

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 20.03.2017

CORAM

THE HON'BLE MR.JUSTICE G.CHOCKALINGAM

C.M.A.No.1325 of 2010
and M.P.No.1 of 2010 and
C.M.P.No.3517 of 2017

ICICI Lombard General
Insurance Company Ltd.,
Swarnambigai Towers,
Omalur Main road,
Salem-9.

.. Appellant/IInd respondent

Vs .

1.R.Sellam
2.Minor.R.Dineshkumar
3.Minor R.Dhivya
(Minor petitioners are represented
by next friend Guardian & Mother
Sellam.)
4.K.Marimuthu
5.Ponnammal
6.K.Ravichandran

..Respondents/Petitioner 1to5/
1st Respondent

Prayer: Civil Miscellaneous Appeal filed under Section 173 of the Motor Vehicles Act 1988, against the judgment and decree dated 11.08.2009 made in M.C.O.P.No.570 of 2007 on the file of the Motor Accidents Claims Tribunal, (Principal District Judge) Salem.

For Appellant : Mrs.R.Sreevidhya

For R1 to R5 : Mr.E.kannadesan

JUDGMENT

This civil miscellaneous appeal is directed against the judgment and decree dated 11.08.2009 made in M.C.O.P.No.570 of 2007 on the file of the Motor Accidents Claims Tribunal, (Principal District Judge) Salem.

2. In this Civil Miscellaneous Appeal, the question for consideration is -

"Whether the insurer has to be exonerated totally in a case where they have established that the driver of the insured vehicle did not possess any type of licence on the date of accident or whether the liability can be fastened on the insurer by directing them to pay the compensation to the claimants with a liberty to recover the same from the insured."

3. In a catena of judgments, the Hon'ble Apex Court has dealt with the liability of the Insurance Company while interpreting Section 149(2)(a)(ii) and the proviso appended to Sub Sections 4 and 5 of the Motor Vehicles Act, 1988. A Full Bench of this Court in Nagammal's case reported in 2009(1) LW 702 (Branch Manager, United India Insurance Co.Ltd., Dharmapuri Town Vs. Nagammal and others), was considering a question of pay and recovery and the Full Bench has held as follows:-

"31. Thus from an analysis of the statutory provisions as explained by the Supreme Court in various decisions rendered from time to time, the following picture emerges :

(i) The Insurance Policy is required to cover the liability envisaged under Section 147, but wider risk can always be undertaken.

(ii) Section 149 envisages the defences which are open to the Insurance Company. Where the Insurance Company is not successful in its defence, obviously it is required to satisfy the decree and the award. Where it 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 under such circumstance envisaged and enumerated in Section 149(4) and Section 149(5)."

4. The First Bench decision of this Court at Principal seat reported in 2010(2) TAMAC 542 (DB) (Bajaj Allianz General Insurance Company Ltd., Pune Vs. P.Manimozhi and others) had considered the question of non possession of a valid licence of the driver and after considering the decision of another Division Bench reported in 2009(2) TNMAC 103 DB (United India Insurance Company Ltd., Vs. S.Saravanan) held that when there is a breach of condition under an insurance policy, then the Insurance Company must pay and recover. It is necessary to extract the relevant portion from the above decision, which is as follows:

"14. The next contention raised by the learned counsel appearing for the appellant is that the third respondent, the rider of the two wheeler did not have a valid driving licence on the date of the accident and therefore, the insurer is not liable to pay. The Hon'ble Supreme Court as regards this point namely, possession of valid driving licence broadly classified the same under four different categories:-

(i)Where, there was no licence
(ii)Where, the licence is forged/fake
(iii)Where, the licence is for a different class of vehicle from the offending vehicle and
(iv)Where, the licence is for a learner
and held that when there is a breach of condition under an Insurance policy is proved then the Insurance company must pay and may recover. A Division Bench of this very Court in which one of us (T.S.SIVAGNANAM, J.) was a party considered this very issue and after taking note of the decisions of the Hon'ble Supreme Court in the case of New India Assurance Co. Vs. Kamla, 2001 (4) SCC 342, United India Insurance Co. Ltd. V. Lehu, 2004 (1) TN MAC 340 (SC), Skandia Insurance Co. Ltd. V. Kokilaben Chandravadan, 1987 (2) SCC 654, Sohan Lal Passi Vs. P. Sesh Reddy, 1996 (5) SCC 21, Oriental Insurance Co. Ltd. V. Swaran Singh, 2004 (1) TN MAC 104 (SC) and National Insurance Co. Ltd. V. Laxmi Narain Dhut, 2001 (1) TN MAC 310 (SC) held that the insurer must pay the amount and then may recover."

5. A latest decision of the Hon'ble Supreme Court reported in 2011(1) TNMAC 641 (SC) (Jawhar Singh Vs. Bala Jain and others), wherein the Hon'ble Supreme Court dealt with a case where a motor cycle belonging to the insured was driven by a minor without driving licence amounts to breach of policy condition and held as follows:

"11. We cannot shut our eyes to the fact that it was Jatin, who came from behind on the motorcycle and hit the scooter of the deceased

from behind. The responsibility in causing the accident was, therefore, found to be solely that of Jatin. However, since Jatin was a minor and it was the responsibility of the Petitioner to ensure that his motorcycle was not misused and that too by a minor who had no licence to drive the same, the Motor Accident Claims Tribunal quite rightly saddled the liability for payment of compensation on the Petitioner and, accordingly, directed the Insurance Company to pay the awarded amount to the awardees and, thereafter, to recover the same from the Petitioner. The said question has been duly considered by the Tribunal and was correctly decided. The High Court rightly chose not to interfere with the same."

6. After analyzing various judgments of the Supreme Court and this Court, the dictum laid down in the judgment reported in 2011(1) TNMAC 641 (SC) in Jawahar Singh's case (cited supra) was followed and ordered the insurance company to pay the compensation and recover the same from the owner of the vehicle.

7. Therefore, in a case of expired licence or a forged/fake licence or learner's licence, the dictum is, it is a breach of policy condition where the owner of the vehicle was not prudent in verifying the licence produced by the driver and therefore, the insurance company is not liable; however, they can be directed to pay the compensation to the victim with a liberty to recover the same from the insured. But what is the position in a case of "No licence at all" where the insured has knowingly or unknowingly allowed the driver to drive the vehicle? The main contention of the learned counsel for the insurance company is that when a person is not duly licensed to drive a vehicle or if he has not possessed any type of licence, the Insurance Company has to be totally exonerated from the liability. The learned counsel would concede that in a case of fake or expired licence or invalid licence to drive a vehicle or a licence without Badge, though the Insurance Company has established the breach of policy condition, they may be ordered to pay and later recover from the owner of the vehicle, but, not in the case of no licence at all.

8. However, according to the learned counsel for the claimant, as per the dictum laid down by the Apex Court in the celebrated case of Swaran Singh reported in 2004 (1) TN MAC 104 (SC) (National Insurance Co.Ltd., Vs. Swaran Singh and others) wherein the Three Judges of the Hon'ble Supreme Court has dealt in detail 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.

9. Heard the learned counsel for the appellant / Insurance Company and the learned counsel for the claimant/ first respondent and perused the entire materials on record and also gone through the various judgments in this regard.

10. Therefore, as per the dictum laid down in Swaran Singh's case in 2004(1) TAC 321 (SC), in 2009(2) TNMAC 103 DB (United India Insurance Company Ltd., Vs. S.Saravanan) in Manimozhi's case (2010(2) TAMAC 542), in Nagammal's case of the Full Bench (2009(1) LW 702) and in 2011(1) TNMAC 641 (SC) (Jawhar Singh Vs. Bala Jain and others) and in Ifco Tyoko case in (2012 1394 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.

11. This Court is of the considered view that the defence available under Section 149(2)(a)(ii) which relates to duly licenced includes no licence also. This court is bound by the decision of the Full Bench in Nagammal's case (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 2011(1) TNMAC 641 (SC) (Jawhar Singh Vs. Bala Jain and others), 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 posses 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 clause (4) and (5) of Sec.149 of the Act, they can be directed to pay and recover. Therefore, the Tribunal is right in directing the Insurance Company to pay and recover.

12. In Oriental Insurance Co.Ltd., Vs. Shri Nanjappan and others, reported in I (2004) ACC 524 (SC) the 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. Since the mode of recovery is not mentioned in the orders of the Tribunal, I see there is a force in the argument of the learned counsel for the Insurance company.

13. Therefore, it is held that the Insurance Company, though exonerated 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 7 of Shri Nanjappan's case, 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 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 realisation by disposal of the securities to be furnished or from any other property of the insured".

14. In the result, the Civil Miscellaneous Appeal is dismissed. Consequently, connected M.P is closed. No costs.

Sd/-
Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

kkd

To

The Principal District Judge,
Motor Accidents Claims Tribunal,
Salem.

+ 1 cc to M/s. R. Sreevidhya, Advocate Sr.17873

+ 1 cc to Mr.E. Kannadasan, Advocate Sr.17177

CMA.No.1325 of 2010 and
MP.No.1 of 2010 and CMP.No.3517 of 2017

AK(CO)
Eu 5.5.17



WEB COPY