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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 08.04.2019

CORAM:

THE HONOURABLE MS.JUSTICE V.M.VELUMANI

C.M.A.No.575 of 2015

and

M.P.No.1 of 2015

United India Insurance Co. Ltd.,
Having at 5, Big Bazaar Street,
Dharapuram & Taluk,
Erode District.

... Appellant /2nd Respondent

Vs.

1.S.Nithyaraj

... 1st Respondent/Petitioner

2.R.Arun Nambi

...2nd Respondent/1st Respondent

Prayer: This Civil Miscellaneous Appeal is filed under Section 173 of Motor Vehicles Act, 1988, against the award dated 22.03.2012 made in M.C.O.P.No.268 of 2008, on the file of the Sub Court, (Motor Accidents Claims Tribunal), Sankari.

For Appellant : Mr.S.Arunkumar

For R1 : Mr.C.Kulanthaivel

R2 : Exparte before the Tribunal

J U D G M E N T

This Civil Miscellaneous Appeal has been filed by the appellant-Insurance Company, challenging the award dated 22.03.2012 made in M.C.O.P.No.268 of 2008, on the file of the Sub Court, (Motor Accidents Claims Tribunal), Sankari.

2.The appellant-Insurance Company is the 2nd respondent in M.C.O.P.No.268 of 2008, on the file of the Sub Court, (Motor Accidents Claims Tribunal), Sankari. The 1st respondent filed the said claim petition, claiming a sum of Rs.5,00,000/- as compensation for the injuries sustained by him in the accident that took place on 21.09.2007.

3.The Tribunal, considering the pleadings, oral and



documentary evidence, held that the accident occurred due to rash and negligent riding by the rider of the motorcycle belonging to the 2nd respondent and directed the appellant-Insurance Company to pay a sum of Rs.2,35,000/- as compensation to the 1st respondent at the first instance and recover the same from the 2nd respondent. Challenging the said award dated 22.03.2012 made in M.C.O.P.No.268 of 2008 granting compensation to the 1st respondent, the appellant-Insurance Company has come out with the present appeal.

4.The learned counsel appearing for the appellant-Insurance Company contended that the policy issued by the appellant in respect of the two-wheeler is only Act policy and the 2nd respondent has paid premium to cover only the third party liability. The Tribunal failed to appreciate the evidence of R.W.1 and Exs.R1 and R2. The Tribunal failed to see that under Section 147 (1) of the Motor Vehicles Act, the pillion rider is not a third party. The Tribunal ought to have dismissed the claim petition against the appellant. In any event, the Tribunal failed to see that the 2nd respondent violated the policy condition and did not possess valid driving license at the time of accident and appellant is not liable to pay compensation in view of the willful breach committed by the 2nd respondent. The amounts awarded by the Tribunal under different heads are excessive and prayed for setting aside the award of the Tribunal. In support of his contentions, the learned counsel appearing for the appellant relied on the following judgments reported in 2012 (2) TN MAC 650 (SC) [Oriental Insurance Co. Ltd., Vs. Surendra Nath Loomba and others], 2015 (1) TN MAC 19 (DB) [New India Assurance Co. Ltd., Vs. S.Krishnasamy and others], 2006 ACJ 1441 [United India Insurance Co. Ltd., Vs. Tilak Singh and others] and 2009 ACJ 104 [General Manager, United India Insurance Co. Ltd., Vs. M.Laxmi and others].

5.Per contra, the learned counsel appearing for the 1st respondent contended that the 1st respondent was a pillion rider and he has to be treated only as a third party as per Section 147 of the Motor Vehicles Act. The 1st respondent is covered by the policy issued by the appellant-Insurance Company. The Tribunal has considered the materials on record and has held that the appellant is liable to pay compensation to the 1st respondent by giving valid reasons and relied on the following judgments reported in:

(i).2011 (2) TN MAC 625 [The Manager, New India Assurance Co. Ltd., Vs. R.Senthamarai and others]:

"12. It is well settled that the liability of the Insurance Company is both statutory and also based on the contract of the Insurance. It is admitted that the Car bearing Registration No. TNJ 7936 was insured with the Appellant. Ex. R.1 is the copy of



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the Insurance Policy. As per the endorsement therein, it is a private Car Act Policy. Premium has been paid on three heads. Third party Rs. 240/-, driver Rs. 15/-, UNTPPL (Unlimited Third party Property Liability) Rs. 50/-.

13. According to the Appellants the passenger is not covered and there is a limitation as to the use of the Car and the Policy does not cover the use of the vehicle for hire or reward.

16. It is not the case of the Claimants that the deceased hired the vehicle and was travelling as gratuitous passenger. But the fact remains that the vehicle was a private Car and covered by an Act Policy, but the deceased was a passenger. In Amritlal's case reported in Amritlal Sood v. Kaushalya Devi Thapar, AIR 1998 SC 1433, it is held as follows:

"the injured was a gratuitous passenger travelling in a Private Car. The High Court held that the insured was not liable since the Claimant was only passenger. The Insurance Policy was extracted by the Supreme Court and we find that it is almost identical to the Policy in the case before us. The Supreme Court held in Amritlal Sood v. Kaushalya Devi Thapar (supra) as follows at pp 46 & 47 of MLJ.

"3. The question to be decided is whether the Insurer is liable to satisfy the claim for compensation made by a person travelling gratuitously in the Car. The factual findings are not in dispute before us but for the contention of the Appellants that the amount of compensation awarded by the Division Bench is excessive. We have no difficulty in repelling that contention as we find the materials on record to be sufficient to support the award of enhanced compensation.

4. The liability of the Insurer in this case depends on the terms of the contract between the insured and the Insurer as evident from the Policy. Section 94 of the



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Motor Vehicles Act, 1939 compels the owner of a motor vehicle to insure the vehicle in compliance with the requirements of Chapter VII of the Act. Section 95 of the Act provides that a Policy of Insurance must be one which insures the person against any liability which may be incurred by him in respect of death or bodily injury to any person or damage to any property of third party caused by or arising out of the use of the vehicle in a public place. The Section does not however require a Policy to cover the risk to passengers who are not carried for hire or reward. The statutory Insurance does not cover injury suffered by occupants of the vehicle who are not carried for hire or reward and the Insurer cannot be held liable under the Act, But that does not prevent an Insurer from entering into a contract of Insurance covering a risk wider than the minimum requirement of the statute whereby the risk to gratuitous passengers could also be covered. In such cases where the Policy is not merely a statutory Policy, the terms of the Policy have to be considered to determine the liability of the Insurer.

6. The relevant clauses in the Policy before us are found in "Section II - Liability to Third parties". They are:

"1. The Company will indemnify the insured in the event of accident caused by or arising out of the use of the motor Car against all sums including Claimant's costs and expenses which the insured shall become legally liable to pay in respect of

(a) death of or bodily injury to any person but except so far as is necessary to meet the requirements of Section 95 of the Motor Vehicles Act, 1939, the Company shall not be liable where such death or injury arises out of and in the course of the employment of such person by the insured.

(b) damage to property other than property belonging to the insured or held in trust



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by or in the custody or control of the insured.

8. Thus under Section II(1)(a) of the Policy, the Insurer has agreed to indemnify the insured against all claims which the insured shall become legally liable to pay in respect of death of or bodily injury to "any person". The expression "any person" would undoubtedly include an occupant of the Car who is gratuitously travelling in the Car. The remaining part of clause (a) relates to cases of death or injury arising out of and in the course of employment of such person by the insured.

9. In such cases the liability of the Insurer is only to the extent necessary to meet the requirements of Section 95 of the Act. Insofar as gratuitous passengers are concerned there is no limitation in the Policy as such. Hence under the terms of the Policy, the Insurer is liable to satisfy the award passed in favour of the Claimant. We are unable to agree with the view expressed by the High Court in this case as the terms of the Policy are unambiguous."

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.....

20. This Circular relates to a Comprehensive Policy. Therefore, if it is a Comprehensive Policy, a gratuitous passenger in a Private Car is covered and if it is an Act Policy, it does not cover. The key term in the Policy is "Including occupants carried in the motor Car provided that such occupants are not carried for hire or reward." In the case on hand the Policy is an Act Policy and the deceased was a gratuitous passenger and therefore, the Appellants is not liable.

21. Now the question is whether the Insurance Company can be directed to pay and recover the same from the insured. The Full Bench of this Court has considered the Principle of Pay and Recovery in Branch Manager, United India Insurance Co. Ltd., Branch Office, Nethaii Bye Pass Road, Dharmapuri Town v. Nagammal, 2009 (1) CTC 1, (cited supra). However the gratuitous passenger in



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a private Car was not considered. The general principle is if there is breach of Policy condition the Insurer can be directed to pay and later recover from the insured. This principle is based on the judicial discretion that the Claimants should not suffer as the liability is an inter sedispute between the Insurer and the insured. Though it is not a Comprehensive Policy to cover the risk of a passenger in a Private Car, the insured had permitted a gratuitous passenger to travel in his Car against the Policy conditions. Therefore, there is a breach of Policy condition. In that case, the Principle of Pay and Recovery can be applied.

22. In the result, the Appeal is allowed. The liability of the Insurance Company to satisfy the compensation of a sum of Rs. 5,04,000/- is set aside. However, there shall be an order for pay and recover."

(ii).2007 ACJ 60 [National Insurance Co. Ltd., Vs. Mahendra Singh and another]:

"11. A bare perusal of the above provisions would clearly reveal that the liability of the Insurance Company is now unlimited. Moreover, the words "any person" used in section 147(1)(b)(i) of the Act would include a pillion rider. Therefore, according to the Act, the Insurance Company is liable to indemnify the insured."

(iii).2004 (1) TN MAC 146 (DB) [Natarajan Vs. D.Chandrasekaran and others]:

"17. Pillion rider of a two wheeler is an authorised rider as per Sec. 128 of the Motor Vehicles Act, 1988. Even in the policy marked as Ex.B1, it is specifically stated that occupants capacity is two. All such persons, whose risk on account of use of vehicle is required to be, are "third parties" in the sense that they are other than the insurer and the insured, in view of the fact that the words "third party" have not been defined in the Act or even in the Rules. In Stroud's Judicial Dictionary, the meaning of the word "third party risk" has been given as below:

"Third Party Risks (Road Traffic Act, 1930 (20 & 21 Geo. 5, c. 43), S. 35) connotes that the



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insurer is one party to the contract, that the policy holder is another party, and that claims made by others in respect of the negligent use of the car, may be naturally described as claims by third parties". The Privy Council has also thus interpreted the words "Third Party Risk" in *Digby v. General Accidents Fire & Life Assurance Corporation*, 1943A.C. 121.

19. The Apex Court also in the decision in *Amrit Lal Sood v. Kayushalya Devi Thapar*, AIR 1988 S.C. 1433, dealt with the said expression "third party" and found that it would include occupants of the car who had gratuitously travelled in the car. But for the clause (ii) of the proviso to Sec. 95 of the Act 1939, the "Act only policy" covers the risk of pillion rider as it comes under the definition "any person" as mentioned in Sec. 95(1) (b) of the Old Act. The same scope could be applied to the New Provision and the legislature, as stated above, has omitted clause (ii) of proviso creating an obligation on the insured to specifically cover the liability with respect to the passengers other than the passengers mentioned under the proviso (ii) of Sec. 95(1)(b) of the Act 1939. Since the said proviso has been omitted and the restriction has been taken away thereby the insurance company which had covered third party risk under the "Act only policy" issued under Sec. 147 of the Act, liable to pay the claim of the pillion rider who is a gratuitous passenger."

6. Heard the learned counsel appearing for the appellant-Insurance Company as well as the 1st respondent and perused all the materials on record.

7. From the materials on record, it is seen that the accident has occurred when the 1st respondent traveled as a pillion rider in the motorcycle driven by the 2nd respondent. According to the appellant, the policy issued is only an Act/Statutory policy, it is not comprehensive policy and pillion rider is not covered when the policy issued is only an Act policy. From the award of the Tribunal, it is seen that R.W.1 has stated that the policy issued by the appellant is only Act policy and the same does not cover the risk liability of pillion rider. There is no denial by the 1st respondent that policy issued by the appellant is only an Act policy. It is well settled that in an Act policy, the pillion rider in a two-wheeler and occupant of the car in a four-wheeler are not



covered by the said policy and they are not entitled to get compensation from the Insurance Company.

8.I had an occasion to consider this issue in the judgment reported in 2019 (1) TN MAC 332 [United India Insurance Co. Ltd., Vs. Sathish Kumar and others], wherein I have held as:

"6.The issue to be decided in the appeal is whether the policy of insurance taken by the owner of the vehicle as per Section 147 of the Motor Vehicles Act covers the bodily injury or death of pillion rider traveling in the offending two-wheeler.

7.The issue whether the rider and pillion rider in a two-wheeler and occupants of a four-wheeler are entitled to claim compensation from the Insurance Company for the bodily injury or death when the policy was issued under Section 147 of the Motor Vehicles Act is no longer res-integra.

8.From the judgments relied on by the learned counsel appearing for the appellant as well as the 1st respondent, the following principles emerge:

"(i).The policy which the owner of the vehicle takes under Section 147 of the Motor Vehicles Act is 'Statutory Policy', also known as 'the Act Policy'.

(ii)It covers the liability of the owner in respect of third party only. After amendment of the Section in the year 1994 by Act 54 of 1994 which came into force with effect from 14.11.1994, it covers owner of the goods or his authorized representative carried in the goods vehicle.

(iii).The owner of the vehicle can pay extra premium to increase the liability of the insurer in respect of third party.

(iv).The rider, pillion rider of a two-wheeler and occupant of a four-wheeler are not third parties and they are not covered by Act Policy issued by the Insurance Company.

(v).The owner of the vehicle can pay extra premium to cover personal accident claim, the rider, pillion rider and occupant of a four-wheeler. The policy issued by the Insurance Company after receiving extra premium to cover rider



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gratuitous passenger. The contention of the learned counsel for the 1st respondent that the 1st respondent is a pillion rider and the Tribunal rightly directed the appellant to pay the compensation is without merits. The Tribunal erroneously held that the 1st respondent, pillion rider is a third party and appellant is liable to pay compensation. In the judgment of the Hon'ble Apex Court reported in 2006 (4) SCC 404 extracted above, it has been held that pillion rider is a gratuitous passenger in case of Act Policy. In the judgment of the Hon'ble Apex Court reported in 2007 (5) SCC 428 [Oriental Insurance Co. Ltd., vs. Meena Variyal], the Hon'ble Apex Court referring to Asha Rani's case, [New India Assurance Co. Ltd., Vs. Asha rani], held in paragraph No.18 as follows:

"In other words, this Court clearly held that the apparently wide words 'any person' are qualified by setting in which they occur and that 'any person' is to be understood as a third party".

As per the judgments referred to above, in an Act Policy, the pillion rider in a two-wheeler is a gratuitous passenger and appellant is not liable to pay compensation to the 1st respondent. In view of the fact that the appellant is not liable to pay any compensation, the question of pay and recovery does not arise.

In view of the same, the judgments relied on by the learned counsel appearing for the 1st respondent are not applicable to the facts of the present case. The judgments relied on by the learned counsel for the appellant are applicable to facts of the present case. The portion of the award directing the appellant to pay the compensation to the 1st respondent at the first instance and recover the same from the 2nd respondent is set aside and the appeal is allowed.

9. In the result, this Civil Miscellaneous Appeal is allowed and the award of the Tribunal is hereby modified setting aside the portion of award directing the appellant-Insurance Company to pay the compensation to the 1st respondent and the compensation amount awarded by the Tribunal is confirmed. The 2nd respondent-owner of the motorcycle is directed to deposit the entire amount awarded by the Tribunal along with interest and costs, within a period of eight weeks from the date of receipt of a copy of this judgment. On such deposit, the 1st respondent is permitted to withdraw the award amount, along with interest and costs, after adjusting the amount, if any already withdrawn, by filing necessary applications before the Tribunal. The



appellant-Insurance Company is permitted to withdraw the amount if any, already deposited by them to the credit of M.C.O.P.No.268 of 2008. No costs.

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Sd/-

Assistant Registrar (CCC)

//True Copy//

Sub Assistant Registrar

gsa

To

1.The Subordinate Judge,
(Motor Accidents Claims Tribunal),
Sankari.

2.The Section Officer,
VR Section,
High Court, Madras.

+1cc to Mr.S.Arunkumar, Advocate, S.R.No. 33914

+1cc to Mr.C.Kulanthaivel, Advocate, S.R.No. 34938

C.M.A.No.575 of 2015
and M.P.No.1 of 2015

MP (CO)
GN(04/12/2019)