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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on :11.01.2021

Pronounced on :21.01.2021

Coram:

THE HONOURABLE DR. JUSTICE G. JAYACHANDRAN

C.M.A.No.525 of 2017

and

C.M.P.No.3321 of 2017

M/s United India Insurance Co.Ltd.,
The Branch Manager,
R.P.R. Complex,
By Pass Road, Govt.Hospital,
Dharmapuri Taluk & District 636 703.

... Appellant /Respondent-II

/versus/

1.Thiru.Manjunathan

...Respondent I/Petitioner

2.Thiru.Kumaran

... Respondents/Respondents

Prayer: Civil Miscellaneous Appeal has been filed under Section 173 of the Motor Vehicles Act, 1988 against the judgment and decree passed in M.C.O.P.No.621 of 2014 on 23.02.2015 on the file of the learned Motor Accident Claims Tribunal (Special Subordinate Judge) at Dharmapuri District.

For Appellant :Mr.J.Chandran

For Respondents:Mr.P.Valliappan for R1
Steps not taken for R2

J U D G M E N T

(The case has been heard through video conference)

This appeal filed by the Insurance Company, being aggrieved by the liability fastened on it to pay the compensation of Rs.8,32,106/- with interest at the rate of 7.5% p.a., from the date of petition till the date of realisation to the claimant/accident victim and recover it from the owner of the vehicle.



2. On 20.01.2011, the first respondent Manjunathan along with his wife on the pillion was riding his two wheeler motor cycle bearing Reg.No.TN-29D-4246 Yamaha RX 135 bike along Dharmapuri to Pennagaram Main Road. At about 9.30 a.m., near Om Sakthi Nursing College, the rider of the Bajaj Discover Motorcycle bearing Reg.No.TN-29AC 0250 proceeding towards Dharmapuri dashed against the Yamaha motor cycle. The claimant and his wife sustained severe injury and were admitted in the Government Hospital, Dharmapuri. After First aid, the claimant was shifted to Ganga Medical Centre, Kovai where he was treated as in-patient from 20.01.2011 to 31.01.2011. Surgery was conducted for the fracture of left tibia and fibula bone. Skin transplant surgery was done subsequently at the fractured side. Alleging that the accident occurred due to the negligence of the Bajaj Discover motorcyclist, the claim petition for Rs.10,00,000/- was filed against the owner of the motorcycle and its insurer.

3. The Insurance Company filed a counter denying their liability stating that the rider of the Bajaj Discover motorcycle bearing Reg.No.TN 29AC 0250 did not inform about the accident and he had no valid and effective driving licence at the time of the accident. Further, the accident has occurred due to the contributory negligence of the claimant. Since the insurer of the claimant's vehicle was not impleaded as respondent, the claim petition is liable to be dismissed. Since the rider of the Bajaj Discover vehicle had no valid driving license, as insurer of the said vehicle, the 2nd respondent insurance company is not liable to indemnify the owner of the said vehicle, in view of the policy violation. The quantum of compensation also questioned as excessive.

4. The claimant and his wife preferred separate claim petitions and both were heard together by the Motor Accident Claims Tribunal. On considering the evidence, the Tribunal in the petition M.C.O.P.No.621 of 2014 filed by the claimant awarded a sum of Rs.8,32,106/- payable by the Insurance company and thereafter, recover the same from the owner of the motorcycle Bajaj Discover Reg.No.TN29-AC-0250 in view of policy violation.

5. The Insurance Company in the appeal has stated that the accident occurred due to the fault of the claimant. Therefore, the claimant is entitled the compensation only under Section 140 of the Motor Vehicle Act and not under Section 166 of the Motor Vehicles Act. Further, the compensation of Rs.8,32,106/- is highly excessive, exorbitant and unsustainable in law. The driver of the vehicle insured under them had no valid driving licence and the same has been proved through the evidence of RW-



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1 Junior Assistant in RTO Office, Dharmapuri. The rider had obtained driving licence only after the accident. Having proved the same, the Tribunal ought not to have ordered pay and recovery. It should have exonerated the insurance company totally.

6.Regarding the quantum of compensation, the appellant contended that the multiplier applied for the disability as if the claimant has lost his earning capacity is factually erroneous. The claimant working as Teacher has neither lost his income nor employment. 50% physical disability itself is excessive and application of multiplier is unwarranted.

7.The learned counsel appearing for the 1st respondent submitted that the claimant suffered the following injury:-

(1)Right lower limb:Swelling tenderness over the right leg Abnormal mobility present over the proximal third leg.

(2)A large wound (irregular) present over the anterior aspect of the leg measuring about 15x15 cm exposing the underlying muscle and bone with composite tissue loss and moderate contamination, Swelling, tenderness over the right foot.

(3)Alaceration over the dorsum of the foot measuring about 10cm exposing underlying muscles.

(4)Degloving injury of the Small toe of the foot-split

Longitudinally. Wound measuring 5x2 cmDorsalis pedis not palpable posterior tibial feebly felt.

Therefore, submitted that the fixation of compensation applying multiplier is appropriate. Further, the learned counsel submitted that the claimant being the third party, the application of pay and recovery principle need not be interfered.

8.Heard the learned counsel appearing for the appellant and the learned counsel appearing for the 1st respondent. Perused records.

9.As far the order of pay and recovery, the Apex Court has invented this principle to save the innocent accident victims from running behind the vehicle owner in the cases of policy violations, if the claimant is a third party and not aware of the fact about the non-availability of the driving licence for the driver of the offending vehicle. Though the terms of insurance contract silent about such liability, as judgment made law the said principle is in vogue for a long period and until it is



unsettled by authoritative pronouncement by Constitutional Bench of the Apex Court, pay and recovery principle bound to be followed in the interest of innocent 3rd party accident victim.

10.The accident has occurred due to collusion of two motorcycles. The First Information Report has been registered against the owner of the Bajaj Discover motorcycle, which is insured under the appellant. No contra evidence has been let in by the Insurance Company to prove negligence on the part of the claimant. However, the Insurance company/appellant has proved through RW1 and RW2 and Exhibits R1 to R4 that the vehicle insured under them was not driven by the person holding valid driving license. The offender has obtained driving licence only on 23.08.2011 almost 7 months after the accident. The injury sustained in the accident does not fall under the category of total permanent disability. To apply multiplier, the guideline is laid by the Hon'ble Supreme Court in Raj Kumar Vs. Ajay Kumar & Anr. reported in (2011) 1 SCC 343. Firstly, there must be evidence to show the loss of earning capacity. From the evidence adduced by the claimant, except loss of increment during the treatment period of medical leave, there is no loss of income or earning capacity. In the absence of proof for loss of earning capacity and in the absence of evidence that the injury has caused total disability, it is needless to apply multiplier. Therefore, this Court is of the view that, the application of multiplier is unwarranted in this case.

11.The Tribunal, while compensating the medical expenses, has deduced Rs.70,000-00 reimbursed under the medical insurance. In this regard, this Court is of the view that only on payment of premium for the medical insurance, the claimant has got the reimbursement of Rs.70,000/-. Therefore, addition Rs.20,000/- is awarded, taking into account the premium paid by the claimant for his medical insurance.

12.Accordingly, the compensation awarded by the Tribunal is reduced and scaled down as below:-

Sl. No.	Particulars	Award passed by the Tribunal (Rs.)	Award passed by this Court (Rs.)	Enhanced/ Reduced/ Confirmed/ Awarded
1.	50% disability and loss of earning capacity	6,49,728-00	1,00,000-00 (50x2000)	Reduced
2.	Pain and suffering	15,000-00	25,000-00	Enhanced



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Sl. No.	Particulars	Award passed by the Tribunal (Rs.)	Award passed by this Court (Rs.)	Enhanced/ Reduced/ Confirmed/ Awarded
3.	Loss of income during the treatment period	67,680-00	1,35,360-00 (22560x6)	Enhanced
4.	Medical Bills after deducting Rs.70,000/- medical insurance amount	17,598-00	17,598-00	Confirmed
5.	Transport charges	57,100-00	57,100-00	Confirmed
6.	Mental agony	15,000-00	15,000-00	Confirmed
7.	Nutritious food and loss of material	10,000-00	10,000-00	Confirmed
8.	Premium paid for medical insurance	---	20,000-00	Awarded
Total		8,32,106-00	3,80,058-00 rounded off 3,80,000-00	Reduced

13. Accordingly the award is scaled down to Rs.3,80,000/- with interest at the rate of 7.5% p.a., from the date of petition till the date of realisation.

14. From the records, this Court finds that 50% of the award amount has already been deposited along with the accrued interest into the credit of M.C.O.P.No.621 of 2014 on the file of the Motor Accident Claims Tribunal, Special Sub Court, Dharmapuri. The claimant is entitled to withdraw the compensation amount as modified by this Court in this appeal with interest at the rate of 7.5% p.a., from the date of petition till the date of deposit. The Insurance Company is permitted to withdraw the excess amount lying in the account, less amount payable to the claimant. The Insurance Company is at liberty to proceed against the Vehicle owner and recover the money as per the dictum laid in Oriental Insurance Co.Ltd., Vs. Shri Nanjappan and others reported in I (2004) ACC 524 (SC) by following the principle of pay and recovery.



15.As the result, this Civil Miscellaneous Appeal is partly allowed. No order as to costs. Consequently, connected Miscellaneous Petition is closed.

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Sd/-
Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

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To:

The Motor Accident Claims Tribunal,
Special Subordinate Judge,
Dharmapuri District.

Copy to

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

+1cc to Mr.J.Chandran, Advocate Sr.3753
+2cc to M/s.P.Valliappan, Advocate Sr.3719

C.M.A.No.525 of 2017
and
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