IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 22.12.2023

CORAM:

THE HONOURABLE MR. JUSTICE K. RAJASEKAR

C.M.A. No. 2132 of 2021
and C.M.P. No.11788 of 2021

Iffco-Tokio General Insurance Company Limited,
148, Vinayaka Complex, 2nd Floor,
Opposite to Ganesh TVS Show Room,
Erode, Erode District - 638 011. ... Appellant / 2nd Respondent

Vs.

1. Ajithkumar ... 1st Respondent/ Petitioner

2. K. Ganesan ... 2nd Respondent/ 1st Respondent

Civil Miscellaneous Appeal filed under Section 173 of Motor Vehicles Act, 1988 against the Judgment and decree dated 22.07.2020 passed in M.C.O.P. No. 2353 of 2014 on the file of the Special Subordinate Judge, Motor Accident Claims Tribunal, Dharmapuri.

For Appellant	:	Mr. N. Somasundaar
For R1	:	Mr. V.R. Annagandhi
For R2	:	No Appearance

JUDGMENT

This Civil Miscellaneous appeal has been filed by the insurance company challenging the Judgment and Decree passed in M.C.O.P. No. 2353 of 2014, dated 22.07.2020 on the file of the Special Subordinate Judge, Motor Accident Claims Tribunal, Dharmapuri, wherein the Tribunal has awarded a compensation for a sum of Rs.1,28,791/- along with interest @ 7.5% per annum.

2. For the sake of convenience, the parties are referred herein according to their litigative status and rank before the Tribunal.

3. On 24.06.2012, at about 13:00 hours, the claimant minor Ajeethkumar was walking in the main road of Chinnampalli to Mecheri on the left hand side of the road, while he reached near Perumbalai Aditya Petrol Bunk, a Hero Honda more cycle bearing Registration No.TN-52-Y-2025, ridden by its rider in a rash and negligent manner, without sounding horn and following traffic rules, dashed against the claimant, thereby causing grievous injuries. The claimant was immediately taken to "Kurinji

Hospital, Salem for treatment. A criminal case was registered against the rider of the Hero Honda motorcyle in Cr.No.92/2012 U/s. 279 and 338 of IPC, 1860 on the file of Perumbalai Police Station. For the injuries sustained, the claimant has filed claim petition seeking compensation for a sum of Rs.5,00,000/- under section 166 of the Motor Vehicles Act, 1988.

4. The first respondent, who is the rider cum owner of the Hero Honda motor cycle has not contested the claim and remained ex-parte. The second respondent - insurance company has filed a counter and disputed the manner in which the accident has taken place and contended that the accident has taken place only due to the negligence on the part of the claimant, who has suddenly crossed the road, without minding the horn sound and due to shouting of public around there, he instantly turned back lost his balance, slipped and fell down, hence the first respondent has not hit against the claimant. The insurance company also stated that the first respondent has no valid driving licence at the time of accident, hence there is a statutory violation of policy conditions, hence the second respondent insurance company is not liable to pay compensation.

5. Before the Tribunal, on the side of the claimant, P.W.1 was examined and Exs.P.1 to P.10 were marked. On the side of the second respondent - insurance company, R.W.1 was examined and Ex.R.1 was marked and the disability certificate of the claimant is marked as Ex.C.1.

6. Based on the evidence placed on record, the Tribunal in point nos.1 and 2, has held that the first respondent is the tortfeasor and the second respondent - insurance company as the insurer of the said vehicle is liable to indemnify the first respondent and to pay compensation to the claimant. In point no.3, the Tribunal has quantified and granted compensation for a sum of Rs.1,28,791/- along with interest @ 7.5% per annum from the date of filing of petition till the date of realization.

7. Aggrieved over the award, the insurance company has filed this appeal challenging the liability fixed on them to indemnify the first respondent.

8. The learned counsel for the insurance company submitted that

the first respondent, who is the owner of the Hero Honda motorcycle is a tortfeasor and he was not having a valid driving licence at the time of accident, but the Tribunal has not properly appreciated the same and fixed the liability on the insurance company to pay the compensation, hence prays to set aside the award of the Tribunal.

9. The learned counsel for the claimant submitted that the Tribunal based on the evidence placed on record, has held that the insurance policy of the offending vehicle was in force at the time of accident, and fixed the liability on the part of the insurance company and directed to pay the compensation, hence prays to confirm the award.

10. I have considered the submissions made on both sides and perused the materials available on record.

11. Admittedly, in this case, the claimant herein is a third party, who sustained injuries in the accident, which was taken place due to tortuous act of the first respondent. Before the Tribunal, Ex.P.7 - insurance policy of the offending vehicle was marked and based on that the Tribunal

has held that the insurance coverage was in force at the time of accident, hence fixed the liability on the the second respondent - insurance company to indemnify the first respondent and to pay compensation.

12. The major contention of the insurance company is that the first respondent has no valid driving licence at the time of accident and to substantiate the same, the insurance company has examined R.W.1 - Record Clerk of RTO, Sankagiri, who has stated that since no licence particulars given, he is not able to give licence details of first respondent. He has manually verified records and was not able to find licence details. The Tribunal based on the evidence of R.W.1 and Ex.R.1 has rejected the contention of the insurance company and fixed the liability on them.

13. Before the Tribunal, the first respondent, who is a tortfeasor, has not come forward to produce his driving licence and the evidences adduced by the second respondent - insurance company shows that, the first respondent has not been issued valid driving licence at the time of accident from the Office of R.T.O, Sankari. The fact that R.W.1 was not able to find any licence details only mean that there was no licence issued and if any

licence is issued, definitely the Official could give licence particulars. By improperly interpreting the evidence of R.W.1, the Tribunal has held that there is no breach of terms and conditions as per the policy and fixed the liability on the second respondent - insurance company. The approach of the Tribunal is not proper since, the insurance company has rightly examined the R.W.1 – Official of R.T.O, to prove the fact that, there is no licence issued in favour of first respondent. According to him, he is not able to find any details about the issuance of licence from his official record and the evidence of R.W.1 is sufficient to hold that there is no licence issued to the first respondent.

14. This Court in ***M. Ananthi and Ors. Vs. P. Venkatesan and Ors. [2022 (1) TNMAC 135]***, by following the r of the Hon'ble Apex Court judgment in ***National Insurance Co. Ltd. vs. Swaran Singh and Ors. [MANU/SC/0021/2004 : AIR 2004 SC 1531]*** and held in paragraph no.12 as follows:

> *"In National Insurance Co. Ltd. vs. Swaran Singh (cited supra), three judges bench of the Hon'ble Supreme court, laid down guidelines in case of claims resisted on the ground of breach of policy condition as below:-*

"The summary of our findings to the various issues as raised in these petitions are as follows:-

(i) Chapter XI of the Motor Vehicles Act, 1988 providing compulsory insurance of vehicles against third party risks is a social welfare legislation to extend relief by compensation to victims of accidents caused by use of motor vehicles. The provisions of compulsory insurance coverage of all vehicles are with this paramount object and the provisions of the Act have to be so interpreted as to effectuate the said object.

(ii) Insurer is entitled to raise a defence in a claim petition filed under Section 163A or Section 166 of the Motor Vehicles Act, 1988 inter alia in terms of Section 149(2)(a)(ii) of the said Act.

(iii) The breach of policy condition e.g., disqualification of driver on invalid driving licence of the driver, as contained in Sub-section (2)(a)

(ii) of Section 149, have to be proved to have been committed by the insured for avoiding liability by the insurer. Mere absence, fake or invalid driving licence or disqualification of the driver for driving at the relevant time, are not in themselves defences available to the insurer against either the insured or the third parties. To avoid its liability towards insured, the insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by duly licensed driver or one who was not disqualified to drive at the relevant time.

(iv) The Insurance Companies are, however, with a view to avoid their liability must not only establish the available defence(s) raised in the said proceedings but must also establish 'breach' on the part of the owner of the vehicle;

the burden of proof wherefor would be on them.

(v) The Court cannot lay down any criteria as to how said burden would be discharged, inasmuch as the same would depend upon the facts and circumstances of the case.

(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 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 Tribunals in interpreting the policy conditions would apply "the rule of main purpose" and the concept of "fundamental breach" to allow defences available to the insured under Section 149(2) of the Act.""

15. In ***S. Iyappan vs. United India Insurance Co. Ltd., (MANU/SC/0632/2013 : 2013 (7) SCC 62)***, the Hon'ble Supreme Court has observed that:-

"18. Reading the provisions of Sections 146 and 147 of the Motor Vehicles Act, it is evidently clear that in certain circumstances the insurer's right is safeguarded but in any event the insurer has to pay compensation when a valid certificate of insurance is issued notwithstanding the fact that the insurer may proceed against the insured for recovery of the amount. Under Section 149 of the Motor Vehicles Act, the insurer can defend the action inter alia on

> *the grounds, namely, (i) the vehicle was not driven by a named person, (ii) it was being driven by a person who was not having a duly granted licence, and (iii) person driving the vehicle was disqualified to hold and obtain a driving licence. Hence, in our considered opinion, the insurer cannot disown its liability on the ground that although the driver was holding a licence to drive a light motor vehicle but before driving light motor vehicle used as commercial vehicle, no endorsement to drive commercial vehicle was obtained in the driving licence. In any case, it is the statutory right of a third party to recover the amount of compensation so awarded from the insurer. It is for the insurer to proceed against the insured for recovery of the amount in the event there has been violation of any condition of the insurance policy."*

16. Based on the above observations, this Court is consistently following the guidelines of the ***National Insurance Co. Ltd. vs. Swaran Singh and Ors.*** cited supra, apply the principle of "Pay and Recover" for the case of third party claim. Considering the case in hand, this Court is of the view that adopting the principle of "Pay and Recover" is proper. Accordingly, the insurance company is directed to pay the compensation awarded by the Tribunal to the claimant and given liberty to recover the same from the first respondent.

17. In the result, this Civil Miscellaneous Appeal is allowed. Consequently, connected civil miscellaneous petition stands closed. No cost.

22.12.2023

stn
Index:Yes/No
Speaking Order:Yes/No
Neutral Citation Case: Yes/No

To:

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

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

K. RAJASEKAR, J.

stn

C.M.A. No. 2132 of 2021

22.12.2023