BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 27.09.2022

Pronounced on : 27.10.2022

CORAM

THE HONOURABLE MRS.JUSTICE **R.THARANI**

C.M.A(MD)No.1226 of 2009
and
M.P(MD)No.1 of 2009

The Oriental Insurance Co.Ltd.,
through its Branch Manager,
Shoba D.M.S.Complex,
Railway Station Road, Palakad,
Kerala State. ...Appellant / 2nd respondent

Vs

1.N.Subburaj ... 1st respondent / petitioner

2.M.Senthilkumar ... 2nd Respondent /1st Respondent

PRAYER :-

This Civil Miscellaneous Appeal is filed under Section 173 of Motor Vehicles Act 1988, to set aside the Award of Rs.1,35,966/-(Rupees One Lakhs Thirty Five Thousand Nine Hundred and Sixty Six only) passed in M.C.O.P.No.172/2006, dated 06.07.2007, on the file of the Motor Accidents Claims Tribunal cum Chief Judicial Magistrate, Theni.

For Appellant : Mr.E.Chandrasekaran

For R1 : Mr.P.Malini

JUDGMENT

This Civil Miscellaneous Appeal is filed against the order in M.C.O.P.No.172 of 2006 on the file of the Motor Accident Claims Tribunal (Chief Judicial Magistrate), Theni. The appellant herein is the second respondent, 1st respondent is the claimant and second respondent is the first respondent in the claim petition.

2.Brief substance of the claim petition is as follows:

On 07.09.2004 at about 4.30 a.m., when the petitioner was travelling in a TATA Sumo Car bearing registration No. TN 60 J 8080 along the Theni-Periyakulam road, near Mathurapuri Saw Mill, another vehicle came from the opposite direction in a rash and negligent manner. The driver of the car turned the vehicle to avoid dashing against the opposite vehicle and that the car hit against a stone pillar. The petitioner sustained injuries. He was admitted in Theni Government Hospital, then he was admitted in Madurai Apollo Hospital and he took treatment as inpatient till 16.09.2004. Then he took treatment as out-patient. The petitioner claimed a sum of Rs.2 Lakhs as compensation.

3.Brief substance of the counter filed by the second respondent is as follows:

The claimant is the owner of the vehicle. He failed to submit the insurance policy copies of First Information Report, driving licence and RC Book to the respondent. The petitioner has to prove that the driver was having a valid driving licence. The age, income and injuries are to be strictly proved.

4.Two witnesses were examined and nine documents were marked on the side of the petitioner. No witness was examined and no document was marked on the side of the respondent. The Tribunal awarded a sum of Rs. 1,35,966/- as compensation.

5.Against the award, the second respondent filed this appeal on the following grounds:

As per the contract of policy, the insurer can compensate the parties. But the claimant herein is the owner. The appellant is not liable to pay compensation. The insurer cannot get the benefit of the insurance policy under the Motor Vehicles Act. The accident did not involve any other motor vehicle than the one which the owner/claimant was driving. Since the deceased himself was negligent, the claim petition under Section 166 of the Motor Vehicles Act, 1988, is not maintainable. The Doctor has not specifically mentioned whether the disability was permanent or partial permanent. The disability fixed is not in accordance with the medical science and the disability certificate has to be rejected. The award is excessive.

6.On the side of the appellant, it is stated that the claimant was travelling as a passenger in the car. He cannot be named as a third party to the contract. The policy is an Act Policy. Only in case of loss of limb, the insurance company is liable to pay compensation. The claimant cannot claim any compensation from his own insurance company. No provision for medical expenses is eligible under the policy. A judgment of this Court reported in **2020 (1) TN MAC 547**, in the case of **Royan Sundaram Allianz Insurance Co.Ltd., v. Somu,** is cited, wherein it is held that,

> *" ... Award of Compensation by Tribunal, held, without considering nature of Policy - Tribunal bound to see nature of Policy and temrs and conditions thereof for purpose of deciding liability - Policy being contractual, Claimant entitled to claim Compensation only with reference to terms and conditions of*

Policy and not beyond that - Disability suffered not covered by Policy - Award of Compensation by Tribunal liable to be quashed."

7.On the side of the respondent it is stated that in the counter filed before the Tribunal, the appellant has not raised this point. The restrictions and terms and conditions of the policy were not brought to the knowledge of the policy holder. Only policy certificate was furnished to the claimant. Liability up to the limit of Rs.2 Lakhs is mentioned in the policy certificate. The Tribunal has awarded only Rs.1,35,966/- that is within the limit of policy.

8.On the side of the respondent, a judgment of the Hon'ble Supreme Court reported in **2004(2) SCC 734** in the case of **Modern insulators Ltd., v. Oriental Insurance Co.Ltd.,** is cited. The Hon'ble Supreme Court has made an observation that it is the duty of the insurance company to disclose all the material evidence.

"6.The National Commission asked the parties to file affidavit to prove that the exclusion clause was duly communicated to the appellant. We have been taken through the affidavits filed and we find in the affidavit of the appellant the letter received by the appellant from the Branch Manager of the

respondent was referred to wherein it was confirmed that the appellant was supplied only with a cover note and the schedule of the policy. So the other terms and conditions containing the above exclusion clause were not communicated. In the reply affidavit filed by the respondent it was not specifically mentioned that the exclusion clause was also communicated to the appellant.

8.It is the fundamental principle of insurance law that utmost good faith must be observed by the contracting parties and good faith forbids either party from non-disclosure of the facts which the parties know. The insured has a duty to disclose and similarly it is the duty of the insurance company and its agents to disclose all material facts in their knowledge since the obligation of good faith applies to both equally.

9.In view of the above settled position of law we are of the opinion that the view expressed by the National Commission is not correct. As the above terms and conditions of the standard policy wherein the exclusion clause was included, were neither a part of the contract of insurance nor disclosed to the appellant, the respondent cannot claim the benefit of the said exclusion clause. Therefore, the finding of the National Commission is untenable in law.

10. .... It is a settled position of law that in an appeal, the parties cannot urge new facts. From the pleadings of the respondent before the State Commission it is found that the respondent pleaded that the property damaged was not covered *under the insurance policy. This plea was given a go-by before the National Commission and a new plea was taken up in the grounds of appeal that the terms and conditions of the insurance policy were violated by the appellant by using used kiln furniture. The National Commission accepted this new ground and allowed the appeal, which in our opinion is not sustainable in law."*

9.On the side of the respondent, another judgment of the Hon'ble Supreme Court reported in **(2019) 6 SCC 212** in the case of **Bharat Watch Company v. National Insurance Company Ltd.,** is cited, wherein it is held that,

Insurance - Exemption / Exclusion/ Restrictions/ Limitation/ Forfeiture Clauses/ Negative Covenants - Non disclosure of exclusions - Conditions of exclusion under policy document not handed over to insured by insurer and in absence of insured being made aware of terms of exclusion, held, it is not open to insurer to rely upon exclusionary clauses - District Forum and SCDRC both came to a specific finding of fact that insurer did not furnish terms and conditions of exclusion and special conditions to appellant and hence they were not binding."

10.A perusal of the records reveals that the appellant has not raised any points regarding the non coverage of the policy against the owner of the vehicle. Only in the appeal, the appellant is introducing a new case. In the copy of the policy certificate, a premium of Rs.100 was paid under the caption 'PA' which is the abbreviation of 'Protection against owner cum driver'. Another sum of Rs.25/- was collected towards legal liability employee/driver. The PA cover is limited ie., the cover for owner and driver was restricted to Rs.2 Lakhs.

11.On the side of the appellant, it is stated that only for Death or for loss of two limbs or sight of two eyes, 100% can be awarded. For 100% Permanent, total disablement compensation can be awarded and only for loss of one limb or sight of one eye, 50% can be awarded. But there is no such mentioning in the policy certificate.

12.As per the judgment of the Hon'ble Supreme Court, cited above, it is the duty of the insurance company to give all the relevant particulars in the policy certificate. The conditions or exclusion from coverage are to be specifically stated in the policy certificate. The insurer has the duty to disclose all material facts. The insurance company has failed to do so.

13.Since the appellant is introducing a new case in the appeal and since premium was paid for the owner and since the conditions of exclusion was not mentioned in the policy certificate, the appeal is not maintainable. Hence, this Civil Miscellaneous Appeal is dismissed.

(i) The appellant /Insurance company, is directed to deposit the entire compensation of Rs.1,35,966/- (Rupees One Lakh Thirty Five Thousand Nine Hundred and Sixty Six only) (if not already deposited) together with interest at the rate of 7.5% per annum from the date of claim petition till the date of deposit and proportionate costs to the credit of M.C.O.P.No.172 of 2006 on the file of the Motor Accidents Claims Tribunal / Additional District Judge (FTC), Theni, within a period of eight weeks from the date of receipt of a copy of this order.

(ii) On such deposit being made by the appellant /insurance company, the first respondent herein is permitted to withdraw their share of Rs. 1,35,966/- (Rupees One Lakh Thirty Five Thousand Nine Hundred and Sixty Six only), along with proportionate interest at the rate of 7.5% per annum. Consequently, connected miscellaneous petition is closed. No Costs.

27.10.2022

Index: Yes / No
Internet : Yes / No

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R. THARANI, J

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To

1.The Motor Accidents Claims Tribunal cum Chief Judicial Magistrate,
Theni.

2.The Record Keeper, Vernacular Records,
Madurai Bench of Madras High Court, Madurai.

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