HON'BLE SMT. JUSTICE KONGARA VIJAYA LAKSHMI

M.A.C.M.A.No.256 of 2012

JUDGMENT:

This appeal is filed by the 2nd respondent-Bajaj Allianz General Insurance Company Ltd., against the order in MV OP No.170 of 2007 dated 03.06.2011 on the file of the Chairman, Motor Accidents Claims Tribunal cum Additional District Judge, Vizianagaram, in granting compensation of Rs.1,40,000/- with interest at 7.5%p.a. from the date of petition, till the date of realization.

2. The appellant herein is the 2nd respondent, the 1st respondent herein is the claimant and the 2nd respondent herein is the owner of the motor cycle, in the original petition. For the sake of convenience, the parties are hereinafter referred to as they were arrayed before the Tribunal in the original petition.

3. The facts, in brief, are that on 04.11.2005 at about 5 p.m. when the petitioner was proceeding on his motor cycle bearing No.AP 35 D 9549 and when he reached near the Bheemsingh village, the rider of the motor cycle bearing No.AP 30 D 8013 drove the same in a rash and negligent manner, dashed the motor cycle of the petitioner, as a result of which the petitioner fell on the road and sustained grievous injuries; after the accident, he was taken to Sanjeevi Hospital, Visakhapatnam; a case was registered by Jami Police, Visakhapatnam in Cr.No.54/05 against the rider of the offending vehicle; as the petitioner sustained grievous injures, he suffered a lot, spent consideration amount for his treatment and is not able to do his normal duties; the 1st respondent is the owner of the motor cycle bearing NO.AP 30 D 8013 and the 2nd respondent is the insurer and at the time of accident, the policy was in

force and hence, both the respondents are jointly and severally liable to pay compensation.

4. The respondents 1 and 2 filed separate counters, denying the material allegations of the petition. The first respondent contended that there was no rashness on the part of the rider of the offending motor cycle. The 2nd respondent contended that the accident is on account of head on collision between two vehicles and as the petitioner is also responsible for the accident, the owner and insurer of the said vehicle are necessary parties.

5. Basing on the said pleadings, the Tribunal has framed three issues. During enquiry, on behalf of petitioner, PWs.1 to 3 were examined and marked Exs.A.1 to A.18, and Exs.X.1 to X.3. On behalf of the 2nd respondent, RWs.1 and 2 were examined and Exs.B.1 to B.3 were got marked.

6. The Tribunal, on appraisal of evidence of PW.1, who is injured, coupled with the contents of Ex.A.1-FIR and Ex.A.3 charge sheet, recorded a finding on issue No.1 that the accident occurred on account of the rash and negligent driving of the rider of offending motor cycle; on issue No.2, the Tribunal held that the petitioner is entitled for a total compensation of Rs.1,40,000/- with interest at 7.5%per annum from the date of petition, till the date of realization; and on issue No.3, the Tribunal observed that the respondents 1 and 2 jointly and severally liable to pay the compensation to the petitioners, as the vehicle of the 1st respondent was insured with the 2nd respondent and the insurance was in force on the date of accident. Aggrieved by the same, the Insurance Company filed the present appeal.

7. Heard Sri T. Mahender Rao, learned counsel for the appellant and Sri G. Sai Narayana Rao, learned counsel for the 1st respondent. None appears for the 2nd respondent-insured. Perused the record.

8. Learned counsel for the appellant mainly contended that the person who committed theft of motor cycle of the insured, caused the accident, was neither an employee nor was he authorized to drive the vehicle by its owner and therefore, the doctrine of vicarious liability cannot be extended to the person who caused the accident and hence, both the owner of the vehicle and the insurance company are not liable to pay compensation as was held in similar circumstances by the High court of Madras in '*Mariammal and others vs. M. Ramasubramaniam and others*[1]'. He further contended that the Tribunal ought to have saddled the liability on the insured, as the appellant-insurance company discharged its burden by examining RWs.1 and 2 and producing Exs.B.1 to B.3 to show that the rider of the motor cycle at the time of accident was not having valid driving licence and he was also charge sheeted for the offence under Section 182 of the Motor Vehicles Act for driving the vehicle without possessing valid driving licence. He further contended that the Tribunal having observed that the claimant filed some medical bills and discharge summary and failed to examine the author of those documents, erred in awarding a sum of Rs.70,000/- towards transport to hospital, medicines and extra nourishment etc.

9. Learned counsel for the 1st respondent-claimant, on the other hand, contended that even though the vehicle of the 1st respondent was stolen and the rider of the vehicle at the time of accident did not possess any valid licence, still the owner and insurer are not exempted from paying the compensation, as the injured is a third party to the

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[1] 1998 ACJ 249 = (1998) 2 MLJ 199

policy, the insurance company has to pay compensation and then recover the same from the rider of the vehicle as per the decision of the Hon'ble Supreme Court in '*New India Assurance Company Ltd., vs Swaran Singh and others*[2]'. He further contended that as per the decision in '*Sasidharan Nair vs Ali and others*[3]', theft of vehicle and unauthorized use by the person, who had stolen the vehicle, cannot be termed as a breach committed by the insured and therefore, the insurance company is liable to pay compensation.

10. On issue No.1 the Tribunal held that the accident occurred on account of the rash and negligent driving of the rider of the offending motor cycle and the said finding is not seriously disputed by the appellant. However, as seen from the contents of Ex.A.1-FIR, Ex.A.3 charge sheet, the police have registered a case against the rider of the motor cycle and charge sheeted him before the criminal court and hence, I am of the view that the Tribunal has rightly held that the accident occurred only due to the rash and negligent driving of the rider of the motor cycle.

11. Coming to the claim, the petitioner claimed a sum of Rs.5,00,000/- under various heads as compensation. He claimed a sum of Rs.3,00,000/- as compensation towards medicines, extra nourishment and transport charges. The accident occurred on 02.11.2005 near Bhimsingh village. According to PW.1, immediately after the accident, he was shifted to Sanjivi Hospital, Visakhapatnam, where he took treatment till 16.12.2005. Thereafter, he was admitted in Sri Sai Orthopedic Hospital, Vizianagaram on 20.12.2015 and was discharged on 11.01.2016. Again he admitted in St.Joseph Hospital, Visakhapatnam,

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[2] 2004 ACJ 1
[3] 2010 ACJ 1061

where in took treatment from 31.01.2006 to 16.12.2006 on various intervals. To prove his prolonged treatment and the injuries sustained by him in the accident, resulting in permanent disability, the petitioner examined PWs.2 and 3. According to PW.2, he treated the petitioner and issued medical bills worth of Rs.52,850/- and also issued discharge summary Ex.A.4. As seen from the medical record, the petitioner took treatment for a considerable length of time. According to PW.3-doctor, the District Medical Board examined the petitioner and issued permanent disability certificate Ex.A.10, assessing the disability at 50%. He admitted that he is one of the doctors, who signed the disability certificate after examining him in the District Headquarters hospital. As per Ex.A.2 wound certificate, the petitioner sustained fracture to his right leg apart from other simple injuries. Even though PW.2 denied that he is not the author of the medical bills, he admitted that he operated the leg of the petitioner. Admittedly, the petitioner is a native of Vizianagaram District and he has taken treatment both at Visakhapatnam and Vizianagaram. So the petitioner might have spent some amounts towards transport charges, attendant charges, extra nourishment and medical bills. The petitioner filed bunch of medical bills for Rs.52,850/-. The documents filed by the petitioner i.e., discharge summaries and other medical record shows the length of treatment taken by the petitioner at various hospitals and hence, the amount of Rs.70,000/- awarded by the Tribunal towards transport to hospital, medicines and extra nourishment, is just and reasonable. The Tribunal awarded a sum of Rs.10,000/- towards pain and suffering, Rs.10,000/- for loss of earnings and Rs.50,000/- towards loss of amenities of life, prospects of life, enjoyment of life and longevity of life. The petitioner has not challenged the said award by filing any appeal. As per Ex.P.10

permanent disability certificate issued by the Regional Medical Board, the petitioner suffered 50% disability and the same was spoken to by PW.3-doctor, who issued the said certificate. In the absence of any appeal by the claimant, the amounts awarded by the Tribunal under the heads stated above, shall be maintained. Thus the amount of Rs.1,40,000/- awarded by the Tribunal towards compensation cannot be interfered with.

12. Coming to the liability, the appellant-insurance company examined RWs.1 and 2 to establish that the vehicle of the 1st respondent was driven by a person, who is not having valid licence and hence, the 1st respondent violated the conditions of the policy.

13. RW.1 in his evidence deposed that the motor cycle of the 1st respondent had been stolen away in the night of 28.10.2005 when the same was parked in the residential premises of the 1st respondent and the 1st respondent also lodged a complaint to the police and the said vehicle was not in possession of the 1st respondent on the date of accident. RW.2 is the person, who is working in the Regional Transport Office, Vizianagaram. The insurance company examined him to prove that the rider of the motor cycle AP 30 D 8013 has no valid driving licence at the time of the accident.

14. Basing on the evidence of RWs.1 and 2, learned counsel for the appellant contended that the rider of the motor cycle was neither an employee nor was he authorized to drive the vehicle by the owner and hence, the insurance company is not liable to pay any compensation. He further contended that even though, the vehicle of the 1st respondent was stolen by a thief and caused the accident, still there is breach of conditions of the policy and the insurer cannot be fastened with liability.

He further contended that unless the jural relationship of master and servant between owner and driver of the vehicle is pleaded and proved the doctrine of vicarious liability cannot be extended to a third party. In support of his contention, he relied upon the decision in *Mariammal's* case (supra), wherein it was held that when the vehicle was not driven by a person in the employment of the owner or the person who drove the vehicle was not authorized to drive the vehicle, the insurance company is not liable to pay any compensation.

15. Learned counsel for the claimant-1st respondent, on the other hand, relying on the decision in *Sasidharan's* case (supra), contended that unless the insured is at fault and is guilty of a breach, the insurer cannot escape from the obligation to indemnify the insured. He further contended that the appellant has not established any fault or violations of conditions of the policy by adducing cogent evidence and hence, the insurance company cannot escape from its liability, as the policy was in force by the date of accident.

16. In *Mariammal's* case, the Madras High Court, while relying on the decision of the Hon'ble Supreme Court in '*Sitaram Motilal Kalal vs. Santanuprasad Jaishankar Bhatt*[4]' and various authorities, held that 'it has not been established that the vehicle was driven by a person either in the employment of the owner or the person who drove the vehicle was authorized to drive the vehicle during the material point of time, exculpates the liability of the owner of the vehicle and the insurer of the vehicle'.

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[4] 1966 ACJ 89 (SC)

17. In *Sasidharan's* case, the High Court of Kerala relied on the decision of the Hon'ble Supreme Court in '*United India Insurance Co. Ltd. v. Lehru*[5]', wherein it was observed as follows:

> "(15) Now let us consider Section 149(2). Reliance has been placed on Section 149(2)(a)(ii). As seen in order to avoid liability under this provision it must be shown that there is a 'breach'. As held in *Skandia's* case [1987 ACJ 411 (SC) and *Sohan Lal Passi*'s case [1996 ACJ 1044 (SC), the breach must be on the part of the insured. We are in full agreement with that. To hold otherwise would lead to absurd results. Just to take an example, suppose a vehicle is stolen. *Whilst it is being driven by the thief there is an accident. The thief is caught and it is ascertained that he had no licence. Can the insurance company disown liability? The answer has to be an emphatic 'No'. To hold otherwise would be to negate the very purpose of compulsory insurance.* The injured or relatives of person killed in the accident may find that the decree obtained by them is only a paper decree as the owner is a man of straw. The owner himself would be an innocent sufferer. It is for this reason that the legislature, in its wisdom, has made insurance, at least third party insurance compulsory. The aim and purpose being that an insurance company would be available to pay. The business of the company is of insurance. In all businesses there is an element of risk. All persons carrying on business must take risks associated with that business. Thus it is equitable that the business which is run for making profits also bears the risk associated with it. At the same time innocent parties must not be made to suffer or loss. These provisions meet these requirements. We are thus in agreement with what is laid down in aforementioned cases, viz., that in order to avoid liability it is not sufficient to show that the person driving at the time of accident was not duly licensed. The insurance company must establish that the breach was on the part of the insured."

18. Relying on the dictum laid in the decisions of the Hon'ble Supreme Court and considering the provisions contained in Section 149(2), it is clear that in order to avoid liability for payment of the amounts due to a third party, who sustained injury in a vehicle, which is

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[5] 2003 ACJ 611 (SC)

properly insured, in view of Section 149(2)(a)(ii) the insurer should prove that there is a 'breach' on the part of the insured. The theft of the vehicle and unauthorised use by the person who had stolen the vehicle cannot be termed as a breach committed by the insured. The insurance company failed to establish that there is breach on the part of the insured by adducing any evidence. Therefore, the insurer cannot be exonerated from the liability to satisfy the award in favour of a third person.

19. In view of the facts and circumstances of the case, I am of the view that the finding of the Tribunal that the insurance company is liable to pay the compensation needs no interference.

20. The appeal fails and is, accordingly, dismissed. No order as to costs. Pending miscellaneous petitions, if any, in this appeal, shall stand closed.

KONGARA VIJAYA LAKSHMI, J

Date: 12.10.2018
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