



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 08.09.2016

CORAM:

THE HONOURABLE MR.JUSTICE M.SATHYANARAYANAN
and
THE HONOURABLE MS.JUSTICE V.M.VELUMANI

C.M.A. (MD) No.948 of 2016
and
C.M.P. (MD) No.8507 of 2016

Iffco Tokio General Insurance
Company Ltd.,
28, I Floor, North Usman Road
Thiyagaraya Nagar
Chennai

... Appellant / 2nd Respondent

-vs-

1.Thangalakshmi
2.Minor.Rithika
rep.by R1 mother
3.Mani
4.Rajapushpam

... Respondents / Petitioners

... Respondents / Respondents 1 & 3

Appeal filed Section 173 of Motor Vehicle Act, 1988 to set aside the fair and decreetal order, dated 30.10.2010, made in M.C.O.P.No.78 of 2007, on the file of the Motor Accident Claims Tribunal (Sub Court), Sivakasi.

For Appellant : Mr.S.Srinivasa Raghavan

For Respondents : Mr.S.Subbiah for R1

J U D G M E N T

[Judgment of the Court was made by M.SATHYANARAYANAN, J.]

Mr.S.Subbiah, learned counsel, takes notice on behalf of the first respondent and with the consent of both sides, this civil miscellaneous appeal is taken up for final hearing at the admission stage itself.



2. The second respondent in M.C.O.P.No.78 of 2007, on the file of Motor Accident Claims Tribunal / Sub Court, Sivakasi, aggrieved by the Award and Decree, dated 30.10.2010, has preferred this civil miscellaneous appeal, challenging the liability to indemnify the insured, namely, Mani / third respondent herein.

3. The respondents 1, 2 and 3 are wife, daughter and mother of the deceased John Albert respectively.

4. According to the respondents 1 and 2 / claimants, the deceased was aged about 28 years and he was a Diploma-holder of Engineering and he was employed in a famous construction company, namely, "E.T.A.Constructions (India) Ltd., and he was earning about Rs.9,000/- per month and apart from it, in order to augment the income, he along with his friends acted as agents of "Jamai Ice Cream" at Kodaikanal.

5. On 15.03.2007, at about 08.45 a.m., when the deceased was proceeding as rider in his Motorbike bearing registration No.TN60 C4126, from Observatory to Kodaikanal, a Lorry bearing registration No.TN57 J9786, belonging to the third respondent and driven by him in a rash and negligent manner, dashed against the Motorbike driven by the deceased John Albert and due to which he sustained grievous injuries in his head and all over the body and died on the spot. The jurisdictional Police, namely, Kodaikanal Police registered a case in Crime No.111 of 2007, against the third respondent / owner-cum-driver of the lorry, for the commission of offence under Section 304-A I.P.C.

6. The respondents 1 and 2 / claimants claimed compensation of Rs.26,70,000/- under the following heads, however they restricted their claim to Rs.15,00,000/-:

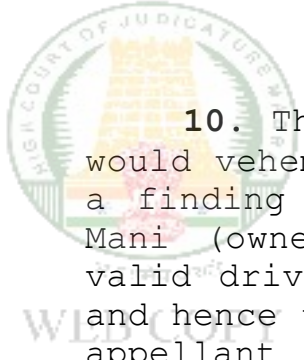
S1.No.	Heads	Amount
1.	Loss of income @ Rs.9,000/- per month for 180 months from 15.03.2007 to 15.03.2022	Rs.16,20,000/-
2.	Funeral expenses	Rs. 30,000/-
3.	Loss of income	Rs. 5,00,000/-
4.	Pain and Suffering, Mental Agony and Loss of Love and Affection	Rs. 5,00,000/-
Total		Rs.26,70,000/-
Restricted to		Rs.15,00,000/-



7. The appellant / Insurance Company filed a counter affidavit denying the contents of the claim petition and also took a stand that at the time of accident, the third respondent / Mani (owner-cum-driver of the Lorry) did not possess valid driving licence as it got expired on 24.07.2005 and it was renewed only on 19.06.2007 and in the interregnum the accident took place on 15.03.2007 and since it amounts to violation of policy conditions, they prayed for exoneration from indemnifying the insured, namely, Mani / third respondent. The appellant / Insurance Company also took a stand that the burden is on the respondents 1 and 2 / claimants to prove the nature of occupation and other material particulars and at any event the amount claimed by the claimants is on the higher side and hence prayed for dismissal of the claim petition.

8. During the course of enquiry, the first respondent / first claimant was examined as P.W.1 and one Prabhu, who was acting as an agent along with the deceased, was examined as P.W.2 and Exs.P1 to P16 were marked on the claimants' side. The fourth respondent / mother of the deceased was examined as R.W.1 and apart from her, S.K.Sundaram and Senthil Kumar were examined as R.Ws.2 and 3 respectively and Exs.R1 to R3 were marked on the respondents' side.

9. The Tribunal, on consideration of oral and documentary evidence, found that the third respondent / Mani (owner-cum-driver of the offending vehicle) did not possess valid driving licence on the date of accident i.e.15.03.2007 as it got expired on 24.07.2005 and renewed on 19.06.2007 and hence the Tribunal applied the principles of Pay and Recovery by relying upon the decisions in **M.Ramasamy & others v. Sankar & others**, reported in **2008 (3) TNCJ 576 (Mad)**; **ICICI Lombard General Insurance Company Ltd., v. Ahilandam & others**, reported in **2010 (1) TNMAC 613** and **Cholamandalam MS General Insurance Company Ltd., v. Veerasamy & others**, reported in **2010 (2) CTC 423** and sofar as the quantum of compensation is concerned, the Tribunal adopted the multiplier method and found that since the deceased was aged about 28 years, he would have earned income at Rs.10,000/- per month from his employment in "E.T.A.Constructions (India) Ltd., and also the commission agent of "Jamai Ice Cream" and deducting 1/3rd of his income for his personal expenses and contribution to his family and also taking note of the compensation claimed under other heads, arrived at the total compensation of Rs.14,79,500/- and directed the appellant / Insurance Company to pay the compensation to the claimants and apportioned the same between them. Aggrieved by the findings and liability to indemnify the third respondent / owner-cum-driver of the offending vehicle, the Insurance Company has preferred this civil miscellaneous appeal.



10. The learned counsel for the appellant / Insurance Company would vehemently contend that admittedly the Tribunal has recorded a finding that on the date of accident, the third respondent / Mani (owner-cum-driver of the offending Lorry) did not possess valid driving licence and he renewed the same only on 19.06.2007 and hence the policy conditions have been violated and as such the appellant / Insurance Company ought to have been exonerated from their liability of paying compensation on behalf of the insured / third respondent to the claimants and hence the learned counsel prays for setting aside the impugned Award and Decree passed by the Tribunal.

11. Per contra, Mr.S.Subbiah, learned counsel appearing for the first respondent, would contend that the Tribunal on consideration of oral and documentary evidence and correct application of law has rightly ordered pay and recovery and it cannot be faulted with and hence the learned counsel prays for dismissal of the civil miscellaneous appeal.

12. This Court has carefully considered the rival submissions and perused the materials produced.

13. The sole question arises for consideration is as to whether the appellant / Insurance Company is to indemnify the third respondent, who is the owner-cum-driver of the offending vehicle?

14. In **National Insurance Co. Ltd. v. Swaran Singh**, reported in (2004) 3 SCC 297, the Hon'ble Supreme Court has held that if a person has been given a licence for a particular type of vehicle as specified therein, he cannot be said to have no licence for driving another type of vehicle which is of the same category but of different type and in Paragraph No.110 of the said Judgment, the Hon'ble Apex Court has observed that the breach of policy condition e.g. disqualification of the driver or invalid driving licence of the driver, as contained in sub-section (2)(a)(ii) of Section 149, has to be proved to have been committed by the insured for avoiding liability by the insurer. Mere absence, fake or invalid driving licence or disqualification of the driver for driving at the relevant time, are not in themselves defences available to the insurer against either the insured or the third parties. To avoid its liability towards the insured, the insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by a duly licensed driver or one who was not disqualified to drive at the relevant time.

<https://hcservices.ecourts.gov.in/hcservices/>

15. The issue / question involved in this appeal is no longer



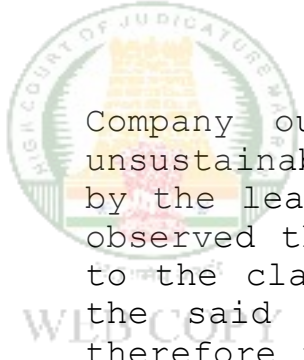
res integra in the light of the decision in **Branch Manager, Oriental Insurance Company Ltd. v. Mansoor Hussain**, reported in **2013 (2) CTC 57**, wherein the very same issue / question arose for consideration and a Single Bench of this Court, after taking into consideration of various pronouncements rendered by the Hon'ble Supreme Court as well as by this Court in Paragraph No.27 has held as follows:

"27. I am of the considered view that the defence available under Section 149(2)(a)(ii) which relates to duly licenced includes no licence also. The contention that in the case of no licence at all, the insured was guilty of negligence and failed to exercise reasonable care in the matter fulfilling the Policy condition can not be acceptable as the victim can not suffer for the failure of the insured. The wisdom of the Three-Judges bench of the Supreme Court in **British India General Insurance Co. Ltd. v. Captain Itbar Singh and others**, 1958-1965 ACJ 1, is very relevant. This Court is also bound by the decision of the Full Bench in **Branch Manager, United India Insurance Co. Ltd., Dharmapuri Town v. Nagammal and others**, 2009 (1) TN MAC 1 (FB) : 2009 (1) CTC 1 (FB) : 2009 (1) LW 702 (cited supra) wherein it is held that -

"Where it (Insurance Company) is successful in its defence, it may yet be required to pay the amount to the Claimant and thereafter recover the same from the owner....."

It is also relevant to refer to **Jawahar Singh v. Bala Jain and others**, 2011 (1) TN MAC 641 (SC), where the Supreme Court upheld the order of the Tribunal directing the Insurer to pay and recover from the insured in case of a Minor who did not possess and could not have possessed any licence at all, caused the accident. Therefore, even in case of no licence if the Insurance Company establishes that the driver of the insured vehicle was not in possession of any type of licence, the Insurance Company is to be exonerated but as per sub-section (4) & (5) of Section 149 of the Act, they can be directed to pay and recover. Therefore, the questions are answered accordingly in all the Civil Miscellaneous Appeals. Since in all the above Appeals the Insurance Company has established no licence to the drivers, the Appellants are exonerated but directed to pay the compensation and recover the same from the owner of the vehicle in the same proceedings."

16. In the light of the said categorical pronouncements, based on various decisions rendered by the Apex Court as well as by this Court, the ground urged by the learned counsel for the appellant / Insurance Company that the appellant / Insurance



Company ought to have been exonerated from its liability is unsustainable. It is also brought to the knowledge of this Court by the learned counsel for the appellant that though the Tribunal observed that it is for the Insurance Company to pay compensation to the claimants and recover the same from the third respondent, the said clause has not been incorporated in the Decree and therefore in the light the Judgment in **Oriental Insurance Co. Ltd. v. V.Nanjappan**, reported in **2004 (2) CTC 464**, appropriate directions may be given to pay the compensation to the claimants and recover it from the insured.

17. Since the quantum is not in serious dispute, this Court is of the view that the appellant / Insurance Company has to discharge its liability / indemnify the third respondent / insured (owner-cum-driver of the offending vehicle) by paying compensation awarded by the Tribunal to the claimants with liberty to recover the same from the insured, subject to Paragraph No.7 of **Nanjappan's** case (cited supra), which is extracted below:

"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 manner in which the insured / owner of the vehicle shall make payment 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".

18. In the result, the civil miscellaneous appeal fails and it is dismissed, subject to the liberty of pay and recovery, and the Award and Decree, dated 30.10.2010, passed in M.C.O.P.No.78 of 2007, on the file of Motor Accident Claims Tribunal / Sub Court, Sivakasi, are confirmed. The appellant / Insurance Company shall deposit the entire award amount including the costs and interest, less the amount already deposited, to the credit of M.C.O.P.No.78 of 2007, on the file of the Motor Accident Claims Tribunal / Sub Court, Sivakasi, within a period of two weeks from the date of receipt of a copy of this Judgment. The major claimants are entitled to withdraw compensation amount, as per the apportion of the amount made by the Tribunal, less the amount, if any, already



received. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (CS-II)

WEB COPY

/True Copy/

Sub Assistant Registrar

To:

The Sub Judge,
Motor Accident Claims Tribunal,
Sivakasi.

+1 cc to MR.S.SRINIVASA RAGHAVAN, Advocate SR.No.51432

+1 cc to MR.S.SUBBIAH, Advocate SR.No.51403

C.M.A. (MD) No.948 of 2016

and

C.M.P. (MD) No.8507 of 2016

08.09.2016

SMA/PV/9.11.2016/7P/4C