



WEB COPY

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on :17.02.2021

Pronounced on :22.02.2021

Coram:

THE HONOURABLE DR. JUSTICE G. JAYACHANDRAN

C.M.A.No.1640 of 2017

The Bajaj Allianz General Insurance Co.Ltd.,
1st Floor, Opp to ABN Ambro Bank Limited,
Saradha College Main Road, Salem. ..Appellant/2nd Respondent

/versus/

1.Lakshmi

2.A.Saranya

3.A.Anand

4.K.Shanthi ..Respondents 1 to 4/Claimants

5.K.P.Palanivelu

6.A.Shanthi ..Respondents 5 & 6/Respodents 1 & 3

Prayer: Civil Miscellaneous Appeal has been filed under Section 173 of the Motor Vehicles Act, 1988 against the decree and judgment dated the 20th of January 2017 in M.C.O.P.No.69 of 2010 on the file of the Motor Accident Claims Tribunal(Special District Court, Salem).

For Appellant :Mr.T.K.Premkumar

For Respondents:Mr.K.S.Karthik Raja for R1 to R4

Mr.P.Valliappan for R5

Mr.Deepan Uday for R6

J U D G M E N T

The appeal filed by the Insurance Company being aggrieved by the award of the Tribunal, fixing the liability on the Insurance Company to pay the claimants a sum of Rs.2,80,000/- as compensation.

2.The facts of the case is that the claimants are the legal representatives and dependants of the deceased Marappan. On 14.06.2009 Marappan while riding TVS XL Super bearing Reg.No.TN-28-AZ-0579 along with his relative by name Saroja on pillion,



was hit by a tractor bearing Reg.No.TN-28-AZ-6435 near Siva Kumar Thottam, Pudupatty to Vellakal Mariamman Kovil Road. The injured Marappan died on the spot due to extensive injury sustained in the accident. The pillion rider sustained minor injuries. Criminal case was registered against the driver of the tractor for his rash and negligent driving. Claiming compensation of Rs.6,00,000/- a claim petition was filed by his wife, daughter and grand children before the Motor Accident Claims Tribunal, Salem.

3.The claim petition was contested by the Insurance Company on the ground that the accident occurred, when the two wheeler rider dashed the tractor towing a trailer load with sand. The tractor involved in the accident alone was insured under the respondent Insurance Company. The driver of the tractor had no valid driving licence. The trailer attached to tractor was neither registered nor insured. Therefore, in view of policy condition violation and Motor Vehicles Act contravention, the Insurance Company is not responsible to pay compensation. The deceased had no income of his own. He was about 70 years old and depending on others. Therefore, the quantum of compensation claimed is exorbitant.

4.Before the Tribunal, on behalf of the claimants, two witnesses were examined. 15 exhibits were marked. On the side of the respondents, three witnesses were examined. 6 exhibits were marked.

5.The Tribunal, on considering the evidence, held that the accident occurred due to the negligence of the driver of the tractor. Based on the evidence given by PW-1 and PW-2, the age of the deceased was fixed as 70 years. The notional income of the deceased person was fixed as Rs.5,000/- per month and after deducting $\frac{1}{4}$ th for his personal expenses, the loss of income was fixed as Rs.2,25,000/- by applying multiplier method. Accepting Ex.R3 the letter given by Rasipuram RDO, the Tribunal observed that the owner-cum-driver of the tractor had no driving licence. However, since the tractor has been insured, the appellant/2nd respondent/appellant-Insurance Company are liable to indemnify the owner of the vehicle. Accepting the evidence of the eye witness(PW-2),who had deposed that the deceased Marappan died because the rear wheel of the tractor run over him, the Tribunal had not considered the defence of the Insurance Company that there is violation of Motor Vehicles Act.

6.In the appeal, the learned counsel appearing for the appellant/Insurance Company contended that the Tribunal has overlooked the evidence of RW-2, who had affirmed that the owner-cum-driver of the tractor, which caused the accident, had not driving licence on the date of the accident. The evidence



of the witnesses confirms the fact that the offending vehicle was a tractor attached with the trailer. The trailer, which had no registration and insurance, was seized by the Motor Vehicle Inspector and the same is reflected in Ex.X4. The Tribunal failed to note that when the accident had occurred by the vehicle not insured under the appellant, there is no responsibility to indemnify the owner, who has violated the Motor Vehicles Act and also the policy conditions. It was also contended that the accident was caused by the tractor with trailer and since the trailer was neither registered as required under Section 61 of the Motor Vehicles Act, 1988 nor insured, the Tribunal ought to have fixed the entire liability on the owner of the tractor (TN-28-AZ-6435) the fifth respondent/1st respondent herein for payment of compensation if any to the respondents/claimants.

7.The learned counsel appearing for the 5th respondent submitted that the victim being a third party, the appellant as the insurer of the offending vehicle responsible to pay the award amount.

8.From the evidence, it is a clear case of motor accident involving a two wheeler and the tractor towing a loaded trailer. The rider of the two wheeler had succumbed to the injury sustained by him in the accident. The Tribunal, after holding that the accident occurred due to the negligence of the driver of the tractor and also held that though the tractor driver had no valid driving licence since the tractor was duly insured under the appellant Insurance Company, had directed the appellant to pay the compensation. From the evidence, it is clearly established that the offending tractor was attached with the trailer and the said trailer had no registration number and had no insurance coverage. Thus, violation under Section 61 of the Motor Vehicles Act as well as the insurance policy violation by riding the tractor without valid driving licence is proved beyond any reasonable doubt.

9.The claim petition is a third party claim filed under Section 166 of the Motor Vehicles Act. In the case of the third party risks, in National Insurance Co.Ltd. v. Swaran Singh reported in [(2004) 3 SCC 297], the Hon'ble Supreme Court has explained the doctrine of "pay and recovery" and its application. It has held that 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 in respect of the third party risks, the insurer has to indemnify the compensation amount to the third party and later recover the same from the insured. At paragraph 110 of the said judgment, the Apex Court has summarised the principle as below:



WEB COPY

(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 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 Tribunes 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.

(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.

10. The learned counsel appearing for the appellant submitted that in the case in hand, the owner of the tractor had participated in the proceedings. It has been proved that there is a fundamental breach of insurance policy and statutory violation. Therefore, the Insurance Company shall not be held responsible even to the extent of pay the victim and recovery from the insured.

11. In case of third party claim, whether the Insurance Company should be mulcted with liability to pay and then recovery in cases of fundamental breach was point for consideration before the Hon'ble Supreme Court in *Shamanna and another v. The*



Divisional Manager, The Oriental Insurance Co.Ltd, and others reported in (2018) 9 SCC 650. The Hon'ble Supreme Court, after considering various judgments including Swaran Singh case, held that in cases of third party claim against the insurer, even if the insured has committed the fundamental breach, the principle of pay and recovery will apply. The Apex Court in Shamanna case held that,

"7.As per the decision in Swaran Singh case[National Insurance Co. Ltd. v. Swaran Singh, (2004) 3 SCC 297 : 2004 SCC (Cri) 733] , 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, does not fulfil 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 [National Insurance Co. Ltd. v. Swaran Singh, (2004) 3 SCC 297 : 2004 SCC (Cri) 733] in subsequent decision in National Insurance Co. Ltd. v. Laxmi Narain Dhut [National Insurance Co. Ltd.v. Laxmi Narain Dhut, (2007) 3 SCC 700 : (2007) 2 SCC (Cri) 142] , wherein this Court held that "the decision in Swaran Singh case [National Insurance Co. Ltd. v. Swaran Singh, (2004) 3 SCC 297 : 2004 SCC (Cri) 733] 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 Premkumari v. Prahlad Dev [Premkumari v. Prahlad Dev, (2008) 3 SCC 193 : (2008) 1 SCC (Civ) 822 : (2008) 1 SCC (Cri) 694] .

9.For the sake of completion, we may refer to few judgments where the breach of policy conditions was fundamental and the Supreme Court taking contrary view that the



WEB COPY

insurance companies were not liable to pay the compensation. In *National Insurance Co. Ltd. v. Bommithi Subbhayamma* [*National Insurance Co. Ltd. v. Bommithi Subbhayamma*, (2005) 12 SCC 243], the Supreme Court reversed the judgment of Andhra Pradesh High Court in making the insurance company liable for payment of compensation in respect of gratuitous passengers carried in the goods vehicle.

10. In *Oriental Insurance Co. Ltd. v. Brij Mohan* [*Oriental Insurance Co. Ltd. v. Brij Mohan*, (2007) 7 SCC 56 : (2007) 3 SCC (Cri) 304], the claimant was travelling in the trolley attached to tractor carrying earth to brick kiln. It was found that the tractor and the trolley were not used for "agricultural works", the only purpose for which the tractor was insured, when the claimant sustained the injuries. The Supreme Court though held that the insurance company is not liable to pay compensation, however, invoked the power vested in the Supreme Court under Article 142 of the Constitution of India in directing the insurance company to satisfy the award by paying compensation to the insured/claimant and realise the same from the owner of the tractor.

11. In the present case, to deny the benefit of "pay and recover", what seems to have substantially weighed with the High Court is the reference to larger Bench made by the two-Judge Bench in *National Insurance Co. Ltd. v. Parvathneni* [*National Insurance Co. Ltd. v. Parvathneni*, (2009) 8 SCC 785 : (2009) 3 SCC (Civ) 568 : (2009) 3 SCC (Cri) 943] which doubted the correctness of the decisions which in exercise of jurisdiction under Article 142 of the Constitution of India directing insurance company to pay the compensation amount even though insurance company has no liability to pay. In *Parvathneni* case [*National Insurance Co. Ltd. v. Parvathneni*, (2009) 8 SCC 785 : (2009) 3 SCC (Civ) 568 : (2009) 3 SCC (Cri) 943], the Supreme Court pointed out that Article 142 of the Constitution of India



WEB COPY

does not cover such type of cases and that "if the insurance company has no liability to pay at all, then, it cannot be compelled by order of the court in exercise of its jurisdiction under Article 142 of the Constitution of India to pay the compensation amount and later on recover it from the owner of the vehicle." The above reference in Parvathneni case [National Insurance Co. Ltd. v. Parvathneni, (2009) 8 SCC 785 : (2009) 3 SCC (Civ) 568 : (2009) 3 SCC (Cri) 943] has been disposed of on 17-9-2013 [National Insurance Co. Ltd. v. Parvathneni, (2018) 9 SCC 657] by the three-Judge Bench keeping the questions of law open to be decided in an appropriate case.

12. Since the reference to the larger Bench in Parvathneni case [National Insurance Co. Ltd. v. Parvathneni, (2009) 8 SCC 785 : (2009) 3 SCC (Civ) 568 : (2009) 3 SCC (Cri) 943] has been disposed of by keeping the questions of law open to be decided in an appropriate case, presently the decision in Swaran Singh case [National Insurance Co. Ltd. v. Swaran Singh, (2004) 3 SCC 297 : 2004 SCC (Cri) 733] followed in Laxmi Narain Dhut [National Insurance Co. Ltd. v. Laxmi Narain Dhut, (2007) 3 SCC 700 : (2007) 2 SCC (Cri) 142] and other cases hold the field."

12. The learned counsel appearing for the appellant submitted that from the cross examination of PW-2, it has been elucidated that only trailer wheel run over the deceased. Since the trailer has not been registered and had not been insured under the appellant Insurance Company, there is no privity of contract between the Insurance Company and the owner of the trailer, which later been seized by the Motor Vehicles Inspector for plying on the road without proper registration. This argument is not appealing for the reason that the trailer had no independent locomotive motor. It was attached to the tractor and as per the evidence the tractor hit the motorcyclist and run over the motorcyclist. Therefore, as the insurer of the tractor, the appellant herein/Insurance Company is liable to pay the compensation to the claimants. However, having proved the fundamental breach of policy condition and violation of statutory provisions, the principle of pay and recovery has to be applied as per the dictum of the Hon'ble Supreme Court since



the claimants are the third parties. Therefore, the appeal is partly allowed giving liberty to the appellant to recover from the insured after satisfying the award by paying to the claimants.

WEB COPY

13. The learned counsel appearing for the appellant/Insurance company submitted that the entire award amount with accrued interest has been deposited to the credit of M.C.O.P.No.69 of 2010, as per the order passed by this Court in C.M.P.No.8682 of 2017, dated 12.06.2017. Therefore, claimants 1 to 4/ respondents 1 to 4 herein and 3rd respondent/6th respondent herein are permitted to withdraw their proportionate shares, as fixed by the Tribunal, on filing appropriate application. The appellant/Insurance company is permitted to recover the award money from the 5th respondent herein/the owner of the vehicle by applying the principle of "pay and recovery" as per the dictum laid down by the Hon'ble Supreme Court in Oriental Insurance Company Co.Ltd., v. Nanjappan reported in (2004) 13 SCC 224.

14. In the result, this Civil Miscellaneous Appeal is partly allowed with the above modification. No order as to costs.

s/d-
Assistant Registrar

True Copy

Sub-Assistant Registrar

To:
The Special District Judge
Motor Accident Claims Tribunal,
Salem.

Copy to
The Section Officer
VR Section
High Court, Madras 104.

+1 CC to Mr.P.Valliappan, Advocate sr 11157
+1 Cc to Mr.J.K. Premkumar, Advocate sr 11133.
+1 CC to Mr.K.S.Karthik Raja, Advocate sr 10743.

C.M.A.No.1640 of 2017

NRL(CO)
SP(07/09/2021)