IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 12.10.2018

Delivered on : 29.11.2018

CORAM:

THE HONOURABLE MR.JUSTICE M.V.MURALIDARAN

C.M.A.No.1709 of 2017
and
CMP.No.9211 of 2017

The Oriental Insurance Company Ltd.,
S.V.Complex, Eashwaran Koil Street,
Pondicherry. ... Appellant/4th Respondent

Vs.

1.Santhi
2.Sivakumar
3.Vasanthi
4.Manikandan
5.Meena ... RR1 to 5/Petitioners 1 to 5
6.Arulmozhi ... R6/R1
7.Janarthanan ... R7/R2
8.Egambaram ... R8/R3

Prayer:- Civil Miscellaneous Appeal filed under Section 173 of Motor Vehicle Act, 1988, against the judgment and Decree dated 03.11.2016 in M.C.O.P.No.51 of 2013 on the file of the Motor Accidents Claims Tribunal (Special Court for M.C.O.P. Cases) Villupuram in so far as directing this appellant to pay 50% of the total compensation of Rs.8,42,000/- with 7.5% interest to the petitioners/respondents 1-5 in this appeal as the indemnifier of the 3rd respondent /8th respondent in this appeal.

For Appellant : Mr.R.Ganesan

For Respondents : Mr.B.Balavijayan (for R1 to R5)

Mr.E.M.K.S.Siddharthar (for R8)
Legal Aid Counsel

No Appearance (for R6)

JUDGMENT

This Civil Miscellaneous Appeal is filed by the 4th Respondent/ Oriental Insurance Company, challenging 50% of the award directed to be paid by the 4th respondent by the Tribunal as per the award dated 03.11.2016 in MCOP.No.51 of 2013. The respondents 1 to 5 in this appeal are the claimants before the claims Tribunal who filed the above MCOP.No.51 of 2013 claiming compensation for the death of one Marimuthu in the Motor Accident occurred on 25.08.2009 under the mode of head-on-collusion. The respondents 1 and 2 before the Tribunal are the respondents 6 and 7 in this appeal. The 6th respondent is the owner of the Tractor bearing Registration No.TN-32-0807 and the 7th respondent in this appeal is the driver of the 6th respondent at the relevant point of time and it is an admitted fact that the 6th respondent during the relevant point of time has not validly insured his Tractor and therefore, the Tribunal has directed that the 6th respondent being the owner of the Tractor having come to the conclusion that the driver of the Tractor has contributed 50% negligence to the accident has directed the 6th respondent to pay 50% of the compensation and the Tribunal also directed the appellant/4th respondent being the insurer of the Jeep TCD 8448 owned by the 8th respondent/3rd respondent to pay the 50% of the award as the deceased Marimuthu was being carried on in the said Jeep TCD 8448 during the relevant point of time on the premise that the deceased Marimuthu has been covered by the insurance policy taken by the 8th respondent in this appeal with this appellant Insurance Company treating the deceased Marimuthu as a third party.

2.There is absolutely no dispute on facts and also on the question of apportionment of liability by the claims Tribunal as the accident has admittedly occurred under the classic mode of head-on-collusion. The Tribunal has rightly apportioned the negligence and also apportioned the liability of the vehicles involved in the above accident as 50 : 50 ratio as both the vehicles are equal in size and power. There is also no dispute regarding the mode of accident. The appellant has challenged the award only on the question of law whether deceased Marimuthu who travelled / carried in the ill-fated Jeep TCD 8448 insured with this appellant could be treated as a third party? If not, could the order passed against the appellant to satisfy 50% award to the claimants is sustainable?

3.As a matter of fact, neither the appellants' lawyer who defended the case of this appellant before the Tribunal nor did the counsel for the petitioner could produce the polity and the policy conditions that the 8th respondent has taken for his Jeep TCD-8448 with this appellant enabling the claims Tribunal to find out whether the policy taken by the 8th respondent was a bare act policy, or a comprehensive/package policy covering the risk of the third parties and the driver, owner and all other occupants of the Jeep TCD-8448.

4.The sole contention of the appellant in this appeal is that a bare act policy was taken by the 8th respondent/owner for the Jeep TCD-8448 during the relevant point of time and no premium has been paid to the driver, owner or any of the occupant of the Jeep and therefore any person travelled in the Jeep cannot be considered as the third party and the deceased Marimuthu admittedly was an occupant of the Jeep during the relevant point of time and for whom the owner of the Jeep/insured having not paid any premium, the deceased cannot be considered to be a third party as per the decision of the Hon'ble Apex Court of India in the case of National Insurance Company Limited v. N.Balakrishnan reported in 2013 (1) SCC 731 and therefore, the Tribunal has committed a twin fold error in so far as (1) either treating the deceased as a lawful passenger in an own Car/own Jeep (2)treated the deceased Marimuthu a third party in the accident.

5.As a matter of fact, the Tribunal has not expressly concluded whether the deceased was a third party in so far as the Jeep TCD-8448 is concerned or whether the deceased is a lawful occupant of the Jeep for whose risk the insured has paid any premium and therefore the Insurance Company is liable.

6.Admittedly, the Jeep of the 8th respondent was insured with the claimant which is an owner's car and not used for hire or reward. Admittedly, the said Jeep has been insured by its owner with the appellant's Insurance Company for a bare statutory act policy covering only the risk of the bodily injury and death and the properties of the third parties only by the use of that Jeep TCD-8448. No premium has been paid covering the risk of the death or bodily injury of the owner, driver or any of the occupant of the said Jeep. In short, the policy taken by the appellant Insurance Company is not liable to the risk of any person who suffered any bodily injury while he is being carried in the said vehicle, whether he is an authorized occupant or an unauthorised occupant.

7.The claimant's have not filed the insurance policy. They have filed the M.V.I. reports of the Jeep and the Tractor. Ex.P3 is the M.V.I. report of the Tractor and Ex.P4 is the M.V.I. report of the Jeep. Generally in the M.V.I. report, the particulars as to the name of the registered owner, financier's name, permit particulars, driver's name, driving license particulars, F.C. particulars and the Insurance particulars will be mentioned. If the vehicle is insured, the M.V.I. will report will mention the name of the Insurance Company and the validity period of the insurance policy. The Motor Vehicle Inspector will not mention in the M.V.I. report what kind of policy that the owner of the vehicle has taken and in force at the time of the inspection in his report. He would simply mention the name of the Insurance Company and the validity period. Suppose the owner or the user of the vehicle has not produced the insurance policy (IC), he will simply mention I.C. not produced, that does not mean that vehicle has not been insured at all. It would be produced subsequently to the M.V.I. to avoid criminal charges.

8.It is so happened in this case that the Tribunal on perusing the Ex.P4 M.V.I. report, which is pertaining to the Jeep TCC-8448 owned by the 8th respondent insured with this appellant only with an Act policy has erroneously jumped to the conclusion that there was a valid and effective insurance policy that the 8th respondent has taken with this appellant during the period of accident and the deceased being the occupant of the said Jeep having been dead due to the accident, the insurer being the indemnifier of the owner is vicariously liable to the claim of the claimants to the extent of 50% and slapped 50% liability on the appellant, presumably, assuming the policy mentioned in the M.V.I. report is a comprehensive policy covering the risk of the deceased Marimuthu who happened to be the occupant at the time of the accident without going into the question deeply whether the I.C. mentioned in the M.V.I. report under Ex.P4 is a comprehensive policy or an act policy. It is an equally unfortunate thing that this position has not at all been clarified and explained by the learned counsel for the Insurance Company/ appellant while defending before the Tribunal.

9.It is also a fact that the appellant has not taken any specific plea in the counter filed before the Tribunal that the appellant is not liable to any claim as the 8th respondent has not insured his Jeep with comprehensive package policy and the appellant is not vicariously liable to the claims of the claimants as the deceased could not be treated as third party expressly. As a matter of fact, the question of law need not be pleaded. The question raised by the appellant before this Court in this appeal is purely a question of law could be raised before this Court at the first time as the power of this Court is analogous to that of the Tribunal as to the facts and also the law as well. The only point to be decided in this appeal is:

> "Whether the occupant of vehicle in a private Jeep, the owner of the said Jeep (insured) has taken only an act policy be treated as a third party for the purpose of making a claim under Section 166 of M.V. Act 1988?"

10.Admittedly, the appellant being the 4th respondent before the Tribunal has not produced the copy of the policy taken by the 8th respondent for the Jeep TCD 8448 before the claims Tribunal nor did the counsel for the appellant before the Tribunal has raised any question regarding the plea that are being raised by the appellant before this Court while the matter was pending before the claims Tribunal.

11.The claimants have filed the detailed policy and the policy conditions for the Jeep of the 8th respondent taken with the appellant before this Court when the appeal is argued before this Court for perusal to find out whether the policy taken by the 8th respondent with this appellant for Jeep bearing Registration No.TCD-8448 is a bare act policy or a comprehensive / package policy to come to a just conclusion. It may not be out of context to mention that there would have been some degree of suppression on the part of the claimants in so far as not filing the detailed policy so that the claims Tribunal may have opportunity to peruse the policy to decide whether the policy taken by the 8th respondent is an act policy or a comprehensive package policy and to decide the case accordingly.

12.There is also some degree of professional ineptness on the part of the learned counsel for the appellant who defended this appellant before the Tribunal in so far as not marking the detailed policy before the claims Tribunal and en-light the Tribunal that the policy taken by the insured with the appellant was only an act policy and therefore, no liability could be fastened against the appellant as the deceased could not come within the ambit of the third party as per the ratio on the decision of the Apex Court in the case of National Insurance Co. Ltd., v. N.Balakrishnan reported in 2013 (1) SCC 731.

13.As a matter of fact, the question of law raised by the appellant is no more a matter of res integra. It has been squarely covered by the authoritative Judicial pronouncement of the Hon'ble Apex Court of India as claimed by the learned counsel for the appellant Mr.R.Ganesan. As a matter of fact, the fact of this case and the fact of the decision in the National Insurance Co. Ltd., v. N.Balakrishnan : 2013 (1) SCC 731 are in parimateria the same. In the above decision, the claimant being the owner of the own car taken only bare act policy hit against a bullock cart and filed claim against the Insurance Company. The Tribunal allowed the claim. The Madurai Bench of this Court also confirmed the said award and as against the said award, the Insurance Company filed S.L.P. and in that appeal the Hon'ble Apex Court after discussing cantena of decisions and also referring the decision of the Delhi High Court in the case of Yaspaul Luthra and another v. United India Insurance Co. Ltd.

and another reported in 2011 ACJ 1414 and also considering the final circular of the IRDA dated 03.12.2009 has held:

> "In view of the aforesaid factual position, there is no scintilla of doubt that a "comprehensive/package policy" could cover the liability of the insurer for payment of compensation for the occupant in a car. There is no cavile that an "Act policy" stands on a different footing from a "comprehensive/package policy". As the circulars have made the position very clear and the IRDA, which is presently the statutory authority, has commanded the insurance companies stating a comprehensive/package policy covers the liability, there cannot be any dispute in that regard. We may hasten to clarify the earlier pronouncements were rendered in respect of the "Act policy" which admittedly cannot cover a third party risk of and occupant in a car. But, if the policy is a "comprehensive/package policy", the liability would be covered. These aspects were not noticed in the Bakyalakshmi (Supra) and, therefore, these matter was referred to a larger Bench as the IRDA, which is presently the statutory authority, has clarified the position by issuing circulars which have been reproduced in the Judgment by the Delhi High Court and we have also reproduced the same".

14.In view of the same legal position, the question that emerges for consideration is whether in the case on hand, the policy is an "Act policy" or "comprehensive / package policy". There has been no discussion either by the Tribunal or the High Court in this regard. True it is, before us, Annexure-P1 has been filed which is a policy issued by the insurer. It mentions the policy to be "comprehensive policy" but we are inclined to think that there has to be a scanning of the terms of the entire policy at the conclusion whether it is a really a package policy to cover the liability of an occupant in a car.

15.The Hon'ble Apex Court has after allowing the above appeal and after setting aside the orders of this Court has remanded the matter to find out whether the policy is an Act policy or Comprehensive / Package Policy before saddling the liability upon the insurer.

16.In the instant appeal, though summons as against the 8th respondent has taken out several time and as the 8th respondent could not be reached out to the process of this Court and with a view to comply natural justice this Court has appointed Thiru.E.M.K.S.Siddharthar, Advocate as Legal Aid Counsel to 8th respondent to represent the cause of the 8th respondent who has produced the copy of the letter and the postal receipt that he has sent to the 8th respondent informing about the listing of the appeal for final arguments. He also filed a written submission stating that the policy taken by the 8th respondent with the appellant for his Jeep TCD-8448 during the relevant period was only an Act policy only covering the risk of the third parties and would submit that the decision of the Hon'ble Apex Court reported in (2013) 1 SCC 173 would squarely apply to this appeal and this Court may pass orders applying the above decision. He also would submit fairly that the policy produced by the appellant is genuine could be relied upon and also would submit that Motor Accidents Claims Tribunal, Villupuram has committed an error in so far as concluding that the appellant is liable to pay 50% compensation to the claimants without properly appreciating the particulars of policy.

17.I heard Mr.R.Ganesan, learned counsel for the appellant, Mr.B.Balavijayan, learned counsel for the respondents 1 to 5 and Mr.E.M.K.S.Siddharthar, learned Legal Aid Counsel appearing for the 8th respondent and perused the entire materials available on record. No representation on behalf of the 6th respondent.

18.In view of the submissions made by the learned counsel for the appellant and the learned counsel for the 8th respondent / insured owner of the (own car) Jeep bearing Registration No.TCD-8448 and also in view of the decision of the Hon'ble Apex Court of India in the case of National Insurance Co. Ltd. vs. N.Balakrishnan and another reported in 2013 (1) SCC 731, the Tribunal has committed an error in so far as concluding that the policy mentioned in the Ex.P4 M.V.I. report is a comprehensive policy and has further committed error in so far as directing the appellant to indemnify the 50% compensation on behalf of the insured on the premise that the policy covers the risk of the deceased Marimuthu who was an occupant of the Jeep during the accident. As it has been clarified overwhelmingly that the policy taken by the 8th respondent for his Jeep is not a comprehensive policy and has also explicitly clear that no premium has been paid to the risk of the owner, driver and also any of the occupant and the deceased being one of the occupant at the time of accident, the appellant though being the insurer not liable under the policy as the deceased Marimuthu could not be treated as third party in the light of the above authoritative decision of the Hon'ble Apex Court of India.

19.In the result, this Civil Miscellaneous Appeal is allowed. The award of the Motor Accident Claims Tribunal (Special Court), Villupuram in MCOP.No.51 of 2013 dated 03.11.2016 in so far as directing this appellant/4th respondent to pay 50% of the award to the claimants is set aside and the same is modified to the extent that the same is to be directed to be paid in the same proportion by the 8th respondent in this appeal / 3rd respondent before the Tribunal. Both the parties do bear their own cost. Consequently, connected miscellaneous petition is closed. No costs.

20.The Legal Aid Authority attached to this Court is directed to pay a sum of Rs.5,000/- to Mr.E.M.K.S.Siddharthar, Legal Aid Advocate.

Sd/-
Assistant Registrar

//True copy//

Sub Assistant Registrar

vs

To

1.The Motor Accident Claims Tribunal
(Special Court for MCOP cases)
Villupuram.

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

3.The Section Officer,
V.R.Section, High Court,
Madras-104.

+1cc to Mr.R.Ganesan, Advocate SR.No.82163

+1cc to Mr.EMK S Siddharthan, Advocate SR.No.82114

C.M.A.No.1709 of 2017
and
CMP.No.9211 of 2017

RV(CO)
GMY(21/01/2019)