance Co. Ltd. vs. Swaran Singh, 2004 [1] TN MAC 104 [SC]; United India Insurance Co. Ltd. vs. S.Saravanan, 2009 [2] TN MAC 103 [DB]; Bajaj Allianz General Insurance Company Ltd. vs. P.Manimozhi and others, 2010 [2] TN MAC 542 [SC]; Branch Manager, United India Insurance Co. Ltd., Dharmapuri Town vs. Nagammal and others, 2009 [1] TN MAC 1 [FB]: 2009[1] CTC 1 [FB] : 2009 [1] LW 702; Jawahar Singh vs. Bala Jain & Ors., 2011 [1] TN MAC 641 [SC]; and Iffco Tokyo General Insurance Co. Ltd. vs. A.Jafer Sadiq and others, 2012 [1] TN MAC 394 [DB], it is settled that if the insurer establishes that there is a breach of policy condition under Section 149[2][a][ii], the Insurance Company though not liable, as it has successfully established its defence, can be directed to pay and recover from the insured. However, the Tribunal being not convinced with the evidences put forth by the Insurance Company directed the Insurance Company to pay the compensation. Considering the submissions made by the learned counsel for the appellant-Insurance Company, this Court is of the view that the driver of the vehicle had no valid licence on the date of accident and hence the Insurance Company is directed to pay and then to recover from the owner.

11.In Oriental Insurance Co. Ltd., vs. Shri.Nanjappan, 2004 [1] TN MAC 211 [SC] : 2004 [1] ACC 524 [SC], mode of recovery is being mentioned and therefore the learned counsel representing the Insurance Company requested this Court to incorporate such mode to enable the Insurance Company to recover the compensation paid from the owner.



12.Therefore, it is held that the Insurance Company is directed to pay and recover the same from the owner of the vehicle. However, the Insurance Company is entitled to recover the compensation as per the mode incorporated in paragraph 8 of Oriental Insurance Co. Ltd., vs. Shri.Nanjappan, 2004 [1] TN MAC 211 [SC], which is incorporated as follows:

"For the purpose of recovering the compensation amount from the insured, the insurer shall not be required to file a Suit. It may initiate a proceeding before the concerned Executing Court as if the dispute between the insurer and the insured was the subject matter of determination before the Tribunal and as if the issue is decided against the owner and in favour of the insurer. A notice shall be issued to the insured to furnish security for the entire amount. The offending vehicle shall be attached as a part of the security. If necessity arises, the Executing Court shall take assistance of the concerned Regional Transport Authority. The Executing Court shall pass appropriate orders in accordance with law as to the insurer. In case there is any default it shall be open to the Executing Court to direct realization by disposal of the securities to be furnished or from any other property of the insured."
13.In the result the Civil Miscellaneous Appeal is partly allowed. Consequently, connected M.P. is closed. No costs."

8.Similarly, in the case of Iffco Tokio General Insurance Co. Ltd. vs. S.Kannadasan reported in 2014 [1] TN MAC 663, it has been held thus;

" 7.The question as to whether, it is open to the insurer to seek for total exoneration for payment of compensation to a third party victim or whether it has only a right of recovery, Section 149[4] & [5] of the Motor Vehicles Act, has been extensively considered in ICICI Lombard General Insurance Company vs. Annakkilli, 2012 [1] TN MAC 226, wherein this Court following the principles of law laid down by the Apex Court and the Division Bench judgments that payment of compensation to a third party victim or legal representatives of the deceased, as the case may be, being statutory and considering the interpretation given by the Supreme Court to Sections 147, 149 [4] & [5], vis-a-vis the defences open to the Insurance Company under Section 149[2][a][ii] of the Motor Vehicles Act and by holding that the very introduction of the words, "pay compensation to the third party and recover the same from the insured" in Section 149[4] & [5] of the Act, would reflect the divine intention of the legislature to protect the interest of the third parties, vis-a-vis inter se disputes between the insured and insurer, held that the insurer cannot avoid its liability to pay compensation to a third party, but such avoidance can be made only, if willful breach of terms and conditions of the policy by the insured, by consciously and recklessly allowing the driver, who did not possess a valid and effective diving licence, to drive the vehicle and even if such breach is proved, payment of compensation to the third party victim cannot, at any stretch of imagination, be avoided by the company and that the only remedy open to the insurer in law is to pay the compensation to the third party victims and recover from the insured. In view of the above, the insurer cannot be totally exonerated from payment of compensation to third party, but it can avoid its liability only to the insured.

8.In a recent decision in S.Iyyapan vs. United India Insurance Co. Ltd., 2013 [7] SCC 62, the Supreme Court, while considering the similar contentions and after considering a catena of decisions, at paragraph 17, held as follows:

"Hence, it our considered opinion, the insurer cannot disown its liability on the ground that although the driver was holding a licence to drive a light motor vehicle but before driving light motor vehicle used as commercial vehicle, no endorsement to drive commercial vehicle was obtained in the driving licence. In any case, it is the statutory right of a third party to recover the amount of compensation so awarded from the insurer. It is for the insurer to proceed against the insured for recovery of the amount in the event there has been violation of any condition of the insurance policy."

9.In view of the above settled legal position, this Court is of the view that the principles of pay and recovery can be applied. Accordingly, the Insurance Company / the second respondent is directed to pay amount of compensation to the claimant and recover the same from the owner of the vehicle.

10.With regard to the quantum, admittedly in the present case, the claimant suffered multiple injuries more particularly fracture in the right fore hand. He was unable to get back his right hand as normal, for which, he took treatment for about 3 days in C.M.C. Hospital, Vellore and even now, he is taking treatment. However, without taking into account such grievous injuries suffered by the claimant, the Tribunal has awarded a meager sum of Rs.2500/- towards pain and suffering. Therefore, this Court, by taking note of hardship faced by the claimant, hereby awards a sum of Rs.25,000/- towards pain and suffering. The Doctor has also certified 35% disability and this has been accepted by the Tribunal. Accordingly, the Tribunal has awarded a sum of Rs.35,000/- [1000 x 35] towards disability, by fixing Rs.1000/- per percentage, which in my view, is a just and reasonable compensation. Except this modification, rest of the compensation awarded by the Tribunal remains unaltered.

11.In fine, the Insurance Company is directed to deposit the modified compensation of Rs.91,755/- to the credit of M.C.O.P.No.110 of 2006, on the file of the Motor Accident Claims Tribunal [Sub Court], Arni, within a period of four weeks from the date of receipt of a copy of this judgment. On such deposit, the claimant is permitted to withdraw the same by moving appropriate application.

12.With this, the Civil Miscellaneous Appeal stands disposed of. However, there is no order as to costs.

Sd/-
Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

To

The Motor Accident Claims Tribunal [Sub Court],
Arni.

+1cc to Mr.P.Satheesh Kumar, Advocate sr.64808
+1cc to Mr.K.Govi Ganesan, Advocate sr.64872
+1cc to M/S.R.Sree Vidhya, Advocate sr.65010

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