THE HON'BLE SRI JUSTICE GUDISEVA SHYAM PRASAD

M.A.C.M.A No.826 of 2010

JUDGMENT:

This is an appeal filed by the claimant aggrieved by the impugned award dated 25.09.2009 in MVOP.No.1374 of 2009 passed by the Chairman, Motor Vehicles Accidents Claims Tribunal-cum-XI Additional District Judge (FTC), Tenali (for short, the Tribunal).

2. The brief facts of the petition before the Tribunal are that on 02.07.2008, while the appellant and another person were going on a motorcycle, met with an accident, when an auto came in opposite direction and dashed against the motorcycle. The appellant and another person have received injuries in the said accident and filed MVOP.No.1374 of 2008 and MVOP.No.1375 of 2008 respectively. The Tribunal clubbed both the MVOPs and passed a common order, awarding compensation to the appellant and another.

3. The Tribunal, on consideration of the evidence of the witnesses P.W.1-appellant herein, P.W.2-medical officer, the documents Exs.A.1 to A.8, Exs.X.1 and 2 and the evidence of the respondents R.W.1 and the documents Exs.B.1 and B.2, has awarded compensation of Rs.2,27,250/- as against the claim of the appellant of Rs.5,00,000/-. The appellant is before this Court being dissatisfied by the quantum of compensation awarded by the Tribunal and also for not ordering pay and recovery.

4. The points for consideration in this matter are:

(i) Whether the appellant is entitled for enhancement of compensation? and

(ii) Whether the appellant is entitled for payment of 50% compensation by the insurance company at the first instance and recover the same from the owner of the crime vehicle?

5. Heard learned counsel for the appellant Sri B.Parameswara Rao and learned counsel for second respondent Sri K.S.N.Murthy.

6. Learned counsel for the appellant, placing reliance on a decision of the Apex Court in **S.Iyyapan v. United India Insurance Co. Ltd.**[1], submitted that, as per the ratio laid down in the said case, in a case of a driver possessing a driving licence to drive light motor vehicle and drives a transport vehicle, the insurer's liability to pay the compensation cannot be exonerated totally, but at the first instance, the insurance company can be ordered to pay the compensation amount, with a direction to recover the same from the owner of the crime vehicle.

7. The Tribunal, relying on the decisions in the cases of **National Insurance Co. Ltd. v. Swaran Singh**[2] and **New India Assurance Co. Ltd. v. Roshanben Rehemansha Fakir**[3], has arrived at a conclusion that pay and recovery in that case was ordered in the circumstances of that case. The Tribunal, therefore, declined to order pay and recovery, as the Apex Court exercised its jurisdiction invoking the provision under Article 141 of the Constitution of India.

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[1] (2013) 7 SCC 62
[2] 2004 ACJ 1
[3] 2008 ACJ 2161

8. The observations of the Tribunal clearly reveals that in **Roshanben Rehemansha Fakir**'s case (3 supra), the Apex Court ordered pay and recovery.

9. The Tribunal was hesitant to grant pay and recovery, as it was doubting its jurisdiction. Otherwise, the Tribunal would have granted pay and recovery, having held that the insurer was liable for 50%.

10. At this juncture, it is appropriate to refer to a decision of the Apex Court in **S.Iyyapan**'s case (1 supra). It was held in paras 17 to 19 as under:

> "17. Reading the provisions of Sections 146 and 147 of the Motor Vehicles Act, it is evidently clear that in certain circumstances the insurer's right is safeguarded but in any event the insurer has to pay compensation when a valid certificate of insurance is issued notwithstanding the fact that the insurer may proceed against the insured for recovery of the amount. Under Section 149 of the Motor Vehicles Act, the insurer can defend the action inter alia on the grounds, namely,
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> (i) the vehicle was not driven by a named person,
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> (ii) it was being driven by a person who was not having a duly granted licence, and
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> (iii) person driving the vehicle was disqualified to hold and obtain a driving licence.
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> Hence, in 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.

18. In the instant case, admittedly the driver was holding a valid driving licence to drive light motor vehicle. There is no dispute that the motor vehicle in question, by which accident took place, was Mahindra Maxi Cab. Merely because the driver did not get any endorsement in the driving licence to drive Mahindra Maxi Cab, which is a light motor vehicle, the High Court has committed grave error of law in holding that the insurer is not liable to pay compensation because the driver was not holding the licence to drive the commercial vehicle. The impugned judgment is, therefore, liable to be set aside.

19. We, therefore, allow this appeal, set aside the impugned judgment of the High Court and hold that the insurer is liable to pay the compensation so awarded to the dependants of the victim of the fatal accident. However, there shall be no order as to costs."

11. Learned counsel for the second respondent contended that the pay and recovery cannot be ordered in this case as the Tribunal observed that it was the discretion of the Apex Court exercised under Article 141 of the Constitution of India in the case of **S.Iyyapan** (1 supra).

12. In the light of the arguments of both the counsel, it is appropriate to consider the facts of the present case to determine whether the pay and recovery can be ordered in this case. Admittedly, the accident had occurred in the year 2008. The Tribunal passed the award in the same year exonerating the liability of the insurance company on the ground of breach of policy as the driver of crime vehicle had no valid driving licence and directed the owner of the vehicle to pay 50% of the compensation to the claimant. The claimant, being aggrieved by

the award, has preferred this appeal in the year 2010 and it is coming up for hearing in the year 2017. The claimant has waited nearly more than 8 years for resolution of lis in this case. In the light of the decision referred in **S.Iyyapan**'s case (1 supra), the insurer cannot disown its liability on the ground that the driver cannot drive an auto a transport vehicle, having licence for driving light motor vehicle. In fact, as observed in **S.Iyyapan**'s case (1 supra), it is the statutory right of the third party to recover the amount of compensation so awarded from the insurer.

13. The Tribunal has held that insurer was liable to pay 50% of the compensation. The Tribunal, having held the liability of insurer at 50%, did not order pay and recovery. Keeping in view the ratio in the case of **S.Iyyapan** (1 supra), this is a fit case, where pay and recovery can be ordered. Therefore, in view of foregoing reasons, this Court is of the considered view to direct the insurer to pay 50% of the compensation amount, at the first instance, and recover the same from the owner of the crime vehicle.

14. It is contended by the learned counsel for the appellant that the Tribunal has taken the income of the appellant as Rs.5,000/- per month without considering the salary certificate Ex.A.8, which shows the salary Rs.7,000/- per month. Ex.A.8 salary certificate shows the total salary of the appellant was Rs.7,000/- per month, shown in figures, but in words it was shown as Rs.9,000/-. No witness was examined to prove the salary of the appellant. Therefore, the Tribunal has rightly taken Rs.5,000/- as the monthly salary of the appellant. Therefore, there are no valid

reasons to interfere with the findings of the Tribunal in this regard.

15. As far as the assessment of quantum of compensation is concerned, there cannot be any dispute, as the Tribunal has properly assessed the compensation. Therefore, I do not see any reasons to interfere with the findings of the Tribunal in this regard.

16. In the result, the appeal is partly allowed. The award of the Tribunal is modified to the extent of liability of the insurance company. Consequently, the second respondent is directed to deposit 50% of the amount awarded by the Tribunal, at the first instance, within two months from the date of this order, and recover the same from the first respondent herein. On such deposit, the appellant is permitted to withdraw the entire amount. There shall be no order as to costs. Miscellaneous petitions, if any, pending in this appeal shall stand closed.

GUDISEVA SHYAM PRASAD, J

Date:17.02.2017
TJMR