

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 29.09.2020

Pronounced on: 01.10.2020

CORAM

THE HONOURABLE DR. JUSTICE G.JAYACHANDRAN

C.M.A.No.2900 of 2015

& M.P.No.1 of 2015

The Divisional Manager,
United India Insurance Co. Ltd.,
Katpadi Road, Vellore.Appellant/2nd Respondent

/versus/

1. M.Suresh,
S/o.Munusamy,
No.371, Kalaignar Nagar,
Abdullaburam, Vellore.1st Respondent/Petitioner
2. V.Sivakumar,
S/o.Venkatesan,
Old No.6/1, New No.14,
Kamala Pillai Street,
Allapuram, Vellore.2nd Respondent/
1st Respondent

Prayer: Civil Miscellaneous Appeal filed under Section 173 of the Motor Vehicles Act, 1988, against the judgment and decree dated 11.02.2015 made in M.C.O.P.No.334 of 2011, on the file of the Motor Accidents Claims Tribunal (I Additional District and Sessions Judge), Vellore.

For Appellant : Mrs.R.Rathna Thara

For R1 : Mr.A.R.Suresh

For R2 : No appearance

J U D G M E N T

(The case has been heard through video conference)

This appeal is by preferred by the Insurance Company. Aggrieved by the award passed by the Tribunal holding that the Insurance Company is liable to indemnify the insured, who has violated the policy condition as well as statute by driving the motor vehicle without license, the present appeal is filed.

2. Mr.M.Suresh, 21 years old studying in an Engineering College final year student. On 04.10.2008, borrowed his friends new unregistered two wheeler Hero Honda Splendor and proceeding towards Arni along the Arni to Arcot Road. At about 8.00 p.m, near Kamaraj Statue at Arni, a TATA SUMO bearing Registration No.TN-07-F-9798, dashed against the two wheeler and caused the accident. Two wheeler rider Mr.Suresh sustained multiple injuries and got admitted in the hospital. The doctor, who examined him after recovery from the injuries had issued disability certificate, wherein, it is recorded that the accident victim suffer dislocation of right hip joint, malunion of fracture of left fibula and malunion of compound fracture of left humerus with restricted left shoulder joint movements.

3. Claim Petition seeking compensation for a sum of Rs.15,00,000/- against the TATA SUMO vehicle owner and its insurer was contested by the Insurance Company. The insurer denied the liability to indemnify on the ground of policy violation by the insured. According to the appellant/insurer, the offending vehicle owned by one Sivakumar S/o.Venkatesan. He was the driver at the time of accident. He had no valid driving license to drive the four wheeler. Hence, for fundamental violation of the policy condition, the insured is not indemnified.

4. The Tribunal, however held the insurer liable to compensate and awarded a sum of Rs.2,70,700/- with 7.5% interest.

5. In this Appeal, the main point canvassed by the learned counsel for the Appellant/Insurance Company is that, before the Tribunal the insurer has demonstrated through oral evidence of R.W-1 and documentary evidence R-3 to R-5 that the driver of the offending vehicle (TATA SUMO) had no valid driving licence. Ex.R-3 to Ex.R-5 are the letter send to Sivakumar, the owner cum driver of the vehicle to produce his driving license and the returned RPAD postal cover. On his failure to produce the driving license, the insurer examined R.W-2 Mr.Varadhan, the Official from R.T.O, Vellore and marked Ex.R-5 to prove that the R.T.O in the jurisdiction of the driver residence has not issued

any Driving License to the offending vehicle driver. In spite of proving the violation of policy condition by the insured, the Tribunal has erroneously fastened the liability on the Insurance Company contrary to facts and law laid down by the Constitutional Bench in National Insurance Company Vs. Swaran Singh reported in (2004 (1) ACJ 1).

6. The Learned Counsel appearing for the claimant/1st respondent herein, would submit that, in case of policy conditions violations such as fake driving license, expired Driving License etc., the Courts have ordered pay and recovery since it is impossible for poor accident victims to run after the individuals. In this case, if the driver of the offending vehicle is not in possession of a valid driving license, then, the Court may exercise its power to order pay and recovery.

7. The learned counsel for the appellant countering the above submission would state that, the principle of pay and recovery is not the rule but only an exception. The principle of pay and recovery will apply only in cases which fall under sub-section (4) and (5) of Section 149 of the Motor Vehicles Act. When the defense of the insurer is under Sub-section (2) of Section 149 of the Motor Vehicle Act, there is no liability on the insurer to pay the amount awarded and the principle of pay and recovery will not arise.

8. In the light of the above argument, it is necessary to refer Section 149(2) of the Act under which the insurer seeks exemption from liability.

Section 149(2): (2) No sum shall be payable by an insurer under sub-section (1) in respect of any judgment or award unless, before the commencement of the proceedings in which the judgment or award is given the insurer had notice through the Court or, as the case may be, the Claims Tribunal of the bringing of the proceedings, or in respect of such judgment or award so long as execution is stayed thereon pending an appeal; and an insurer to whom notice of the bringing of any such proceedings is so given shall be entitled to be made a party thereto and to defend the action on any of the following grounds, namely:-

(a) that there has been a breach of a specified condition of the policy, being one of the following conditions, namely:-

(i) a condition excluding the use of the vehicle-

(a) for hire or reward, where the vehicle is on the date of the contract of

insurance a vehicle not covered by a permit to ply for hire or reward, or

(b) for organised racing and speed testing, or

(c) for a purpose not allowed by the permit under which the vehicle is used, where the vehicle is a transport vehicle, or

(d) without side-car being attached where the vehicle is a motor cycle; or

(ii) a condition excluding driving by a named person or persons or by any person who is not duly licensed, or by any person who has been disqualified for holding or obtaining a driving licence during the period of disqualification; or

(iii) a condition excluding liability for injury caused or contributed to by conditions of war, civil war, riot or civil commotion; or

(b) that the policy is void on the ground that it was obtained by the non-disclosure of a material fact or by a representation of fact which was false in some material particular.

9. The Learned Counsel for the Appellant who submit that, the insurer is not liable to indemnify the vehicle owner, who has driven the car without driving license relying on the following judgements in support of her argument.

(i). New India Insurance Company Limited -vs- C.M.Jaya and others reported in (AIR 2002 SC 651).

(ii). National Insurance Company Ltd -vs- Swaran Singh & others reported in (2004 ACJ 1)

(iii). National Insurance Company. Ltd -vs- Parvathneni & another reported in (2009 (2) TN MAC 241(SC))

10. The learned counsel for the claimant/1st respondent would submit that, in case the driver of the offending vehicle had no valid driving license, the Courts have applied pay and recovery principle in the following judgments:-

(i). Francisca Luiza Rocha and others vs. K.Valarmathi reported in (2018 (2) TN MAC 30 (SC))

(ii). Manager, Reliance General Insurance Company Limited Vs. Thulasimani reported in (2018 (2) TN MAC 186.)

11. The bedrock case on the point of insurer liability in case of invalid driving license or no driving license is the Swaran Singh case. In this judgment the Hon'ble Supreme Court has laid down the following proposition.

"The summary of our findings to the various issues as raised in these petitions are as follows :

(i) Chapter XI of the Motor Vehicles Act, 1988 providing compulsory insurance of vehicles against third party risks is a social welfare legislation to extend relief by compensation to victims of accidents caused by use of motor vehicles. The provisions of compulsory insurance coverage of all vehicles are with this paramount object and the provisions of the Act have to be so interpreted as to effectuate the said object.

(ii) Insurer is entitled to raise a defence in a claim petition filed under Section 163A or Section 166 of the Motor Vehicles Act, 1988 inter alia in terms of Section 149(2)(a)(ii) of the said Act.

(iii) The breach of policy condition e.g., disqualification of driver on invalid driving licence of the driver, as contained in Sub-section (2)(a)(ii) of Section 149, have to be proved to have been committed by the insured for avoiding liability by the 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 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 was not disqualified to drive at the relevant time.

(iv) The Insurance Companies are, 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 them.

(v) The Court cannot lay down any criteria

as to how said burden would be discharged, inasmuch as the same would depend upon the facts and circumstances of the case.

(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 qualification to drive during the relevant period, the insurer would not be allowed to avoid its liability towards 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 insured 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.

(viii) If a vehicle at the time of accident was driven by a person having a learner's licence, the Insurance Companies would be liable to satisfy the decree.

(ix) The Claims Tribunal constituted under Section 165 read with Section 168 is empowered to adjudicate all claims in respect of the accidents involving death or of bodily injury or damage to property of third party arising in use of motor vehicle. The said power of the Tribunal is not restricted to decide the claims inter se between claimant or claimants on one side and insured, insurer and driver on the other. In the course of adjudicating the claim for compensation and to decide the availability of defence or defences to the insurer, the Tribunal has necessarily the power and jurisdiction to decide disputes inter se between insurer and the insured. The decision rendered on the claims and disputes inter se between the insurer and insured in

the course of adjudication of claim for compensation by the claimants and the award made thereon is enforceable and executable in the same manner as provided in Section 174 of the Act for enforcement and execution of the award in favour of the claimants.

(x) Where on adjudication of the claim under the Act the Tribunal arrives at a conclusion that the insurer has satisfactorily proved its defence in accordance with the provisions of Section 149(2) read with Sub-section (7), as interpreted by this Court above, the Tribunal can direct that the insurer is liable to be reimbursed by the insured for the compensation and other amounts which it has been compelled to pay to the third party under the award of the Tribunal. Such determination of claim by the Tribunal will be enforceable and the money found due to the insurer from the insured will be recoverable on a certificate issued by the Tribunal to the Collector in the same manner under Section 174 of the Act as arrears of land revenue. The certificate will be issued for the recovery as arrears of land revenue only if, as required by Sub-section (3) of Section 168 of the Act the insured fails to deposit the amount awarded in favour of the insurer within thirty days from the date of announcement of the award by the Tribunal.

(xi) The provisions contained in Sub-section (4) with proviso thereunder and Sub-section (5) which are intended to cover specified contingencies mentioned therein to enable the insurer to recover amount paid under the contract of insurance on behalf of the insured can be taken recourse of by the Tribunal and be extended to claims and defences of insurer against insured by relegating them to the remedy before regular Court in cases where on given facts and circumstances adjudication of their claims inter se might delay the adjudication of the claims of the victims."

12. Depending upon the facts of the each case, the Courts have either exonerated the insurer or ordered 'pay' and 'recovery.' In the present case, the facts goes to show that

the the insured is the tortfeasor. The F.I.R has been registered against the vehicle owner-cum-driver Mr.Sivakumar. When he was called to produce his driving license by the Insurance Company, he failed to do so. He also remained exparte before the Tribunal. By examining the Officer from R.T.O, Vellore, the insurer to the possible extend proved that, the offending vehicle driver had no driving license. The insured, without license had driven the vehicle and caused accident. The violation being fundamental and by the insured, the Tribunal ought to have exonerated the Insurance Company under Section 149 (2) of the Motor Vehicle Act for the fundamental violation of policy condition.

13. The insured had evidently violated the policy condition by driving the vehicle without license. The case falls under the proposition (vii) laid down in National Insurance Company Limited vs. Swaran Singh case, 2004 ACJ 1 = (2004) 3 SCC 297. Hence, the award of the Tribunal is liable to be modified to the effect that, the liability to pay the compensation is on the owner of the vehicle and not on the insurer. The principle of "pay" and "recovery" will not apply to this case when the offender/tortfeasor is the owner of the vehicle. The judgments cited are all where the driver is not the owner/insured. Only in such cases, Courts have held that for the failure of the insured to take reasonable care in engaging a driver with valid license, third party injured not be penalised. Hence award to the claimants be paid by the insurer and then recover from the insured.

14. The Hon'ble Supreme Court in their subsequent judgments, Singh Ram vs. Nirmala and others reported in (2018) 3 SCC 800 and Pappu and others vs. Vinod Kumar Lamba and another reported in AIR 2018 SC 592 following the principle laid down in Swaran Singh case has held that the principle of "pay" and "recovery" in case of violation of policy condition namely invalid driving license, fake driving license or expired driving license all depends on the facts of the case.

15. Having pointed out the law and the error in the judgment of the Tribunal, this Court from the record finds that, as per the direction of this Court on 06.01.2016, the Appellant has deposited the entire award amount with interest in the credit of M.C.O.P account. Therefore, taking note of the fact that, the accident is of the year 2008 and if the claimant is directed to proceed against the vehicle owner and recover the award amount, it may take few more years. In the said facts and circumstances, to meet the interest of justice, the principle of "pay" and "recovery" is applied though not warranted.

16. In the result, the Insurance Company is exonerated from liability. However, having deposited the entire award amount, to avoid further delay in reaping the fruits of the

award, the Claimant is permitted to withdraw the money deposited and the Appellant is permitted to proceed against Mr.Siva Kumar, the insured/2nd respondent herein, who is the driver-cum-owner, for recovery, as per the procedure laid down in Nanjappa vs. State of Karnataka.

17. Accordingly, the Civil Miscellaneous Appeal is Allowed. No costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar(CS V)

//True Copy//

Sub Assistant Registrar

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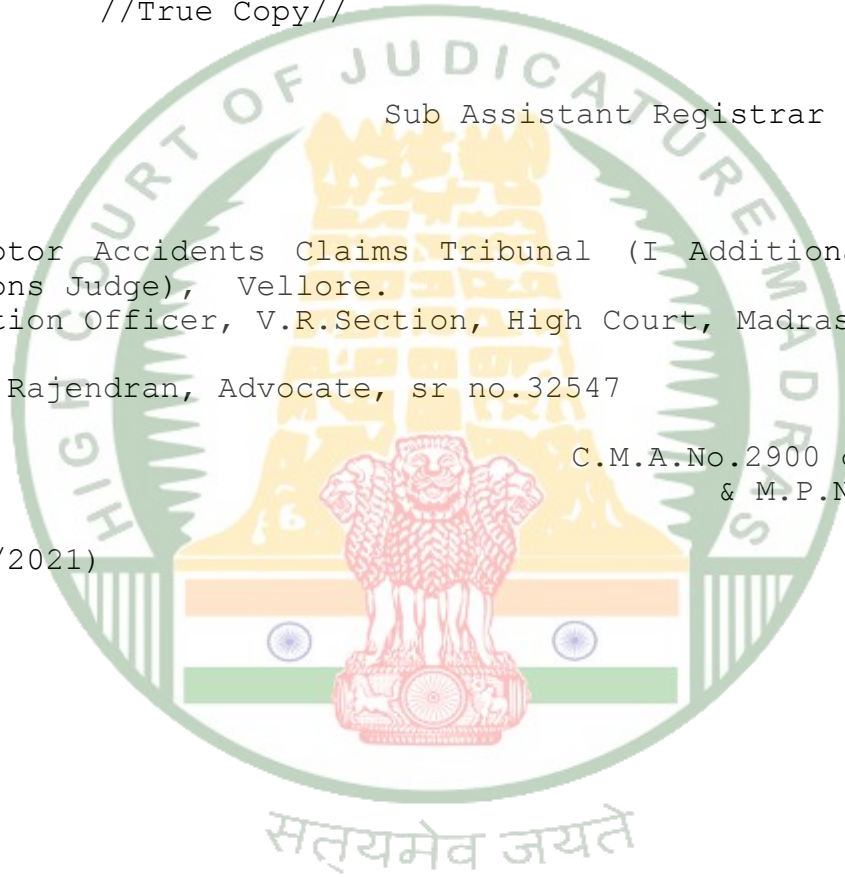
To,

1. The Motor Accidents Claims Tribunal (I Additional District and Sessions Judge), Vellore.
- 2.The Section Officer, V.R.Section, High Court, Madras.

+1cc to A.Rajendran, Advocate, sr no.32547

C.M.A.No.2900 of 2015
& M.P.No.1 of 2015

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