

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 10.03.2017

CORAM:

THE HONOURABLE MRS. JUSTICE. PUSHPA SATHYANARAYANA

CMA.No. 502 of 2017

1. Kumuthavalli,
2. Selvaganesan,
3. Senthil Kumar,
4. Venkatesan,
5. Uma Mageshwari.

... Petitioners / Appellants

Vs.

1. Ramesh,
2. Kubendiran,
3. United India Insurance Company,
No. 36, K.B.S. Motors Building,
Katpadi Road, Gandhi Nagar,
Vellore-600 006

... Respondents

Prayer : Appeal filed under Section 173 of the Motor Vehicles Act, 1988 against the judgment and decree dated 31.10.2013 made in MCOP.No.792/2011 on of 2010 on the file of the Motor Accident Claims Tribunal, (Principal District Judge), Vellore Dist.

For Petitioner : M/s. M. Malar

For Respondents : Mr. Srinivasa Pandiyan (R3)

R1 & R2 ex parte

J U D G M E N T

Seeking enhancement of compensation awarded by the Claims Tribunal, in M.C.O.P.No.792 of 2011, the claimants have forward with this Civil Miscellaneous Appeal.

2. The deceased Kuppusamy, aged 65 years, a retired teacher, getting pension at Rs.20,000/- p.m. died in an accident that occurred on 08.09.2009. His wife, sons and daughter has filed the Claim Petition in M.C.O.P.No.792 of 2011, seeking compensation for a sum of Rs.10,00,000/-. The Claims Tribunal, on consideration of oral and documentary evidence has awarded a

sum of Rs.2,23,000/-. The break-up details of the same are as under:

Loss of income (4500x1/3x12x5)	-	Rs.1,80,000/-
Loss of consortium	-	Rs. 10,000/-
Funeral Expenses	-	Rs. 5,000/-
Loss of love and affection	-	Rs. 25,000/-
Transport Expenses	-	Rs. 3,000/-

Total		Rs. 2,23,000/-

3. The learned counsel for the appellant would submit that the compensation awarded by the tribunal is very low and the same has to be enhanced.

4. The learned counsel for the Insurance company would submit that the Claims Tribunal has rightly awarded the compensation and the same need not be enhanced. It is further submitted that the first respondent, who is the driver of the auto-rickshaw had driven the vehicle without valid driving licence and without badge and hence the Insurance Company may be permitted to recover the compensation amount from the owner of the first respondent.

5. This Court, considering the submissions made by the learned counsel appearing on either side and also on perusing the materials available on record, is inclined to revise the award as follows:

Loss of income	-	Rs.1,80,000/-
Loss of consortium	-	Rs. 50,000/-
Funeral Expenses	-	Rs. 25,000/-
Loss of love & affection	-	Rs. 1,00,000/-
Transport Expenses	-	Rs. 5,000/-

Total Rs.3,60,000/-

6. The Hon'ble Supreme Court, in a case of National Insurance Company Ltd., Vs. Swarn Singh, reported in 2004 (1) TNMAC 104 (SC) has taken note of various decisions including that of the decision in Sohan Lal Passi V. P.Sesh Reddy reported in 1996 (5) SCC 21, and their Lordships held as follows:

"102. The summary of our findings to the various issues raised in these petitions are as follows:

(iv) The Insurance companies are, however, with a view to avoid their liability must not only establish the available defence(s) raised in the said proceedings but must also establish 'breach' on the part of the owner of the vehicle, the burden of proof wherefor would be on them.

(v) The Court cannot lay down any criteria as to how said burden would be discharged, inasmuch as the same would depend upon the facts and circumstances of each case.

(vi) 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 or his qualification to drive during the relevant period, the insurer would not be allowed to avoid its liability towards insured unless the said breach or breaches of the condition of driving licence is/are so fundamental as are found to have contributed to the cause of the accident. The Tribunals in interpreting the policy conditions would apply 'the rule of main purpose' and the concept of 'fundamental breach' to allow defences available to the insurer under Section 149 (2) of the Act.

(x) Where on adjudication of the claim under the Act the Tribunal arrives at a conclusion that the insurer has satisfactorily proved its defence in accordance with the provisions of Section 149 (2) read with sub-section (7), as interpreted by this Court above, the Tribunal can direct that the insurer is liable to be reimbursed by the insured for the compensation and other amounts which it has been compelled to pay to the third party under the award of the Tribunal. Such determination of the claim by the Tribunal will be enforceable and the money found due to the insurer from the insured will be recoverable on a

certificate issued by the Tribunal to the Collector in the same manner under Section 174 of the Act as arrears of land revenue only if, as required by sub-section (3) of Section 168 of the Act the insured fails to deposit the amount awarded in favour of the insurer within thirty days from the date of announcement of the award by the Tribunal."

6a. In the instant case, the auto driver is said to have driven without a valid licence. Mere absence or invalid licence or disqualification of driver are not in themselves defences available to the insurer against either the insured or their parties. The burden is on the insurer to prove that the insured was guilty of negligence and failed to exercise reasonable care in fulfilling the policy conditions regarding use of vehicle by licensed driver. The insurance company has not established the breach on the part of the insured.

7. The Motor Accident Claims Tribunal failed to apply the principles laid down by the Hon'ble Supreme Court in the decision referred supra. In Paragraph 99 of the decision of the Hon'ble Supreme Court in National Insurance Co.Ltd. Vs. Swaran Singh & others reported in 2004 (1) TNMAC 104 SC, it is held as follows:

"99. We may, however, hasten to add that the Tribunal and the Court must, however, exercise their jurisdiction to issue such a direction upon consideration of the facts and circumstances of each case and in the event such a direction has been issued despite arriving at a finding of fact to the effect that the insurer has been able to establish that the insured has committed a breach of contract of insurance as envisaged under sub-clause (ii) of clause (a) of sub section (2) of Section 149 of the Act, the insurance company shall be entitled to realise the awarded amount from the owner or driver of the vehicle, as the case may be, regard to provisions of Sections 165 and 168 of the Act. However, in the event, having regard to the limited scope of inquiry in the proceedings before the Claims Tribunal it had not been able to do so, the insurance company may initiate a separate action therefore against the owner or the driver of the vehicle or both, as the case may be. Those exceptional cases may arise when the evidence becomes available to or comes to the notice of the

insurer at a subsequent stage or for reason or the other, the insurer was not given opportunity to defend at all. Such a course of action may also be resorted when a fraud or collusion between the victim and the owner of the vehicle is detected or comes to knowledge of the insurer at a later stage."

8. Considering the same, the Insurance Company is directed to deposit the revised award amount and recover the same from the owner of the vehicle.

9. In the result, this Civil Miscellaneous Appeal partly allowed, enhancing the compensation from Rs.2,23,000/- to Rs.3,60,000/-. The Insurance Company is directed to deposit the revised award amount, within a period of four weeks, from the date of receipt of a copy of this order and recover the same from the second respondent. No costs.

-s/d-
Assistant Registrar (CS-VII)

True Copy

Sub-Assistant Registrar

To

1. Motor Accident Claims Tribunal,
(Principal District Judge,
Vellore)

+1 CC to M/s. M. Malar, Advocate sr 15413

+1 CC to Mr. Srinivasan Ramalingam, Advocate sr 15359

KS (CO)
sp/7/4

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