IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 02.11.2018

CORAM:

THE HONOURABLE MR.JUSTICE M.V.MURALIDARAN

Civil Miscellaneous Appeal No.259 of 2016
and
CMP.No.2148 of 2016

The Branch Manager,
United India Insurance Co. Ltd.,
Micro Office, Central Theater Backside,
Gandhi Nagar, Krishnagiri. ... Appellant

Vs

1.G.Dakshinamoorthy

2.V.Arumugam ... Respondents

Civil Miscellaneous Appeal filed under Section 173 of Motor Vehicles Act, 1988 against the award dated 19.6.2015 passed in M.C.O.P.No.377 of 2009 by the Motor Accidents Claims Tribunal (Additional Special Judge), Krishnagiri.

For Appellant : Mr.C.Paranthaman

For Respondents: Mr.I.Siddiq (for R1)
for M/s.Dass & Viswa Associates

Ms.A.Bagyalakshmi (for R2)
Legal Aid Counsel

JUDGMENT

Calling into question the liability fastened on the appellant and also the quantum of compensation, the appellant insurance company has filed the present appeal.

2. Brief facts are that on 19.6.2007 at 7.15 P.M., the first respondent was proceeding in his motorcycle bearing registration No.ABC 4340 on Krishnagiri - Kuppam National Highway and while he was nearing Varattanpalli E.B. Transformer,

a motorcycle bearing registration No.TN-24 B 4010 belonging to the second respondent insured with the appellant driven by its rider in a rash and negligent manner dashed back side of the first respondent. As a result, the first respondent sustained grievous injuries. Immediately after the accident, the first respondent was taken to Government Hospital, Krishnagiri and thereafter, he had taken treatment privately at Krishnagiri, Dharmapuri, Kaveripattinam and Bangalore. Regarding the accident, a criminal case in Crime No.210 of 2007 was registered by the Kandhikuppam police station against the rider of motorcycle bearing registration No.TN-24-B 4010. At the time of accident, the first respondent was aged 31 years and was earning Rs.7,000/- per month by doing plantain leaf business. Stating that the accident occurred due to rash and negligent driving of the rider of the motorcycle bearing registration No.TN-24 B 4010, the first respondent had filed the claim petition claiming compensation of Rs.5,00,000/-.

3. Resisting the claim petition, the appellant insurance company filed the counter stating that at the time of accident, the motorcycle bearing registration No.TN-24 B 4010 was not insured with the appellant and that the rider of the motorcycle viz., Suresh Kumar had no valid driving licence to drive the motorcycle. The appellant also denied the manner of accident. It is stated that the first respondent came from side road without seeing the second respondent's vehicle coming on the main road and dashed against him and thus, invited the accident. It is also stated that the first respondent had also no valid driving licence to drive the motorcycle at the time of accident. Hence, prayed for dismissal of the claim petition.

4. Before the Tribunal, the first respondent examined himself as P.W.1 and Dr.D.V.Gandhi was examined as P.W.2. Exs.P1 to P7 were marked. On the side of the appellant, one M.Ravi who was then working as Senior Assistant in the appellant insurance company was examined as R.W.1 and Exs.R1 to R3 were marked.

5. The Tribunal held that the accident occurred due to rash and negligent driving of the rider of the second respondent's motorcycle and since the rider of the motorcycle had no valid driving licence, the Tribunal directed the appellant insurance company to pay the compensation at the first instance and then recover it from the second respondent. Taking the disability at 35%, the Tribunal awarded total compensation of Rs.2,00,000/- payable with interest at the rate of 7.5% per annum. Challenging the award, the appellant has filed the present appeal.

6. The learned counsel for the appellant submitted that the

Tribunal failed to appreciate the evidence of R.W.1 and Ex.P5-Motor Vehicle Inspector's Report that at the time of accident the owner of the motorcycle authorised his driver to drive the vehicle without having valid driving licence. He would submit that the Tribunal ought to have exonerated the appellant from its liability. He would also submit that the Tribunal failed to consider that the accident happened due to the contributory negligence of the first respondent.

7. The learned counsel for the appellant further submitted that the Tribunal failed to appreciate the fact that injuries sustained by the first respondent are non-schedule injuries and that the Tribunal erroneously took the disability at 35% and awarded Rs.1,05,000/-. Further, amounts awarded under other heads are on the higher side and prayed for setting aside the award.

8. Per contra, reiterating the findings of the Tribunal, the learned counsel for the first respondent submitted that after analysing the oral and documentary evidence, the Tribunal rightly held that the appellant insurance company is liable to pay the compensation at the first instance and then recover it from the second respondent. As far as quantum of compensation is concerned, the learned counsel submitted that the total compensation awarded by the Tribunal is inadequate.

9. The learned counsel for the second respondent submitted that the accident occurred only due to rash and negligent riding of the first respondent who had failed to notice the second respondent's motorcycle coming on the main road and dashed against his vehicle. Thus, the first respondent also contributed to the accident.

10. Though the appellant and the second respondent contended that the accident occurred due to contributory negligence of the rider of the first respondent motorcycle, nothing has been produced by them to establish the same. On the other hand, the first respondent marked Ex.P1-FIR registered against the rider of the offending motorcycle. In his evidence, P.W.1, the injured clearly deposed that only due to the rash and negligent driving of the rider of the offending motorcycle bearing registration No.TN-24 B 4010, the accident occurred. Thus, the Tribunal rightly held that the accident occurred due to rash and negligent riding of the rider of the second respondent's motorcycle.

11. The Tribunal while holding that the accident occurred due to rash and negligent riding of the rider of the second respondent motorcycle observed that at the time of accident, the rider had no valid driving licence. To prove that the rider of

the offending motorcycle had no valid driving licence at the time of accident, the appellant examined R.W.1. In his evidence, R.W.1 deposed that the rider of the second respondent motorcycle had no valid driving licence at the time of accident. The second respondent also failed to prove that the rider of the motorcycle had valid driving licence at the time of accident. Though the appellant issued letter to the second respondent to produce the driving licence of the rider of the offending vehicle, he had failed to produce the same. In Ex.P5-Motor Vehicle Inspector's Report also it has been stated that no licence was produced by either the owner or the rider of the offending vehicle.

12. The learned counsel for the appellant contended that the second respondent by violating the policy conditions authorised his driver to drive the vehicle without having driving licence and the Tribunal ought to have exonerated the appellant from its liability. The first respondent marked Ex.P2-insurance policy to show that the offending motorcycle was insured with the appellant and the policy was valid from 27.9.2006 to 26.9.2007, covering the date of accident.

13. 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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> ....
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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)

....

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 herein before. 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. ...... "

14. 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."

15. In 2014 (1) TN MAC 122 (Bajaj Allianz General Insurance Co. Ltd., Chennai vs. Samiyathaal and others), this Court 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."

16. In a catena of decisions, this Court as well as the Hon'ble Supreme Court held that in the case of 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 owner of the offending vehicle. In view of the consistent view taken in that regard, this Court is of the view that the Tribunal has rightly held that the appellant is liable to pay the compensation to the first respondent at the first instance and then recover it from the second respondent and point No.1 is answered accordingly.

17. According to the first respondent, in the accident he had sustained grievous injuries. The first respondent marked Ex.P3-wound certificate which reveals that injuries sustained by the first respondent are grievous in nature. P.W.2-Doctor, who examined the first respondent assessed the disability as 35% and Ex.P7 is the disability certificate issued by him.

18. Though the appellant contended that the Tribunal erroneously took the disability as 35%, nothing has been produced to prove the same. Being an expert in the field and also after examining injuries sustained by the first respondent, P.W.2-Doctor assessed the disability as 35%. In the absence of any contra evidence adduced by the appellant, the Tribunal was right in taking the disability as 35% and no error in awarding Rs.1,05,000/- towards disability by taking Rs.3,000/- per percentage of disability.

19. In addition, the Tribunal awarded Rs.20,000/- for pain and suffering; Rs.30,000/- for medical expenses; Rs.10,000/- for future medical expenses; Rs.20,000/- for transportation and nutrition; Rs.5,000/- for attender charges and Rs.10,000/- for loss of income for two months. Thus, the Tribunal awarded total compensation of Rs.2,00,000/- payable with interest at the rate of 7.5% per annum from the date of claim petition till the date of realisation. Since the compensation of Rs.2,00,000/- awarded by the Tribunal is reasonable, the same is confirmed and point No.2 is answered accordingly.

20. In the result, the Civil Miscellaneous Appeal is dismissed. The award passed by the Tribunal is confirmed. The appellant insurance company is directed to pay the compensation of Rs.2,00,000/- awarded by the Tribunal with interest at the rate of 7.5% per annum from the date of claim petition till the date of deposit within a period of eight weeks from the date of receipt of a copy of this judgment, excluding the default period, if any. On such deposit, the first respondent is permitted to withdraw the entire compensation amount along with accrued interest on filing proper application before the Tribunal. No costs. Consequently, connected miscellaneous petition is closed.

By an order dated 24.10.2018, this Court nominated Ms.A.Bagyalakshmi, learned counsel as the counsel for the second respondent and accordingly, the learned counsel appeared and argued in this appeal. Therefore, the Secretary, High Court Legal Services Committee is directed to pay a sum of Rs.5,000/- (Rupees Five Thousand) to Ms.A.Bagyalakshmi towards her fee.

Sd/-
Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

vs

To

1. The Motor Accidents Claims Tribunal,
   Additional Special Judge,
   Krishnagiri.

2. The Secretary,
   High Court Legal Services Committee,
   High Court, Madras.

+2cc to Mr.C.Paranthaman, Advocate, S.R.No.75612
+1cc to Mr.A.Bakkiayalakshmi, Advocate, S.R.No.76018
+1cc to Mr.Dass & Viswas Associates, Advocate SR.No. 76207

Civil Miscellaneous Appeal No.259 of 2016 and
CMP.No.2148 of 2016

KAN(CO)
GN(28/05/2019)