IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 03.02.2020

C O R A M

THE HONOURABLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

C.M.A.No.3599 of 2011

T. Saravanakumar ..Appellant/Petitioner

Versus

1.Selvam S/o. Ayyadurai Nadar,

2.V. Eswaran

3. Bajaj Allianz General Insurance Co. Ltd.,
D. No.11, Office, No.6A, Peoples Park,
3rd Floor, Government College Road,
Coimbatore ..Respondents/Respondents

Prayer: Civil Miscellaneous Appeal filed against the order and decree dated 26.09.2008 made in M.C.O.P.No.547 of 2007 on the file of the Motor Accident Claims Tribunal and First Additional Sub Judge, Coimbatore.

For Appellant : Mr. B. Nedunchezhiyan

For Respondents-1&2 : Not Ready Notice

For Respondent-3 : Mrs. R. Sreevidhya

J U D G M E N T

The claimant before the Tribunal has preferred the appeal against the Judgment and order in M.C.O.P.No.547 of 2007 dated 26.09.2008 on the file of the Motor Accident Claims Tribunal and First Additional Sub Judge, Coimbatore, seeking for enhancement of compensation and direction to the Insurance company to pay and recover of compensation.

2. The facts of the case briefly are as follows:

On 11.02.2007, when the appellant herein was riding his Motor Cycle bearing registration No.TN 37 AP 9778 (TVS Star City) on the SIHS Road, situated in Singanallur, the 1st respondent driving his Motor Cycle bearing registration No.TN 41 X 5374 in rash and negligent manner in the opposite direction dashed the appellant's vehicle thereby the appellant sustained grievous injuries and admitted in the hospital. Due to the injuries sustained in the accident, the appellant herein filed a claim petition in M.C.O.P.No.547 of 2007 on the file of the Motor Accident Claims Tribunal and the learned First Additional Sub Judge, Coimbatore wherein the Tribunal held that the driver and owner of the offending vehicle are only liable to make compensation for Rs.84,000/- (Rupees Eighty Four Thousand Only) exonerating the Insurance company from liability since the 1st respondent did not have a valid licence at the time of the accident.

3. Being aggrieved by the award, the claimant/appellant herein has filed the present appeal seeking for enhancement of award amount and pay and recovery of compensation.

4. Heard the learned counsel for the parties and perused the materials placed on record. Though the notice was ordered to the respondents 1 & 2 as early as on 06.11.2019 by this Court, there is no representation for them either in person or through learned counsel.

5. The factum of the accident and the manner of the accident being the rash and negligent driving on the part of the 1st respondent and entitlement of the claimant/appellant herein for compensation under Section 163A are not in dispute. The quantum of the compensation and exonerating the insurance company from liability are disputed.

6. In the case of third party risks, as per the decision in "National Insurance Company Ltd. Vs. Swaran Singh and Others" (2004) 3 SCC 297, the Insurer had to indemnify the compensation amount payable to the third party and the Insurance company may recover the same from the insured. Doctrine of "Pay and recover" was considered by the Supreme Court in Swaran Singh case wherein the Hon'ble Supreme Court examined the liability of the Insurance Company in cases of breach of policy condition due to disqualification of the driver or invalid driving licence of the driver and held that in case of third party, the Insurance company may recover the same from the insured. Elaborately considering the insurer's contractual liability as well as statutory liability vis-a-vis the claims of the third parties, the Supreme Court issued detailed guidelines as to how and what circumstances, "pay and recover" can be ordered. In para (110), the Supreme Court summarised its conclusion as under:

> (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 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 duly licensed driver or one who has 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 wherefor would be on themselves

(v) The Court cannot lay down any criteria as to how the said burden would be discharges, inasmuch as the same would depend upon the facts and circumstances of each cases.

(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 disqualification 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 fulfil the requirements of law or not will have to be determined in each case."

7. As per the decision of the Hon'ble Supreme Court 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, 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 the following decision in National Insurance Co. Ltd. Vs. Laxmi Narain Dhut, (2007) 3 SCC 700, wherein it was 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 Vs. Prahlad Dev and others (2008) 3 SCC 193. Other than aforesaid decisions, various judgments have been passed in support of pay and recovery of compensation in accordance with the decision in Swaran Singh and Laxmi Narain Dhut cases. While so, I am of view that the insurer has to pay the compensation amount payable to the appellant and recover the same from the owner of the vehicle and as far as the enhancement of compensation is concerned, this Court is not inclined to interfere with the award passed by the Tribunal since the compensation has been fixed are just and reasonable and only after considering the facts and circumstances of the case and oral and documentary evidence during the trial.

9. In view of the above, the Impugned judgment and order of the Tribunal exonerating the insurance company from its liability and directing the claimants/appellant herein to recover the compensation from the driver and owner of the vehicle is set aside. The 3rd respondent/Insurance company shall pay the award amount of compensation to the appellant/claimant within a period of four weeks from the date of receipt of copy of this order and the 3rd respondent/insurance company shall recover the same from the owner of the vehicle. On such deposit, the claimant/appellant herein is directed to withdraw the award amount immediately by filing formal petition from the Tribunal.

10. In the result, the appeal is party allowed. Accordingly, the impugned award passed by the Tribunal in M.C.O.P. No.547 of 2007 dated 26.09.2008 is modified to the extent indicated above. There shall be no order as to costs.

Sd/-
Assistant Registrar(CO)

//True copy//

Sub Assistant Registrar

lbm

To:

The Motor Accident Claims Tribunal and
First Additional Sub Judge, Coimbatore.

Copy To

The Section Officer, V.R.Section,
High Court, Madras.

+1cc to Mr.B. Nedunchezhiyan, Advocate SR.No.9098

C.M.A.No.3599 of 2011

LN(CO)
GMY(20/04/2021)