



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 01.04.2021

Pronounced On : 09.04.2021

CORAM

WEB COPY

THE HONOURABLE MR.JUSTICE K.MURALI SHANKAR

C.M.A (MD)No.1122 of 2015

and

MP (MD)No.1 of 2015

The United India Insurance Company Limited,
Kumbakonam : Appellant / 2nd Respondent
Vs.

1.K.Selvam

2.Minor Jansirani

3.Minor Muthulakshmi : Respondents 1 to 3 /Petitioners

4.M.Ilayaraja : Respondent No. 4/ 1st Respondent

(Minor Respondents 2 and 3 are represented by their father and natural guardian 1st respondent Selvam)

(Cause title amended as per order of this Court dated 19.02.2021 in CMP(MD)No.1317 of 2021 in CMA(MD)No.1122 of 2015)

PRAYER:- Civil Miscellaneous Appeal filed under Section 173 of Motor Vehicle Act, 1988, against the Judgment and decree dated 11.02.2015 passed in M.C.O.P.No.145 of 2014 on the file of the Motor Accidents Claim Tribunal (Chief Judicial Magistrate), Thanjavur.

For Appellant : Mr.I.Robert Chandrakumar
For R1 to R3 : Mr.Govindarajan,
For R4 : No Appearance

J U D G M E N T

The Civil Miscellaneous Appeal has been filed under Section 173 of Motor Vehicle Act, 1988, against the Judgment and decree dated 11.02.2015 passed in M.C.O.P.No.145 of 2014 on the file of the Motor Accidents Claim Tribunal (Chief Judicial Magistrate), Thanjavur.

2.The Appellant/Insurer, who was made liable to pay compensation of Rs.8,02,000/- with interest at 7.5% per annum to the claimants/legal heirs of the deceased Pushpalatha, who died in an



accident occurred on 21.08.2013, challenged the liability mulcted on it.

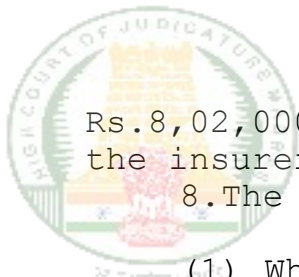
3. Admittedly, the first claimant is the husband and the claimants 2 and 3 are the daughters of the deceased Pushpalatha. The case of the claimants is that on 21.08.2013, at about 06.45 pm, when the deceased Pushpalatha was travelling as a pillion rider in a TVS XL Motor Cycle bearing Registration No. TN 68 H 6780 driven by her husband Saravanan in Saranatham to Alangudi Main Road and at Poonayiruppu Village, the rider while turning the vehicle slowly toward west, a cow suddenly crossed the road, that the rider had immediately applied the breaks and in that he skidded and as a result of which, both the rider and his wife fell on the road ditch and both of them had sustained injuries, that the said Pushpalatha was immediately taken to the Government Hospital at Kumbakonam, and that despite treatment she succumbed to the injuries on that day itself.

4. The claimants' further case is that the rider of the two wheeler was not at all responsible for the accident and that since the said two wheeler owned by the fourth respondent/first respondent was insured with the Appellant/Insurer, they are liable to pay compensation.

5. The defence of the Appellant/insurer is that the first claimant drove the TVS XL bearing Registration No. TN 68 H 6780 owned by the fourth respondent/ first respondent, without driving license at the time of accident, that he has paid a fine amount of Rs.300/- on 01.10.2013 in S.T.C.No.167 of 2013 before the Court of the Judicial Magistrate, Valangaiman, for driving the vehicle without license, that the first claimant alone was responsible for the accident and that therefore, the insurer is in no way liable for the claim.

6. During enquiry before the Tribunal, the claimants have examined the first claimant Thiru.Selvam as P.W.1 and exhibited six documents as Ex.P.1 to Ex.P.6. The fourth respondent/first respondent owner of the two wheeler had remained ex-parte before the Tribunal. On the side of the Appellant/insurer, they have summoned and examined the staff attached to the Regional Transport Office, Kumbakonam, Tmt.Amsavalli and the father of the deceased Thiru.Nagarajan as R.W.1 and R.W.2 respectively, and exhibited the letter of the RTO, Kumbakonam as Ex.R.1.

7. The Tribunal, upon considering the evidence, both oral and documentary, came to the conclusion that the husband of the deceased, the first claimant was not responsible for the accident and that since the two wheeler was insured with the Appellant/insurer at the relevant point of time, fastened the liability on the insurer, directing them to pay compensation of



Rs.8,02,000/- with interest and costs. Aggrieved by the said award, the insurer has come forward with the present appeal.

8.The points for determination are :

(1) Whether the Tribunal erred in mulcting the liability on the Appellant/Insurer, despite the production of materials to show that the first claimant/husband of the deceased was the tort-feaser and as such, he cannot maintain claim application as legal heir of his deceased wife?

(2) Whether the trial Court erred in deciding that the claimants are entitled to the compensation without considering the stand of the claimants that the first claimant was not responsible for the accident and by holding that the first claimant was not at all fault?

(3) Whether the Tribunal erred in fastening the liability on the insurer, inspite of the specific admission given by the first claimant that he was not possessing any driving license at the time of accident and that he was convicted therefor?

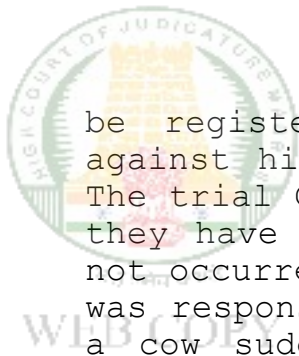
Points No. 1 and 2 :

9.It is the specific case of the claimants that the first claimant had driven the TVS XL motorcycle with his wife as a pillion rider, that since a cow suddenly crossed the road, the first claimant had applied the breaks immediately and in that he skidded and as a result of which, the first claimant and his wife fell down and sustained injuries and that his wife despite treatment, succumbed to the injuries.

10.It is pertinent to mention that the claimants in their claim petition itself have specifically stated that the first claimant was not at all responsible for the accident. The first claimant in his chief examination affidavit filed before the Tribunal would say specifically that he was not responsible for the accident. But, admittedly FIR was lodged by the father-in-law of the first claimant i.e., the father of the deceased and whereunder he has stated that his son-in-law Selvam had driven the two wheeler in a rash and negligent manner and dashed against the nearby coconut tree and that his daughter and son-in-law had sustained injuries and subsequently his daughter had died.

11.As already pointed out, the Appellant/Insurer has summoned and examined the Nagarajan/father of the deceased as R.W.1 and he would say in his chief examination that he does not know as to how his daughter had died, that since the police had demanded his signatures at Kumbakonam Hospital, he had subscribed his signatures and that he has not preferred any complaint before the police. But in cross examination on behalf of the claimants, he would say that he had lodged the complaint with the police and that he was not aware of the contents of the complaint.

12.P.W.1 in his cross examination would admit that FIR came to



be registered against him, that a criminal case was proceeded against him and that as the matter was settled, he was acquitted. The trial Court, by placing the burden on the Appellant/Insurer that they have not produced any evidence to show that the accident was not occurred as alleged by the claimants and that the first claimant was responsible for the accident, came to the conclusion that since a cow suddenly crossed the road, he could not apply the breaks immediately, and as a result of which, both of them had fallen down and that there was no evidence to show that the negligence of the first claimant was responsible for the accident. To put it in short, the Tribunal has come to the conclusion that the first claimant was not responsible for the accident.

13. Before entering into the further discussion, it is necessary to understand the scope of Section 166 of the Motor Vehicles Act and the existing legal position;

Section 166 reads as follows:

166. Application for compensation. - (1) An application for compensation arising out of an accident of the nature specified in sub-section (1) of section 165 may be made -

- (a) by the person who has sustained the injury; or
- (b) by the owner of the property; or
- (c) where death has resulted from the accident, by all or any

of the legal representatives of the deceased; or

- (d) by any agent duly authorised by the person injured or all or any of the legal representatives of the deceased, as the case may be :

Provided that where all the legal representatives of the deceased have not joined in any such application for compensation, the application shall be made on behalf of or for the benefit of all the legal representatives of the deceased and the legal representatives who have not so joined, shall be impleaded as respondents to the application.

(2) Every application under sub - section (1) shall be made, at the option of the claimant, either to the Claims Tribunal having jurisdiction over the area in which the accident occurred or to the Claims Tribunal within the local limits of whose jurisdiction the claimant resides, or carries on business or within the local limits of whose jurisdiction the defendant resides and shall be in such form and contain such particulars as may be prescribed :

Provided that where no claim for compensation under section 140 is made in such application, the application shall contain a separate statement to that effect immediately before the signature of the applicant.

(4) The Claims Tribunal shall treat any report of accidents forwarded to it under sub-section (6) of Section



158 as an application for compensation under this Act.

14. Section 166 contemplates the machinery for laying the claim on fault liability, whereas Section 140 of the Act deals with interim compensation, which is a fixed amount and the owner of the vehicle is mulcted with the statutory liability. The compensation claimed under Section 140 of the Act is governed by the principle of 'No-fault liability'. Section 163 A and 140 are based on strict liability (liability without fault) principle.

15. In Section 163 (A) and 166 both the owner and the insurer are liable. When an application under Section 166 of the Act is filed, the Court is required to hold an enquiry into the claim and then proceed to make an award and when such a claim is made, it has to be proved that the deceased was not himself responsible for the accident by his rash and negligent driving.

16. At this juncture, it is necessary to refer the decision of our High Court passed in CMA.No.2898 of 2018 and Cross Objection No.5 of 2019, dated 28.02.2019; (M/s. Bajaj Alliance General Insurance Company Limited Vs. Seeniammal and others)

"11. The claimants filed the said claim petition under Section 166 of the Motor Vehicles Act (hereinafter referred to as 'the Act'). It is well settled that when a claimant has come out with the claim petition under Section 166 of the Act, they have to plead and prove the negligence on the part of the offending vehicle insured with the Insurance Company. Unless the claimant proves the negligence on the part of the driver of the vehicle insured with the Insurance Company, the Insurance Company is not liable to pay any compensation. The principle of Insurance Policy is that the Insurance Company has to indemnify the insured owner of the vehicle for the claim made by the third parties against the owner of the vehicle. The liability will arise when the driver of the vehicle is negligent and caused accident and then the owner becomes vicariously liable is negligent act of his driver. In the present case, no negligence is alleged on the part of the 1st respondent, rider of the motorcycle insured with the 2nd respondent. In view of the same, the Tribunal erred in fastening the



liability on the 2nd respondent on the ground that the deceased was a third party, when insured was not liable to pay any compensation to the claimants. The judgments relied on by the learned counsel appearing for the 2nd respondent are squarely applicable to the facts of the present case. The judgments relied on by the learned counsel appearing for the claimants are not relevant to the facts of the present case."

17. In that case, it was alleged that while the deceased was travelling in the motorcycle as a pillion rider, an unknown tipper lorry dashed against the motorcycle and caused accident. The Police after Investigation has filed a final report stating that the accident was occurred only due to rash and negligent driving of the tipper lorry driver and that as and when the driver of the tipper lorry was found out the case would be re-opened. Even then, the Tribunal has come to the conclusion that since the vehicle was insured with the second respondent and the deceased being third party, the insurer is liable for the claim. When that award was challenged, our High Court has held that the reasoning given by the Tribunal is erroneous and that the insurer cannot be fastened liability only on the ground that the motorcycle was insured with the appellant and consequently set aside the award passed by the Tribunal and directed the insurer to pay a sum of Rs.25,000/- as compensation under Section 161-3 (a) of the Motor Vehicles Act.

18. In the present case also, as already pointed out, there was neither pleadings nor evidence that the negligent driving of the offending vehicle was responsible for the accident. But on the other hand, the claimants have been taking a continuous stand that the first claimant/rider of the two wheeler was not at all responsible for the accident. In order to claim compensation under Section 166 of the Motor Vehicles Act, the injured or the legal heirs of the deceased are duty bound to prove that negligent driving of the offending vehicle was the reason for the accident. Except the motorcycle driven by the first claimant, no other vehicle was allegedly involved in the accident. There is no gainsay that proof of negligence is *sine qua non* in a petition under Section 166 of the Motor Vehicles Act. Since the two wheeler i.e., TVS XL Motorcycle alone was allegedly involved in the accident, the claimants are under the obligation to prove that the accident was occurred because of rash and negligent driving of the two wheeler.

19. As already pointed out, in a claim under Section 166 of the Act, it is compulsory to show that someone is guilty of negligent



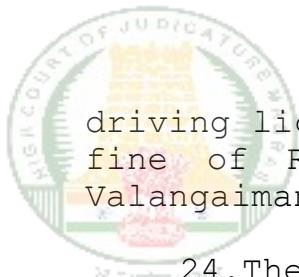
driving and then only, the owner of the offending vehicle can be made liable consequently and thereafter only, the liability can be fastened on the insurer. It is pertinent to mention that the liability of the insurer is to the extent of indemnification of the insured against the respondent or the injured person or in respect of damages of property and in case, if the injured cannot be mulcted with any liability under the provisions of Motor Vehicles Act, the question of the insurer being liable to indemnify the insured does not arise at all. In no case, the insurer can be made liable straightaway and only if insured is made liable, then only insurer can be made liable to indemnify the insured.

20.As already pointed out, it is not the specific case of the claimants that the accident was occurred only due to the rash and negligent driving of the first claimant, the rider of the two wheeler. It is also not their case that the accident was occurred due to the rash and negligent driving of the some other vehicle by some other person. As already pointed out, since there is no proof of negligence, the question of making the first respondent liable and consequently making the insurer liable does not arise at all. But the Tribunal without considering the above material aspects of the case, has recorded a finding that the first claimant was in no way responsible for the accident and by holding so, fastened the liability on the insurer.

21.The learned counsel for the Appellant would contend that the Tribunal erred in giving a finding that there was no breach of policy condition having accepted that the first claimant/rider had paid the fine amount for not having license, that the Tribunal has also failed to consider that the first claimant had admitted in his cross examination that he did not have the driving license and that he had paid the fine for not having license.

22.The Tribunal by relying on the decision of Delhi High Court reported in **2014 ACJ 805, [Reliance General Insurance Company Vs. Tetar Yadav and others]** has held that the insurer has failed to prove that there was breach of violation of the policy on the part of the insured.

23.It is settled law that the burden of proof to show that there is breach of terms and conditions of the policy is on the insurer. In the case on hand, after raising the necessary pleadings with respect to non possessing of the driving license and payment of penalty by the first claimant, the first claimant was subjected to cross examination, P.W.1/first claimant would admit categorically that he had paid fine of Rs.300/- for not having driving license in S.T.C.No.167 of 2013 on the file of the Judicial Magistrate, Valangaiman. Moreover, the Appellant/Insurer has also summoned and examined the staff attached to the RTO, Kumbakonam as R.W.1 and R.W.1 would say that the rider Selvam was not having any



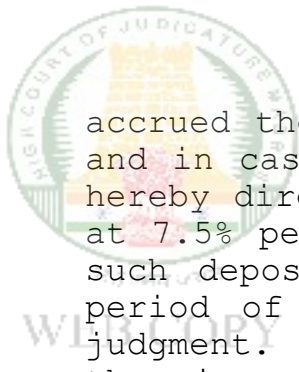
driving license at the time of accident and that he was imposed with fine of Rs.300/- in S.T.C.No.167 of 2013 on the file of the Valangaiman Court on 01.10.2013.

24.The first claimant in his cross examination would also admit that the owner of the two wheeler was his neighbor and that the owner was aware that he was not possessing driving license at that time. In the case before the Delhi High Court, the driver of the offending vehicle was only having a license to drive a Motorcycle, scooter and motor car and that he was not having driving license to drive the goods vehicle. In the present case, the first claimant was not having any kind of license. Considering the above, this Court is at loss to understand what more evidence or materials are necessary to show that the policy condition has been violated.

25.The learned trial Judge without considering the factual aspects of the case and the settled legal position in proper perspective, has passed the impugned award mulcting the liability on the insurer mechanically, hence, this Court has no hesitation to hold that the impugned award is liable to be set aside.

26.No doubt the claimants have also filed their application under Section 140 of Motor Vehicles Act, which provides for liability to pay compensation in certain cases on the principle of 'no fault'. Section 140 contemplates that in the event of death or permanent disablement of any person resulting from an accident arising out of the use of a motorcycle or motor vehicles, the owner of the vehicle or the owners of the vehicles shall jointly and severally liable to pay compensation, in respect of such death or disablement in accordance with the provisions of the said Section. In case of death, the owners are bound to pay Rs.50,000/- and in case of permanent disablement, owner is bound to pay to the injured person a sum of Rs.25,000/-. The liability under Section 140 is the statutory liability fastened on the owner of the vehicle without fault. Since the claim petition filed under Section 166 of the Motor Vehicles Act is misconceived, the claimants are entitled to get compensation under Section 140 of the Motor Vehicles Act. Hence, this Court decides that the claimants are entitled for a sum of Rs.50,000/- as compensation in terms of Section 140 of the Motor Vehicles Act. Considering the other facts and circumstance of the case, this Court further decides that the parties are to be directed to bear their own costs and the above points are answered accordingly.

27.In the result, this Civil Miscellaneous Appeal is partly allowed and the impugned award directing the Appellant/Insurer to pay compensation of Rs.8,02,000/- is set aside. The claimants 2 and 3 are entitled to get Rs.50,000/- as compensation. In case if the Appellant/Insurer has deposited entire amount, the insurer is hereby permitted to withdraw the balance amount together with interest



accrued thereon by filing necessary application before the Tribunal and in case if the amount has not been deposited, the Appellant is hereby directed to deposit the amount of Rs.50,000/- with interest at 7.5% per annum from the date of claim petition till the date of such deposit, less the amount already deposited if any, within a period of eight weeks from the date of receipt of copy of this judgment. The Tribunal is directed to deposit the said amount of the minor claimants in any one of the Nationalized Bank in a fixed deposit scheme, till they attain majority. The father and guardian of the minor claimants is permitted to withdraw the accrued interest once in three months directly from the Bank only for the welfare of the minors. Parties are directed to bear their own costs.

Sd/-

Assistant Registrar (AE)

// True Copy //

/ /2021

Sub Assistant Registrar(CS)

das

To

The Motor Accidents Claim Tribunal
(Chief Judicial Magistrate), Thanjavur.

Copy to:

The Record Keeper,
Vernacular Section,
Madurai Bench of Madras High Court,
Madurai. (2c)

+1 CC to M/s.K.GOVINDARAJAN, Advocate (SR-15902[F] dated 15/04/2021)

+1 CC to M/s.G.PRABHU RAJADURAI, Advocate (SR-16026[F] dated 16/04/2021)

C.M.A(MD)No.1122 of 2015
09.04.2021

KK(26.05.2021) 9P 6C