IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 29.08.2018

CORAM:

THE HONOURABLE MR.JUSTICE M.V.MURALIDARAN

Civil Miscellaneous Appeal No.1249 of 2015

A.Kumar ... Appellant / Petitioner

Vs

1. G.Suresh

2. The National Insurance Company Ltd.
rep. by its Branch Manager
Vellore. ... Respondents / Respondents

Civil Miscellaneous Appeal filed under Section 173 of Motor Vehicles Act, 1988 against the decree and judgment dated 27.1.2015 passed in M.C.O.P.No.152 of 2009 by the Motor Accidents Claims Tribunal (Sub Court), Arni.

For Appellant : Mr.P.Satheesh Kumar

For Respondents : Mr.S.Arunkumar (for R2)

JUDGMENT

Calling into question the decree and judgment dated 27.1.2015 passed in M.C.O.P.No.152 of 2009 by the Motor Accidents Claims Tribunal (Sub Court), Arni, the present civil miscellaneous appeal is filed.

2. The facts in a nutshell are as under: The claimant is the appellant herein. It is the case of the appellant, who is the injured, that on 6.2.2009 at about 7.30 PM, when he was riding his cycle on the extreme left side of the road in Peranampet Ambur Road and was nearing Periyathamai Bus Stop, a Hero Honda motorcycle bearing registration No.TN 09 AX 1810, which is owned by the first respondent and insured with the second respondent, driven in a rash and negligent manner came in the opposite direction, that too on the wrong side of the road, and dashed against the appellant's cycle. As a result of the said collision, the appellant claims to have fallen down and sustained multiple injuries all over the body causing permanent disability.

3. It is claimed that the petitioner was only bread winner of the family and the entire family of the petitioner is depending on his income and due to the injuries sustained in the accident, he is not able to do any work and his family members are put to sufferance. In such circumstances, a claim petition was filed seeking compensation of Rs.3,00,000/-.

4. The second respondent insurance company filed a counter affidavit before the Tribunal refuting the allegation levelled by the appellant. The second respondent denied the manner of accident. It was further averred that in the Accident Register of G.H., Pernambat, it is specifically stated that the appellant had consumed alcohol at the time of accident and the accident occurred only due to the appellant, who lost his control. It was also stated that at the time of accident the driver of the motorcycle was not having valid driving license and, therefore, the insurance company is not liable to pay compensation. The second respondent also disputed the age, occupation, monthly income and the nature of injuries sustained by the appellant. They prayed for dismissal of the claim petition.

5. The learned Tribunal, by decree and judgment dated 27.1.2015 passed in M.C.O.P.No.152 of 2009 awarded compensation of Rs.1,04,410/-.

6. Seeking enhancement of compensation, the unsatisfied claimant has filed this appeal.

7. The learned counsel for the appellant submitted since the accident was due to rash and negligent driving of the rider of the vehicle owned by the first respondent insured with the second respondent, it ought to have directed the second respondent to pay the compensation and granted leave to it to recover the same from the first respondent.

8. It is the contention of the learned counsel appearing on behalf of the appellant that the Tribunal did not give due credence to the fact that the appellant suffered 30% disability due to the accident and suffered fracture in the skull and had suffered loss of earning capacity.

9. He further contended that the Tribunal having found that the accident had occurred due to the rash and negligent riding of the rider of the vehicle owned by the first respondent, which was insured with the second respondent, had awarded a meagre sum of compensation for the grievous injuries suffered by the appellant and awarded minimum amount or no amount under various heads like (i) loss of earning capacity; (ii) pain and suffering; (iii) transportation, etc.

10. Per contra, the learned counsel appearing on behalf of the second respondent insurance company reiterated the reasons that weighed with the Court below and prayed for dismissal of this appeal.

11. I have heard Mr.P.Satheesh Kumar, learned counsel appearing for the appellant and Mr.S.Arunkumar, learned counsel appearing for the 2nd respondent and also perused the materials available on record.

12. The case of the appellant is that on 6.2.2009 at about 7.30- P.M., he was riding his cycle on the left extreme side of the road in Peranampet-Ambur Road and when he was nearing Periyathamal bus stop, a Hero Honda bearing registration No.TN-09 AX 1810 owned by the first respondent insured with the second respondent driven by its driver in a rash and negligent manner dashed against the petitioner. Due to the impact, the appellant sustained injuries.

13. The second respondent denied the manner of accident and also contended that the appellant has wrongly stated that K.Saravanan was the rider of the motorcycle instead one Kumar, who alone drove the vehicle at the time of accident as per the M.V.I. Report. Moreover, at the time of accident, the rider of the motorcycle was not having valid driving licence and therefore, the second respondent was not liable to pay the compensation.

14. The second respondent has not disputed the fact that the offending vehicle was not insured with them. In his evidence, R.W.1 deposed that the offending motorcycle was driven by one Kumar and at the time of accident, he was not having valid driving licence. As per policy condition, the owner of the vehicle should not hand over the vehicle to a person who did not possess valid driving licence.

15. On the side of the second respondent, the alleged rider of the offending vehicle viz., Kumar was examined as R.W.2, who deposed that on the date of accident, he did not possess driving licence and police have registered a case for not having valid driving licence and he also has paid the fine.

16. Finding that R.W.2, who drove the offending vehicle at the time of accident did not possess valid driving licence, the Tribunal held that the first respondent owner of the vehicle alone is liable to pay the compensation.

17. The Tribunal found that at the time of accident the driver of the offending vehicle was not possessing valid driving licence and hence, it had fastened the liability on the first respondent owner.

18. In National Insurance Co. Ltd. v. Swaran Singh,(2004) 3 SCC 297, the Hon'ble Supreme Court examined the liability of the insurance company vis-a-vis the owner and held that the liability of the Insurance Company would arise both from contract as well as from statute. Considering the insurer's contractual liability as well as statutory liability vis-a-vis the claims of third parties, the Hon'ble Supreme Court held as under:

> "31. The right of the victim of a road accident to claim compensation is a statutory one. He is a victim of an unforeseen situation. He would not ordinarily have a hand in it. The negligence on the part of the victim may, however, be contributory. He has suffered owing to wrongdoing of others. An accident may ruin an entire family. It may take away the only earning member. An accident may result in the loss of her only son to a mother. An accident may take place for a variety of reasons. The driver of a vehicle may not have a hand in it. He may not be found to be negligent in a given case. Other factors such as unforeseen situation, negligence of the victim, bad road or the action or inaction of any other person may lead to an accident.
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> 72. A beneficent statute, as is well known, must receive a liberal interpretation. (See Bangalore Water Supply & Sewerage Board v. A. Rajappa (1978) 2 SCC 213, Steel Authority of India Ltd. v. National Union Waterfront Workers (2001) 7 SCC 1, ITI Ltd. v. Siemens Public Communications Network Ltd.(2002) 5 SCC 510, Amrit Bhikaji Kale v. Kashinath Janardhan Trade (1983) 3 SCC 437 and Kunal Singh v. Union of India (2003) 4 SCC 524)
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> 82. Proviso appended to sub-section (4) of Section 149 is referable only to sub-section (2) of Section 149 of the Act. It is an independent provision and must be read in the context of Section 96(4) of the Motor Vehicles Act, 1939. Furthermore, it is one thing to say that the insurer will be entitled to avoid its liability owing to breach of terms of a contract of insurance but it is another thing to say that the vehicle is not insured at all. If the submission of the learned counsel for the petitioner is accepted, the same would render the proviso

to sub-section (4) as well as sub-section (5) of Section 149 of the Act otiose, nor can any effective meaning be attributed to the liability clause of the insurance company contained in sub-section (1) of Section 149. The decision in NEW INDIA ASSURANCE CO.LTD. VS. KAMALA, (2001 ACJ 843= 2001 4 SCC 342) has to be read in the aforementioned context.

83. Sub-section (5) of Section 149 which imposes a liability on the insurer must also be given its full effect. The insurance company may not be liable to satisfy the decree and, therefore, its liability may be zero but it does mean that it did not have initial liability at all. Thus, if the insurance company is made liable to pay any amount, it can recover the entire amount paid to the third party on behalf of the assured. If this interpretation is not given to the beneficent provisions of the Act having regard to its purport and object, we fail to see a situation where beneficent provisions can be given effect to. Sub-section (7) of Section 149 of the Act, to which pointed attention of the Court has been drawn by the learned counsel for the petitioner, which is in negative language may now be noticed. The said provision must be read with sub-section (1) thereof. The right to avoid liability in terms of sub-section (2) of Section 149 is restricted as has been discussed hereinbefore. It is one thing to say that the insurance companies are entitled to raise a defence but it is another thing to say that despite the fact that its defence has been accepted having regard to the facts and circumstances of the case, the Tribunal has power to direct them to satisfy the decree at the first instance and then direct recovery of the same from the owner. These two matters stand apart and require contextual reading. ...... "

19. After referring to various decisions, in Swaran Singh', supra, the Hon'ble Supreme Court summarised its findings as under:

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

(i) Chapter XI of the Motor Vehicles Act, 1988 providing compulsory insurance of vehicles against third-party risks is a social welfare legislation to extend relief by compensation to victims of accidents caused by use of motor vehicles. The provisions of compulsory insurance coverage of all vehicles are with this paramount object and the provisions of the Act have to be so interpreted as to effectuate the said object.

(ii) An insurer is entitled to raise a defence in a claim petition filed under Section 163-A or Section 166 of the Motor Vehicles Act, 1988, inter alia, in terms of Section 149(2)(a)(ii) of the said Act.

(iii) 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.

(iv) Insurance companies, 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 the 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 the insured unless the said breach or breaches on 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.

(vii) The question, as to whether the owner has taken reasonable care to find out as to whether the driving licence produced by the driver (a fake one or otherwise), does not fulfil the requirements of law or not will have to be determined in each case.

(viii) If a vehicle at the time of accident was driven by a person having a learner's licence, the insurance companies would be liable to satisfy the decree.

(ix) The Claims Tribunal constituted under Section 165 read with Section 168 is empowered to adjudicate all claims in respect of the accidents involving death or of bodily injury or damage to property of third party arising in use of motor vehicle. The said power of the Tribunal is not restricted to decide the claims inter se between claimant or claimants on one side and insured, insurer and driver on the other. In the course of adjudicating the claim for compensation and to decide the availability of defence or defences to the insurer, the Tribunal has necessarily the power and jurisdiction to decide disputes inter se between the insurer and the insured. The decision rendered on the claims and disputes inter se between the insurer and insured in the course of adjudication of claim for compensation by the claimants and the award made thereon is enforceable and executable in the same manner as provided in Section 174 of the Act for enforcement and execution of the award in favour of the claimants.

(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 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. The certificate will be issued for the recovery 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.

(xi) The provisions contained in sub-section (4) with the proviso thereunder and sub-section (5) which are intended to cover specified contingencies mentioned therein to enable the insurer to recover the amount paid under the contract of insurance on behalf of the insured can be taken recourse to by the Tribunal and be extended to claims and defences of the insurer against the insured by relegating them to the remedy before regular court in cases where on given facts and circumstances adjudication of their claims inter se might delay the adjudication of the claims of the victims.

20. It is relevant to extract the law fixed by the judgment of this Court in 2014 (1) TN MAC 122 (Bajaj Allianz General Insurance Co. Ltd., Chennai vs. Samiyathaal and others), wherein it is held as follows:

> "8....... as per the dictum laid down by the Apex Court in the celebrated case of National Insurance Co. Ltd., vs. Swaran Singh, 2004 (1) TN MAC 104 (SC), wherein the Three-Judges of the Hon'ble Supreme Court has dealt 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. Therefore, as per the dictum laid down in National Insurance Co. Ltd. vs. Swaran Singh, 2004 (1) TN MAC 104 (SC); United India Insurance Co. Ltd. vs. S.Saravanan, 2009 (2) TN MAC 103 (DB); Bajaj Allianz General Insurance Company Ltd. vs. P.Manimozhi and others, 2010 (2) TN MAC 542 (SC); Branch Manager, United India Insurance Co. Ltd., Dharmapuri Town vs. Nagammal and others, 2009 (1) TN MAC 1 (FB): 2009 (1) CTC 1 (FB) : 2009 (1) LW 702; Jawahar Singh vs. Bala Jain & Ors., 2011 (1) TN MAC 641 (SC); and Iffco Tokyo General Insurance Co. Ltd. vs. A.Jafer Sadiq and others, 2012 (1) TN MAC 394 (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. However, the Tribunal being not convinced with the evidences put forth by the Insurance Company directed the Insurance Company to pay the compensation. Considering the submissions made by the learned counsel for the appellant-Insurance Company, this Court is of the view that the driver of the vehicle had no valid licence on the date of accident and hence the Insurance Company is directed to pay and then to recover from the owner."

21. In a catena of decisions, this Court as well as the Hon'ble Supreme Court held that in the case of violation of policy conditions and/or no valid driving licence possessed by the driver of the offending vehicle, the Court/Tribunal has to exercise its discretion and direct the insurer to pay first and then recover the same from the first respondent. In view of the consistent view taken in that regard, this Court is of the view that it would be appropriate to direct the second respondent to pay the compensation amount to the appellant with liberty to recover the same from the first respondent owner of the offending motorcycle.

22. The appellant has claimed compensation of Rs.3,00,000/- for the injuries sustained in the accident. According to the appellant, in the accident, he had sustained multiple injuries all over the body, particularly, injuries on his left ear, right leg, left leg, both hands, hip and also fracture of skull.

23. The Tribunal has taken Rs.600/- for determination of compensation under the head loss of future earning capacity. While calculating the amount, the Tribunal has adopted multiplier "15" and awarded compensation of Rs.90,000/-. In his claim petition, the appellant stated that he was working as coolie at the time of accident and was earning Rs.7,500/- per month. Though there was no proof to show that the appellant was earning Rs.7,500/- per month by doing coolie work, without any basis, the Tribunal has taken Rs.600/- for calculating the future earning capacity. This Court feels that the amount of Rs.600/- taken by the Tribunal is very lesser and the same has to be increased. Considering the age of the appellant at the time of accident, it would be appropriate to take Rs.2,000/- for calculating the loss of future earning capacity. Taking the earning capacity at Rs.2,000/- and disability at 10% and adopting multiplier "15", the loss of future earning capacity is calculated at Rs.3,00,000/-.

24. The Tribunal awarded Rs.10,000/- towards pain and suffering. Considering the nature of injuries sustained by the appellant and also the period of treatment undergone by them, Rs.10,000/- awarded by the Tribunal is enhanced to Rs.25,000/- for pain and suffering. The Tribunal awarded Rs.2,000/- for transport charges; Rs.1,000/- for damages to cloths and articles and Rs.1,410/- for medical expenses and since the said amounts awarded by the Tribunal are reasonable, the same are maintained.

25. In view of the above discussion, the total compensation of Rs.1,04,410/- awarded by the Tribunal is enhanced to Rs.,3,32,401/- payable with interest at the rate of 7.5% per annum from the date of petition till the date of deposit.

26. The learned counsel for the appellant submitted that though the appellant claimed Rs.3,00,000/- and paid court fee, in appropriate case, if the Court feels that the claim made by the appellant is less, the Court can grant more than claimed in the claim petition. There is no restriction that compensation could be awarded only up to the amount claimed by the claimant.

27. In Nagappa v. Gurudayal Singh and others, reported in 2003 ACJ 12 (SC), the Hon'ble Supreme Court held that there is no restriction that compensation could be awarded only up to the amount claimed by the claimant. In an appropriate case where from the evidence brought on record, if the Tribunal considers that the claimant is entitled to get more compensation than claimed, the Tribunal may pass such as award. The Hon'ble Supreme Court said that the only embargo was that it should be just compensation, that is to say, it should be neither arbitrary or fanciful nor unjustifiable.

28. In the result, the Civil Miscellaneous Appeal is partly allowed with proportionate costs. The total compensation of Rs.1,04,410/- awarded by the Tribunal is enhanced to Rs.3,32,400/-. The second respondent is directed to deposit the enhanced compensation with interest at the rate of 7.5% per annum from the date of petition till the date of deposit and then recover the same from the owner of the vehicle i.e., the first respondent. On such deposit, the appellant is entitled to withdraw the entire amount on payment proper application before the Tribunal. The Registry is directed to draft decree on payment of deficit court fee by the appellant. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CS-VI)

//True Copy//

vs

Sub Assistant Registrar

To

1)The Subordinate Judge,
Motor Accidents Claims Tribunal,Sub-Court, Arni.

2)The Section Officer, VR Section,, High Court, Madras (2 copies)

+1 cc to Mr.P.Satheesh Kumar, Advocate, S.R.No.59935

Civil Miscellaneous Appeal No.1249 of 2015

EV(CO)
SSM(24/01/2019)