BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
DATED: 16.03.2018

CORAM:

THE HONOURABLE MR.JUSTICE A.M.BASHEER AHAMED

C.M.A(MD)No.769 of 2013

The Branch Manager
National Insurance Company Limited,
D.No.37C, S.N.High Road,
Tirunelveli : Appellant / 2nd Respondent

Vs.

1.J.Esaikumar : 1st Respondent / Petitioner

2.C.Ramadoss : 2nd Respondent / 1st Respondent

PRAYER: Civil Miscellaneous Appeal is filed under Section 173 of the Motor Vehicles Act, against the Judgment and Decree in M.C.O.P.No.253 of 2008, dated 11.07.2012, on the file of the Motor Accident Claims Tribunal, Subordinate Court, Valliyoor.

For Appellant : Mr.J.S.Murali
For Respondent-1 : Mr.H.Arumugam
For Respondent-2 : Mr.D.Venkatesh

JUDGMENT

This Civil Miscellaneous Appeal has been preferred against the Judgment and Decree in M.C.O.P.No.253 of 2008, dated 11.07.2012, on the file of the Motor Accident Claims Tribunal, Subordinate Court, Valliyoor.

2. The 1st respondent herein is the claimant / injured in M.C.O.P.No.253 of 2008, on the file of the Motor Accident Claims Tribunal, Subordinate Court, Valliyoor. The 2nd herein is the owner of the vehicle viz., Auto, bearing Registration No.TN-72-F-6675, in which, the claimant travelled on 29.09.2008 and was caused injuries in the accident. The appellant / Insurance Company herein is the insurer of the above said vehicle and the policy was in force on the date of accident. The claimant filed the above claim petition under Sections 140 & 166 of the Motor Vehicles Act, seeking for a restricted compensation of Rs.6,00,000/-, for the injuries sustained by him in the accident in which, the auto capsized, due to rash and negligent driving by the driver of the said auto.

3. The owner of the vehicle was set ex-parte in the claim proceedings. The insurer alone contested the case by filing a counter statement that the driver of the auto, who drove the

vehicle, was a minor and was not having driving licence to drive the auto on the date of accident and the vehicle owner has violated the policy condition and also permit condition for plying the auto and hence, the insurer is not liable to pay any compensation to the claimant / injured for the said accident.

4. On the side of the claimant, P.Ws.1 & 2 were examined. Exs.P1 to 13 were marked. On the side of insurer, R.Ws.1 to 4 were examined and Exs.R1 to 12 were marked.

5. The Tribunal, after analyzing the evidence adduced by the parties, held that the accident had occurred due to rash and negligent driving of the Auto, driven by its driver viz., Manoj / R.W.3 and the Insurance Company is liable to pay the compensation to the claimant, since the said Auto was insured with the Insurance Company and the Policy was in force on the date of accident. The Tribunal awarded compensation of Rs.80,500/-, with interest at 7.5% per annum with proportionate costs and directed both the respondents ie., vehicle owner and also the insurer to pay the above compensation and also directed the insurer to pay the said compensation to the claimant at the first instance and thereafter, recover the same from the owner of the vehicle.

6. Aggrieved by the Award, fixing liability upon the owner of the vehicle and also directing the insurer to pay the compensation at first instance and recover the same thereafter, from the owner of the vehicle, the Insurer filed this appeal for setting aside the Award in respect of the insurer.

7. The primary ground raised in this appeal is that there is willful breach of terms of policy and permit condition by the owner of the vehicle and that the appellant Insurance Company is not liable to pay any compensation and the insurer is to be exonerated.

8. Admittedly, Ex.P1 / FIR was registered in Crime No.168 of 2008, dated 05.10.2008, on the statement recorded from the injured, while he was admitted for treatment in a private hospital at Nagercoil by Thisayanvilai Police, under Sections 279 & 337 of IPC., against R.W.3 and Ex.P4 / charge sheet was also laid on 15.10.2008 showing R.W.3 as an accused for the offence punishable under Sections 279 & 337 of IPC., and the said criminal case is pending before the learned Judicial Magistrate, Nanguneri. The Insurer has also admitted in Ex.R4 / Investigation Report that R.W.3 drove the Auto at the time of accident, though R.W.3 denied in his evidence. It is further admitted that the said Manoj / R.W.3 was not having any driving licence to drive the auto, on the date of accident. The Insurer had also taken steps to produce the driving licence of the driver viz., Manoj, by issuing notices to the said Manoj and also the owner of the auto / 2nd respondent herein. The said copy of the notices and acknowledgement card were marked as Exs.R5 to R11 respectively. Hence, the insured proved the fact that R.W.3, who drove the auto, on the date of accident, was not having any driving licence to drive the auto.

9. The policy of the said auto is produced and marked as Ex.R3. It is admitted that the said auto was insured with the appellant herein and a policy was also in force on the date of accident. The vehicle owner has committed violation / breach of terms of the policy by allowing R.W.3, who was not having any driving licence to drive the auto, on the date of accident, in which, the claimant sustained injures, due to his rash and negligent driving. Breach of permit is not proved by the Insurer in this case, but violation of terms of Insurance Policy by the owner of the vehicle is proved by the insurer. The liability created under the contract of insurance between the owner of the vehicle and insurer is contractual in nature, in terms of breach of terms and conditions of policy. A third party / claimant in this case cannot be left in lurch and made to suffer. The liability to pay compensation to the 3rd party / victim is statutorily imposed, under Section 149 of the Motor Vehicles Act, on the Insurer by directing them to satisfy the Award passed against the owner. In such circumstances, in order to protect the third party / victim, the concept of "pay and recover" is devised by directing the insurer to honour its statutory liability and then to proceed against the owner for the breach of contract.

10. In the instant case, the Tribunal has fixed the liability to pay compensation upon the vehicle owner as well as the insurance company. The owner of the vehicle has committed breach of contract by allowing R.W.3, who was not possessing any driving licence to drive the auto on the date of accident. In such circumstances, the insurer cannot be allowed to avoid its statutory liability, under Section 149 of the said Act, to pay the compensation to the victim. Hence, the insurer is exonerated from the liability to pay the compensation to the injured in an accident which was caused by the driver of the 2nd respondent herein, since the driver was not having any driving licence and the terms of policy was breached by the owner of the vehicle. Since the owner of the vehicle / 2nd respondent herein has violated the terms and conditions of the Insurance Policy / Ex.R3, this Court is of the considered view that the Tribunal ought to have passed the Award of compensation fixing the liability to pay the compensation on the owner of the vehicle / 2nd respondent herein and then only giving liberty to the insurer to pay the awarded amount to the claimant / injured / 3rd party and on such payment, recover the same from the owner / 2nd respondent herein.

11. The learned counsel for the appellant submitted that the appellant, on payment of the compensation to the claimant / injured, be given liberty to recover the same from the owner of the vehicle viz., the 2nd respondent herein in accordance with the Judgment of the Apex Court in Oriental Insurance Co.Ltd., Vs. Shri Nanjappan & Ors., reported in (2004 (1) TN MAC (SC) 211). The paragraph 8, which is the operative portion of the Judgment reads as follows:-

> "8. Therefore, while setting aside the judgment of the High Court we direct in terms of

what has been stated in Baljit Kaur's case (supra) that the insurer shall pay the quantum of compensation fixed by the Tribunal, about which there was no dispute raised, to the respondents-claimants within three months from today. For the purpose of recovering the same from the insured, the insurer shall not be required to file a suit. It may initiate a proceeding before the concerned Executing Court as if the dispute between the insurer and the owner was the subject matter of determination before the Tribunal and the issue is decided against the owner and in favour of the insurer. Before release of the amount to the insured, owner of the vehicle shall be issued a notice and he shall be required to furnish security for the entire amount which the insurer will pay to the claimants. The offending vehicle shall be attached, as a part of the security. If necessity arises the Executing Court shall take assistance of the concerned Regional Transport authority. The Executing Court shall pass appropriate orders in accordance with law as to the manner in which the insured, owner of the vehicle shall make payment to the insurer. In case there is any default it shall be open to the Executing Court to direct realization by disposal of the securities to be furnished or from any other property or properties of the owner of the vehicle, the insured. The appeal is disposed of in the aforesaid terms, with no order as to costs."

12. Considering the forgoing discussions, this Court is inclined to allow this appeal partly by setting aside the Award passed by the Tribunal. Accordingly, this Civil Miscellaneous Appeal is partly allowed by setting aside the Award passed by the Tribunal in M.C.O.P.No.253 of 2008, on the file of the Motor Accident Claims Tribunal, Subordinate Court, Valliyoor, dated 11.07.2012 and the liability to pay compensation awarded is fixed upon the owner of the vehicle / 2nd respondent herein and the appellant, on payment / deposit of the entire compensation, after deducting any amount already deposited by the insurer to the first respondent / claimant herein, as per the Award, within a period of one month from the date of receipt of a copy of this order, is permitted to recover the amount from the 2nd respondent / vehicle owner, as per the dictum laid down by the Hon'ble Supreme Court in the Judgment reported in (2004 (1) TN MAC (SC) 211) (cited supra). No costs.

Sd/-
Assistant Registrar(CS-I)

/True Copy/

Sub Assistant Registrar

To

1.The Subordinate Judge,
Motor Accident Claims Tribunal,
Subordinate Court,
Valliyoor.

2.The Record Keeper,
Vernacular Records Section
Madurai Bench of Madras High Court.
Madurai. **(Two Copies)**

+1cc to M/S.H.Arumugam, Advocate SR.No. 56064
+1cc to M/S.J.S.Murali, Advocate SR.No. 56037

Orders Made in
C.M.A(MD)No.769 of 2013
Dated:-
16.03.2018

mpk
JM/JC/SAR 3/27.04.2018/5P/6C