IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 28.08.2020

PRONOUNCED ON : 04.09.2020

CORAM

THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN

C.M.A.No.539 of 2016 and
C.M.P.No.4524 of 2016
(Heard through video conferencing)

The New India Assurance Company Ltd.,
Balamore Road,
Opp. Anna Stadium,
Nagarkovil – 629 001. ... Appellant/ Respondent 2

Vs.

1.Mr.R.Prabhu @ Saravanaprabhu
S/o Rasukonar,
C/o Aroma Bus Service,
Perichipalayam,
Dharapuram Road,
Tirupur.

2.Mr.J.Chellaganesan,
S/o.C.Janardhan
Vellar Street,
Therekalputtor & Post,
Tazhakudi,
Kanyakumari District.
... Respondents/ Petitioner /1st Respondent

Prayer:- This Civil Miscellaneous Appeal has been filed under Section 173 of Motor Vehicles Act, 1988, against the decree and judgment dated 10.08.2015 passed in M.C.O.P.No.490 of 2013 on the file of the Motor Accidents Claims Tribunal / 1st Additional District Judge, Tirupur.

For Appellant : Mr.G.Udaya Sankar

For R.1 : Dr.S.S.Swaminathan
For R.2 : Exparte

JUDGMENT

This appeal arise from the award passed by the Motor Accident Claims Tribunal, Tirupur. The Insurance Company is the appellant herein. The appeal preferred challenging the quantum of compensation as baselessly high and unreasonable.

2.The first respondent herein who is the claimant has laid his claim petition under section 166 of the Motor Vehicles Act on the premise that he was working as a Mini-bus Driver earning Rs.10,000/- pm. On 02/04/2013 at about 21.00 hrs, near the wood shop on the college road, Tiruppur, the Share Auto, in which, he was travelling dashed a fruit pushcart. In the accident, the claimant sustained fracture of his left leg thigh bone and injuries all over the body. For his injuries, he first took treatment in the Government Hospital, Tiruppur then at Deepa Hospital. The injuries have caused him permanent diability. The left leg thigh bone fracture has made him jobless since, he find difficulty in driving the Mini Bus using his fractured left leg. The accident occurred due to the rash and negligent driving of the Share Auto Driver. Hence, the Share Auto owner and the vehicle insurer are liable to compensate the loss.

3.The appellant Insurance Company placed its counter on two grounds. Firstly, the Share Auto Driver has no license to drive. Being a policy violation, the appellant Insurance Company is not responsible to pay any compensation. Secondly, the accident occurred due to the negligence of the claimant. The policy of indemnity does not cover the fault of others.

4.The Tribunal considering the fact that a criminal case has been registered against the Share Auto Driver based on the F.I.R., marked as Ex.P-1, held that the accident occurred due to the negligence of the Share Auto Driver. Therefore, the appellant Insurance Company being its Insurer, bound to indemnify the owner of the vehicle in respect of the third party claim. Relying upon the judgement of the Hon'ble Supreme Court in Kulwant Singh and others v. Oriental Insurance Co. Ltd., (2014 ACJ 2873), the Tribunal has held that, the absence of batch endorsement in the Light Motor Vehicle driving license cannot be a ground to deny compensation. The Tribunal fixed the income of the claimant at Rs.8,000/- per month. Taking into consideration the evidence given by the doctor PW-3, assessing the disability at 34.9% on clinical examination, held that the injured claimant has suffered 25% loss of earning capacity due to the permanent disability. Adding 50% more to the income on the head of future prospects, the Tribunal on the whole, awarded a sum of Rs.7,24,000/- with interest at the rate of 7.5% pa from the date of filing the petition till the date of realisation.

5.The learned counsel appearing for the appellant Insurance Company submitted that, the Tribunal failed to consider that the fact that the Share Auto Driver did not possess valid and effective license to drive the said Share

Auto. Allowing to drive particular type of vehicle by a person who does not possess valid license is a clear violation of policy condition. In case of policy violation, the Insurer is not liable to indemnify. Further, the application of multiplier method for non schedule injury is improper. Further more, adding 50% for future prospects for the unproved current income is preposterous. There is no proof for functional disability in this case. The Tribunal ought to have paid a lumpsum for disability based on the percentage of disability.

6.Per contra, the learned counsel for the first respondent claimant submitted that, the injury has caused fracture of shaft of femur middle 1/3. For the said fractured injury, Open Reduction Internal Fixation (ORIF) with Intramedullary (IM) nailing was done at the Government Head Quarters Hospital, Tirupur. Ex.P-3, the medical records produced by the first respondent claimant prove his injuries and disability. The claimant was in the hospital for nearly 45 days. In his deposition, the claimant had stated that due to his injuries, he has lost his livelihood. After recovery from the accident, he tried to get Driver job. On seeing him limping, he was rejected. The plate fixed causes discomfort to him and he is not able to sit for a long time and use his injured left leg which is essential for a Driver.

7.This Court has considered the rival submissions.

8.The first contention of the appellant Insurance Company is that, the Share Auto Driver who caused the accident did not possess valid driving license. He is not permitted to drive a share auto without batch endorsement on his driving license.

9.This issue is no more res integra in view of the judgments of the Hon'ble Supreme court in National Insurance Co Ltd -vs- Swaran Singh (2004 ACJ 1 (SC)) and in National Insurance Co Ltd -vs- Annappa Irappa Nesaria (2008 ACJ 721 (SC)). It is now well settled law that, for every proven breach of policy will not entitle the Insurer to avoid the liability. As far as the liability of the Insurer in respect of third party, their liability to pay is certain, right of recovery is based on the individual facts. In this case, the Share Auto Driver - Senthil Kumar had LMV license valid upto 09/04/2026. The said license is marked as Ex.R.2, through the official of Regional Transport Office. In the judgements cited above and other judgments, the Hon'ble Supreme Court had consistently held that, Insurer cannot escape liability towards third party on minor violation of policy conditions. Hence, the first contention of the appellant Insurance Company is unsustainable.

10.The first respondent claimant’s profession and income is spoken by himself and his friend - PW-2. No document is produced in support of the income. In the claim petition, the income is stated as Rs.10,000/-. In his deposition, the claimant has said that he was paid Rs.9,000/- per month. PW-2,who claims to be his colleague had deposed that they were paid Rs.10,000/- per month as salary. The Tribunal on considering the material facts on hand, had fixed the monthly income of the claimant as Rs.8,000/-. This has to be confirmed since, no error is to be found. In respect of future prospects, the Tribunal has awarded 50% which is contrary to the law laid in National Insurance Co.Ltd., Vs. Pranay Sethi and others (2017 (2) TN MAC 609 (SC)) hence reduced to 40%.

11.As far as 25% fixed for functional disability, this Court finds that, 34.39% of physical disability mentioned by the Doctor in his certificate and deposition does not necessarily be translated into functional disability. As held by the Hon'ble Supreme Court in Rajkumar –vs Ajay Kumar (CDJ 2010 SC 1153) and by this Court in UIIC –vs- Velusamy (CDJ 2004 MHC 1947), the percentage of functional disability affecting his future earning capacity has to be tested with the nature of injury and the nature of his avocation/employment.

12.In the instant case, the claimant is a Driver by profession. The fractured injury is on his left thigh. The claimant and the Doctor has deposed the disability will cause difficulty in sitting or standing for a long time. The Tribunal has also accepted the evidence to apply multiply method. This Court has no good reason to reverse the said conclusion. Except to point out, that the functional disability cannot be fixed as high as 25% since, the claimant himself had admitted in his deposition that he went in search of Driver job, on seeing him limping they rejected him. That means, he is confident and capable of driving and in one place, he was not considered because of limping. This leads to a conclusion that, his functional capacity is not much affected by the disability. However, the earning capacity will be affected. Hence, the percentage of earning capacity due to the disability is fixed at 15% and future prospects is fixed at 40%. Thus, under the head of loss of earning power

(Rs.8000 + Rs.3200)x 15/100x12x17 = 3,42,720/-. Under the head of loss of earning during treatment period, the Tribunal has taken into consideration only for two months but this Court is inclined to modify it to three months. Thus, under this head, the claimant is entitled for Rs.24,000/- (Rs.8,000 x 3) instead of Rs.16,000/- as awarded by the Tribunal. The compensation is modified accordingly:-

Sl.No	Under the Heads	Awarded by the Tribunal in Rs.	Awarded by this Court in Rs.	Award enhanced/ confirmed/ modified
1	Loss of Earning Power	6,12,000/-	3,42,720/-	Modified
2	Loss of Earning during treatment period.	16,000/-	24,000/-	Modified
3	Pain & Suffering	50,000/-	10,000/-	Modified
4	Medical Expenses	6,000/-	20,000/-	Enhanced
5	Attendant Charges	20,000/-	10,000/-	Modified
6	Trnasportation expenses	10,000/-	10,000/-	Confirmed
7	Extra Nutritious Food	10,000/-	10,000/-	Confirmed
8	Loss of amenities	----	25,000/-	
	Total	7,24,000/-	4,51,720/-	Modified

13.The award passed by the Tribunal is reduced and modified to Rs.4,51,720/- with 7.5% per annum from the date of claim petition till the date of realisation.

14.The learned counsel appearing for the appellant submits that as per the interim order of this Court, the Insurance Company has deposited the entire award amount with liberty to the claimant to draw 50% of it. The leraned counsel appearing for the appellant seeks leave to withdraw the excess amount lying in the deposit.

15.The appellant is permitted to withdraw any excess amount over and above the award as modified by this Court under this order. The 1st respondent herein is permitted to withdraw the compensation as awarded by this Court lying in the Court deposit.

16.Accordingly, the Civil Miscellaneous Appeal is partly allowed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

jbm
To

1.The Motor Accidents Claims Tribunal /
1st Additional District Judge,
Tirupur.

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

+1cc to Mr.G.Udhaya sankar , Advocate SR.No. 292221
+1cc to Mr.S.S.Swaminathan, Advocate SR.No. 29052

C.M.A.No.539 of 2016
A.SK(29.03.2021)