IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 24.08.2018

CORAM :

THE HONOURABLE MR.JUSTICE N.KIRUBAKARAN
and
THE HONOURABLE MR.JUSTICE S.BASKARAN

C.M.A.No.1957 of 2017
and
C.M.P.No.10595 of 2017

Bharti AXA General Ins. Co. Ltd.
2nd Floor, Metro Plaza,
162, Anna Salai, Chennai 600 002 ... Appellant/ 2nd Respondent

Vs

1.A.Aysha
2.Master M.Shuyule (Minor)
Rep.by his mother and next friend A.Aysha
3.S.Shahul Hameed
4.Syed Ibrahim Beevee ... Respondents 1 to 4/Claimants
5.R.Ravi .. 5th Respondent/1st Respondent

PRAYER :

Civil Miscellaneous Appeal filed against the Decree and Judgment dated 31.01.2017 passed in M.C.O.P.No.3263 of 2012, on the file of the Motor Accident Claims Tribunal, III Court of Small Causes at Chennai.

For Appellant : Mr.A.N.Krishnaswamy

For Respondents : Mr.K.Suryanarayanan (for R1 to R4)

J U D G M E N T

(Judgment of the Court was delivered by N.KIRUBAKARAN, J)

The appeal has been preferred by the Insurance company against the award of Rs.1,09,37,100/- as compensation for the death of S.M.Meeran Arul Mozhi, aged about 34 years, a software engineer, working in T.C.S., Chennai, earning about Rs.70,000/- per month, in the accident, which occurred on 09.05.2012, when the victim was walking on M.M.D.A. Colony Main Road and was hit behind by an Autorickshaw, which was driven rashly and negligently.

2.The facts of the case are as follows:

The victim was walking on the road on 09.05.2012 and the Autorickshaw, which was coming behind hit him down, resulting in his death. Therefore, the claim petition. On contest, the Tribunal found based on PW2-eyewitness that the driver of the Autorickshaw was rash and negligent and he was responsible for the accident and found that the driver was negligent in driving the vehicle. Taking into consideration the absence of valid driving licence possessed by the driver of the Autorickshaw, the Tribunal directed the Insurance company to pay the amount and recover the same from the owner of the vehicle. The said award is being challenged before this Court.

3.Heard Mr.A.N.Krishnaswamy, learned counsel appearing for the appellant and Mr.K.Suryanarayanan, learned counsel appearing for respondents 1 to 4.

4.The learned counsel appearing for the appellant would submit that there was no driving license possessed by the driver of the Autorickshaw and therefore, there is violation of policy condition as well as the Motor Vehicles Act. Hence, the Insurance company could avoid the liability. He would rely upon the judgment of the Honourable Supreme court in National Insurance company Ltd., V. Swaran Singh and others reported in 2004 (3) SCC 297, wherein the Honourable Supreme Court elaborately dealt with the cases, in which the Insurance Company could avoid liability and the cases in which, the Insurance Company could pay and recover the amount. Relying upon the said judgment, he would submit that the Insurance Company could avoid liability and even pay and recovery could not be ordered as it is the case of no driving licence. He would state that the judgment particularly speaks about absence of licence, fake licence, invalid driving licence or disqualification of the driver for driving at the relevant time where the Insurance company could avoid liability. Therefore, he would submit that in this case, the auto driver did not have driving licence and therefore, pay and recovery ordered by the Tribunal has to be set aside.

5.However, Mr.K.Suryanarayanan, learned counsel appearing for the respondents would support the award passed by the Tribunal relying upon the very same Swaran Singh's judgment as well as recent judgment of the Honourable Supreme Court in Shamanna and another Vs Divisional Manager, Oriental Insurance Company Ltd., reported in 2018 (2) TN MAC 151.

6.As far as the manner of the accident is concerned, it is not disputed. The only dispute raised by the Insurance company is that the driver of the Autorickshaw did not have driving licence and therefore, there is no liability on the part of the Insurance company either to pay the money or to pay and recover the money.

7.The Honourable Supreme Court in National Insurance Company Ltd., Vs Swaran Singh and others reported in 2004 (3) SCC 297, in threadbare analysed which are all the cases in which the Insurance company could avoid the liability and other cases in which the Insurance company could be directed to pay and recover the amount. Paragraph 110 of the said judgment is extracted as follows:

> “"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 wherefore 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 fulfill 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 there under 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,"

Much reliance has been made by the learned counsel appearing for the appellant in clause (iii) of Para 110. It speaks about absence of licence, fake licence, invalid driving licence or disqualification of the driver could be the defence to the Insurance company. However, to avoid the liability, the Insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the conditions of the policy regarding use of vehicles by a duly licensed driver or one, who was not disqualified to drive at the relevant time. So avoidance could be possible only if the insurer is able to prove that the insured failed to exercise reasonable care, while appointing a driver. In this case, though the owner and drivers have been impleaded, they remained ex parte, as usual. As per the above judgment to avoid the Insurance liability, the insurance company has to prove that the owner was negligent while appointing the driver. The Insurance company did not summon the owner at the time of trial. Even, all parties remained ex parte, the duty is cast upon the Insurance company to prove the failure of the owner. It is obligatory on the part of the Insurance company to summon even a person who remained ex parte as a witness, if his evidence would be useful to avoid the liability. No such steps have been taken by the Insurance company. Therefore, contention made by the appellant in this case is not sustainable.

8.Even in the recent judgment, the Honourable Supreme Court in Shamanna and another Vs Divisional Manager, Oriental Insurance Company Ltd., reported in 2018 (2) TN MAC 151 categorically held that the third party have to be covered. Paragraph 7 and 8 which are extracted as follows.

> “7. As per the decision in Swaran Singh case, onus is always upon the insurance company to prove that the driver had no valid driving licence and that there was breach of policy conditions. Where the driver did not possess the valid driving licence and there are breach of policy conditions, "pay and recover" can be ordered in case of third party risks. The Tribunal is required to consider as to whether the owner has taken reasonable care to find out as to whether the driving licence produced by the driver, does not fulfill the requirements of law or not will have to be determined in each case.
> 8. The Supreme Court considered the decision of Swaran Singh case in subsequent decision in National Insurance Co. Ltd. v. Laxmi Narain Dhut, (2007) 3 SCC 700, wherein this Court held that "the decision in Swaran Singh case has no application to cases other than third party risks and in case of third party risks the insurer has to indemnify the amount and if so advised, to recover the same from the insured". The same principle was reiterated in Prem Kumari v. Prahlad Dev and others (2008) 3 SCC 193.”

Therefore, the liability of the Insurance company cannot be avoided. The Tribunal rightly fastened the liability on the owner of the vehicle and directed the Insurance company to pay the compensation and recover the same. The Honourable Supreme Court in Swaran Singh's case also considered the scope of the beneficial legislation viz., Motor Vehicles Act and declared that no third party should suffer because of the failure of the owner and safeguarded the interest of the third parties by ordering pay and recovery, even in cases, where the Insurance company could avoid liability.

9.As far as the quantum of compensation is concerned, the Tribunal took Rs.52,000/- as monthly income of the deceased, as per the documents produced before the Tribunal, even though, the salary varied from Rs.52,950/- to 63,584/- at the time of his death. In any event, when the Tribunal on appreciation of evidence especially, documentary evidence, determined the monthly income at Rs.52,000/-, though lesser amount, this Court is not inclined to interfere with the same. The Tribunal fixed the monthly income at Rs.52,000/- and added 50% towards futures prospects, as the deceased was aged about 34 years and was a permanent employee working as a software engineer in TCS and therefore, as per Pranay Sethi's case, this Court confirms adding of 50% towards future prospects.

10.The age of the deceased was 34 years as proved by Ex.P6, Ex.P7, Ex.P8 and therefore, the Tribunal rightly took "16" as multiplier, after deducting $1/4^{th}$ towards personal expenses as the size of the family is 4 and determined the loss of income at Rs.1,06,02,048/-. The same is confirmed.

11.Loss of consortium:

The Tribunal awarded a sum of Rs.1,00,000/- towards loss of consortium, which is on the higher side. As per the the judgment of Honourable Supreme Court in Pranay Sethi's case, the same is reduced to Rs.40,000/- to the 1^{st} respondent.

12.Love and affection:

Since the 2^{nd} respondent was hardly 3 months, who lost the love and affection, care and guidance of the father throughout his life, the Tribunal rightly awarded him a sum of Rs.1,00,000/- and the same is confirmed. A sum of Rs.1,00,000/- was awarded to the 3^{rd} and 4^{th} respondents, who are the parents towards the loss of love and affection and the same is also confirmed. The amount towards loss of love and affection to 2^{nd} to 4^{th} respondents is akin to the amount awarded towards loss of consortium to the 1^{st} respondent/wife. When a child of a parent dies or parent of a child dies, definitely there will be loss of love and affection and therefore, they have to be suitably compensated and in an attempt to render complete justice, the above amounts are awarded.

13.Funeral expenses:

The Tribunal awarded a sum of Rs.25,000/- towards funeral expense. The same is reduced to Rs.15,000/- as per the judgement of the Hon'ble Supreme Court in Pranay Sethi's case.

14.Transport expenses:

The Tribunal awarded a sum of Rs.10,000/- towards transport expenses. The same is confirmed.

15.Loss of estate:

No amount was awarded by the Tribunal towards loss of estate and therefore, this Court awards a sum of Rs.15,000/- under this head.

Head	Amount (Rs.)
Loss of income	10602048
Loss of consortium	40000
Loss of love and affection	200000
Funeral expenses	15000
Transport expenses	10000
Loss of estate	15000
Total	10882048

16.Hence, the total compensation payable in this case is Rs.1,08,82,048/-.

17.The interest awarded by the Tribunal at the rate of 7.5% per annum is confirmed.

18.The Insurance company is directed to deposit the award amount as per the modified award passed by this Court, within a period of four weeks from the date of receipt of a copy of this order, after deducting the amount already deposited, if any. On such deposit being made, the Tribunal is directed to transfer the award amount along with interest and costs as per the ratio fixed by the Tribunal to the bank accounts of the respective claimants through RTGS within a period of one week thereon, except the minor/2nd respondent's share. The share of the minor 2nd claimant shall be deposited in interest bearing Fixed Deposit in any one of the Nationalised Banks, till he attains majority. The 1st claimant/1st respondent, who is the mother of the minor 2nd claimant/2nd respondent, is permitted to withdraw interest accruing on such deposit once in three months.

19.Accordingly, this appeal is partly allowed, reducing the award of the Tribunal from Rs.1,09,37,100/- to Rs.1,08,82,048/- with interest. Consequently, connected miscellaneous petition is closed. No costs.

Sd/-
Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

kkn/sai

To

The III Judge,
Court of Small Causes ,
Chennai.

+1cc to Mr.A.N.Krishnaswamy, Advocate, S.R.No.58001
+1cc to Mr.K.Suryanarayanan, Advocate, S.R.No.57859

C.M.A.No.1957 of 2017

KGK(Co)
CS/01/10/18