

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 21.06.2017

CORAM:

THE HON'BLE DR. JUSTICE S.VIMALA

Civil Miscellaneous Appeal No.1404 of 2016
and C.M.P.No.10683 of 2016

C.Vasudevan

... Appellant / Owner of the
vehicle/1st Rspondent

...Vs...

1. Lakshmi
2. Arunachalam
3. Palanisamy
4. Vasanthi ...RR1 to 4 / Petitioners
5. The Branch Manager,
National Insurance Company Limited,
1272, 1273, Palaniyappa Complex,
Mettur Road, Erode - 11 ...5th Respondent/2nd
Respondent

Civil Miscellaneous Appeal filed under Section 173 of the Motor Vehicles Act, 1988, against the judgment and decree, dated 19.04.2012 passed in MCOP No.289 of 2009 passed by the Motor Accident Claims Tribunal (I Additional District Judge), Erode.

For Appellants : Mr. R.Nalliyappan
For Respondents : Mr. B.Karthick, for R-1 to R-4 &
Mr. J.Chandran, for R-5.

J U D G M E N T

Whenever the Insurance Company alleges violation / breach of provisions of law by the insured, i.e., the owner of the vehicle, whether the Insurance Company can disown the liability on proving the mere technical violations of law, by the owner of the vehicle or only on proving that the breach was so fundamental as to cause the accident ? In other words, whether causal connections between the breach alleged and the accident need to be established, in order to disown liability.

2. This Appeal has been filed by the appellant / first respondent in MCOP No.289 of 2009, the owner of the offending vehicle, challenging the judgment and decree dated 19.04.2012,

granting liberty to the Insurance Company to recover the award amount from the appellant, owner of the vehicle, on the ground that the appellant has violated the policy conditions.

3. The operative portion of the judgment, dated 19.04.2012, reads as under:-

"An award is passed for a sum of Rs.3,21,500/- (Rupees three lakhs twenty one thousand and five hundred only) in favour of the petitioners. The respondents are directed to pay the said amount together with interest at the rate of 7.5% per annum from the date of petition till the date of realization with proportionate costs. The 2nd respondent is directed to pay the compensation to the claimants and he is entitled to recover the same from the owner of the vehicle by filing an execution petition....."

3.1. This portion of the judgment has driven the owner of the vehicle to file this Appeal.

4. The contention of the learned counsel of the appellant is that it is not open to the insurance company to disown the liability by merely pointing out technical violation of law and that the violation should have some connection with the cause of accident.

4.1. On the other hand, the learned counsel for the fifth respondent would submit that violation of terms and conditions of the policy would exonerate the insurance company from the liability and pointed out the observation made by the tribunal.

4. The Tribunal, while passing the judgment, has relied upon the decision of this Court reported in 2009 (1) TNMAC 301 (D.M., United India Insurance Co. Ltd., v. V.S.Sowkath Ali and others), in which it has been held that if the offending vehicle has no fitness certificate, then it amounts to breach of contract and breach of conditions of policy and hence, the Insurance Company, after paying the compensation, can recover the same from the owner of the vehicle.

5. In order to appreciate the rival contention raised it is necessary to look into Section 149 of Motor Vehicles Act, 1988 - which speaks about the duty of insurers to satisfy judgments and awards against persons insured, in respect of third party risks.

(1) If, after a certificate of insurance has been issued under sub-section (3) of section 147 in favour of the person by whom a policy has been

effected, judgment or award in respect of any such liability as is required to be covered by a policy under clause (b) of sub-section (1) of section 147 (being a liability covered by the terms of the policy) or under the provisions of section 163A is obtained against any person insured by the policy, then, notwithstanding that the insurer may be entitled to avoid or cancel or may have avoided or cancelled the policy, the insurer shall, subject to the provisions of this section, pay to the person entitled to the benefit of the decree any sum not exceeding the sum assured payable thereunder, as if he were the judgment debtor, in respect of the liability, together with any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments.

(2) No sum shall be payable by an insurer under sub-section (1) in respect of any judgment or award unless, before the commencement of the proceedings in which the judgment or award is given the insurer had notice through the Court or, as the case may be, the Claims Tribunal of the bringing of the proceedings, or in respect of such judgment or award so long as execution is stayed thereon pending an appeal; and an insurer to whom notice of the bringing of any such proceedings is so given shall be entitled to be made a party thereto and to defend the action on any of the following grounds, namely:-

(a) that there has been a breach of a specified condition of the policy, being one of the following conditions, namely:-

(i) a condition excluding the use of the vehicle-

(a) for hire or reward, where the vehicle is on the date of the contract of insurance a vehicle not covered by a permit to ply for hire or reward, or

(b) for organised racing and speed testing, or

(c) for a purpose not allowed by the permit under which the vehicle is used, where the vehicle is a transport vehicle, or

(d) without side-car being attached where the vehicle is a motor cycle; or

(ii) a condition excluding driving by a named person or persons or by any person who is not duly licensed, or by any person who has been disqualified for holding or obtaining a driving licence during

the period of disqualification; or

(iii) a condition excluding liability for injury caused or contributed to by conditions of war, civil war, riot or civil commotion; or

(b) that the policy is void on the ground that it was obtained by the nondisclosure of a material fact or by a representation of fact which was false in some material particular.

(3)

(4)

(5)

(6) In this section the expression "material fact" and "material particular" means, respectively a fact or particular of such a nature as to influence the judgment of a prudent insurer in determining whether he will take the risk and, if so, at what premium and on what conditions, and the expression "liability covered by the terms of the policy" means a liability which is covered by the policy or which would be so covered but for the fact that the insurer is entitled to avoid or cancel or has avoided or cancelled the policy.

(7) No insurer to whom the notice referred to in sub-section (2) or sub-section (3) has been given shall be entitled to avoid his liability to any person entitled to the benefit of any such judgment or award as is referred to in sub-section (1) or in such judgment as is referred to in sub-section (3) otherwise than in the manner provided for in subsection (2) or in the corresponding law of the reciprocating country, as the case may be.

6. in respect of breach of terms and condition of the policy, what should be the nature of violation of the terms and condition of the policy was the issue considered by the Hon'ble Supreme Court in the case of National Insurance Company Ltd. v. Swaran Singh & Ors (2010) 10 SCC 567 a three judge bench of this Court has held as under:-

"49. Such a breach on the part of the insured must be established by the insurer to show that not only the insured used or caused or permitted to be used the vehicle in breach of the Act but also that the damage he suffered flowed from the breach.

52. In Narvinva's case (supra) a Division Bench of this Court observed: "The insurance company complains of breach of a term of contract which would permit it to disown its liability

under the contract of insurance. If a breach of a term of contract permits a party to the contract complaints of breach to prove that the breach has been committed by the other party to the contract. The test in such a situation would be who would fail if no evidence is led.

1. The proposition of law is no longer res-integra that the person who alleges breach must prove the same. The insurance company is, thus, required to establish the said breach by cogent evident. In the event the insurance company fails to prove that there has been breach of conditions of policy on the part of the insured, the insurance company cannot be absolved of its liability."

6.1 The judgment of this Hon'ble Court in the case of Swaran Singh (supra) has been followed subsequently in the case of Oriental Insurance Company Ltd. v. Meena Variyal (Appeal (civil) 5825 of 2006, wherein it was held as under:-

"We shall now examine the decision in Swaran Singh on which practically the whole of the arguments on behalf of the claimants were rested. On examining the facts, it is found that, that was a case which related to a claim by a third party. In claims by a third party, there cannot be much doubt that once the liability of the owner is found, the insurance company is liable to indemnify the owner, subject of course, to any defence that may be available to it under Section 149(2) of the Act. In case where the liability is satisfied by the insurance company in the first instance, it may have recourse to the owner in respect of a claim available in that behalf, it may have recourse to the owner in respect of a claim available that behalf. Swaran Singh was a case where the insurance company raised a defence that the owner had permitted the vehicle to be driven by a driver who really had no licence and the driving licence produced by him was a fake one.

There Lordships discussed the position and held ultimately that a defence under Section 149(2)(a) (ii) of the Act was available to an insurer when a claim is filed either under Section 163-A or under Section 166 of the Act. The breach of a policy condition has to be proved to have been committed by the insured for avoiding liability by the

insurer. Mere absence of or production of 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 party.

The insurance company to avoid liability, must not only establish the available defence raised in the proceeding concerned but must also establish breach on the part of the owner of the vehicle for which the burden of proof would rest with the insurance company. Whether such a burden had been discharged, would depend upon the facts breach on the part of the insured concerning a policy condition, the insurer would not be allowed to avoid its liability towards the insured unless the said breach of condition is so fundamental as to be found to have contributed to the cause of the accident."

7. The learned counsel for the appellant would submit that as per the dictum laid down by the Full Bench judgment of the High Court of Kerala, reported in 2015 (1) TNMAC 740 (FB) (Ker.) (Augustine V.M. v. Ayyappankutty and others) the expiry of the fitness certificate, can at the most can be said to be a technical violation and it cannot be a ground to absolve the insurer from its liability to pay the compensation. The relevant observation in the judgment, cited supra, reads thus:-

"14. This Full Bench while deciding National Insurance Company Ltd. v. Jisha MANU/KE/2266/2014 : 2015 (1) KHC 29 : 2015 (1) KLT 1 : 2015 (1) KLJ 82 : ILR 2015 (1) Ker. 349 followed the aforesaid decisions to hold that the recovery right of the insurer is not automatic in the absence of any evidence to show that there was a fundamental breach which led to the accident.

15....

16. In order to enable the insurance company to take up the defence under Section 149(2)(a)(i)(c) it must be shown that the use of the transport vehicle was for a purpose not allowed by the permit under which the vehicle was used. Instances may occur where transport vehicles intended or permitted for a particular purpose are used for another purpose. For example, if a transport vehicle permitted only for carrying goods, carries passengers and capsizes en route causing injuries to the passengers, certainly, the insurer can take up the defence under Section 149(2)(a)(i)(c). However, if such a vehicle is

used only for the permitted purpose, and the accident occurs when the permit or fitness certificate ceased to exist, it amounts to a technical violation only, which will not entitle the insurer to disown the liability to third parties. For avoiding the liability relying on Section 149(2)(a)(i)(c), the insurer should plead and prove that the offending vehicle was used for a purpose not authorised by the permit. It is true, that the vehicles in these cases ceased to have fitness certificate as well as permit on their expiry. We are unable to agree that the breach of condition in respect of non-renewal of certificate of fitness or permit would entitle the insurer to take up the defence under Section 149(2)(a)(i)(c) of the Act...."

8. The learned counsel for the fifth respondent relied upon the following decisions, contending that once the violation of terms and conditions are proved, then the owner becomes responsible to reimburse the insurance company, which the Insurance Company has paid to the claimant.

8.1. In support of the contention, the following decisions are relied upon:

(i) 2009 (1) TN MAC 301 (Divisional Manager, United India Insurance Company, Hosur vs. S.Sowkath Ali and others) (referred to supra)

(ii) 2012 (1) TN MAC 353 (DB) (Oriental Insurance Co. Ltd. vs. Pooja and others)

(iii) 2006 ACJ 1039 (Velammal and others vs. P.Kanagu and others)

These decisions will not be applicable in the light of the Supreme Court decision on the same point which is referred to supra. Even in the decision reported in 2012 (1) TN MAC 353 (DB), it has been pointed out that the decision in Swaran Singh's case has no application to cases other than third party risks. This is a case relating to third party risks and hence, the ratio laid down in Swaran Singh's case applies to the facts of this case.

9. So far as this case is concerned, the claim relates to death of one Annamalai, who is the husband of the first claimant and father of claimants 2 to 4, in the accident that took place on 30.07.2008. The accident is stated to have taken place, while the deceased had been walking along Erode to Poonthurai Road. The rider of the vehicle, Sivakumar drove the scooter in a rash and negligent manner and hit against the deceased and thus caused the accident. Therefore, it is clear that a third party has suffered the accident while the scooter was used in

the road. There is no case that the scooter was used for the purpose for which it is not permitted. It is not the case of either party that the accident happened on account of the non-fitness of the vehicle. Therefore, the violations alleged are only technical violations and it has nothing to do with the cause of accident. Therefore, the judgment passed by the Claims Tribunal to the extent of permitting the Insurance Company to recover the amount of compensation from the owner of the vehicle is set-aside.

10. In the result, this Civil Miscellaneous Appeal is allowed. No costs. Consequently, the connected CMP is closed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

srk

To

1. Motor Accident Claims Tribunal
(I Additional District Judge),
Erode.

+1cc to Mr.R.Mullaiyappan, Advocate, S.R.No.43585

+1cc to Mr.J.Chandran, Advocate, S.R.No.44052

C.M.A.No.1404 of 2016
& CMP No.10683 of 2016

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