IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 02.11.2023

CORAM:

THE HONOURABLE MR. JUSTICE K. RAJASEKAR

C.M.A. Nos. 3279 and 3282 of 2021

C.M.A. No. 3279 of 2021

1. S. Palani
2. S. Kavitha
3. S. Venkatesan
4. Devi ... Appellants / Petitioners

Vs.

1. R. Santhakumar

2. The Manager,
Bajaj Allianz General Insurance Co. Ltd.,
New No. 497 & 498 Isana Kattima Building,
5th Floor, Poonamallee High Road,
Arumbakkam,
Chennai - 600 106. ... Respondents / Respondents

Civil Miscellaneous Appeals filed under Section 173 of Motor Vehicles Act, 1988 against the common Judgment and decree dated 22.04.2021 passed in M.C.O.P. No. 108 of 2018 on the file of the Motor Accident Claims Tribunal No.I, Special District Court, Thiruvallur.

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For Appellants	:	Mr. R. Ramesh
For R1	:	No Appearance
For R2	:	Mr. S. Arun Kumar

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COMMON JUDGMENT

These Civil Miscellaneous appeals have been filed by the claimants to fix the liability on the second respondent - insurance company awarded in M.C.O.P. Nos. 107 and 108 of 2018, dated 22.04.2021 on the file of the Motor Accident Claims Tribunal No.I, Special District Court, Thiruvallur.

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

3. On 10.04.2018, at about 22:00 hours, their parents namely Subramani and Munniammal were returning from Sholinghur Temple to their native place, in TVS XL motor cycle bearing Registration No.TN-20-AH-4946, while they reached near P.R. Ramamoorthy Power Mill on the Chittoor Road, a TATA Load carrier bearing Registration No.TN-23-AP-4963 came in the opposite direction in rash and negligent manner, hit on the two wheeler, which resulted in causing serious injuries to them and both have died on the spot. A criminal case was also registered against the driver of the TATA load mini van bearing Registration No.TN-23-AP-4963 in

Cr.No.106 of 2018 u/s.279, 337, 304(A) of I.P.C. on the file of the R.K.Pet Police station. For the loss of their parents, two separate claim petitions in M.C.O.P. No. 107 of 2018 and M.C.O.P. No. 108 of 2018 filed claiming compensation of Rs.20,00,000/- under section 166 of the Motor Vehicles Act.

4. The first respondent is the owner of the offending TATA load mini van carrier bearing Registration No.TN-23-AP-4963, and has not contested the claim and remained ex-parte. The second respondent - insurance company has filed a counter and disputed the age, occupation and income of the deceased and dependency of the claimants. The insurance company also resisted the claim on the ground that the driver of the TATA load carrier was not having a valid driving licence at the time of accident. They also contended that rider of TVS XL motor cycle ridden the vehicle and suddenly entered into the middle of the road, which resulted in accident and the compensation claimed under various heads is on the higher side.

5. Before the Tribunal, joint trial was conducted and common evidences were recorded, on the side of the claimants, P.W.1 and P.W.2

were examined and Exs. P.1 to P.11 were marked and on the side of the second respondent - insurance company, R.W.1 and R.W.2 were examined and Exs.R.1 to R.6 were marked.

6. Based on the evidence placed on record, the Tribunal in point No.1, has held that the rash and negligent driving by the driver of the first respondent TATA load mini van carrier bearing Registration No.TN-23-AP-4963 is responsible for the accident. In point No.2, the Tribunal has held that there is a violation of policy condition that the driver of the offending TATA load carrier was not having a valid driving licence at the time of accident, hence, the Tribunal held that the second respondent - insurance company is not liable to indemnify the first respondent, who is the owner of the offending lorry. In point No.3, the Tribunal has quantified and granted compensation for a sum of Rs.12,50,000/- towards death of Subramani and Rs.8,81,900/- towards death of Muniammal to the claimants.

7. Aggrieved over the finding that there is a violation of policy condition and absolving the insurance company from indemnifying the first respondent, the claimants have come forward with these appeals.

8. The learned counsel appearing for the claimants has submitted that the Tribunal has not properly appreciated the fact that the deceased are the third parties to the insurance policy between the respondents. The Tribunal has not properly followed the judgments of the Hon'ble Apex Court in ***National Insurance Company Vs. Swaran Singh*** **[*2004 (3) SCC 29]***, held that the insurance company is not liable to indemnify the owner of the offending lorry and absolved the insurance company. The Tribunal has not followed the principle of pay and recovery, which is the proper remedy to be awarded in favour of the claimants herein.

9. Per contra, the learned counsel appearing for the insurance company submitted that the insurance company is not liable to pay the compensation, since the driver of the TATA load mini van bearing Registration No.TN-23-AP-4963 has no valid driving licence at the time of occurrence. The Tribunal has rightly appreciated the evidence placed on record and held that the insurance company is not liable to pay the compensation and the owner of the TATA load mini van alone liable to pay compensation to the claimants.

10. Heard the submissions made on both sides and perused the materials placed on record:

11. This Court is of the view that the Tribunal has properly appreciated the evidence placed on record and quantified the quantum of compensation to the claimants towards loss of their parents in an accident, which took place on 10.04.2018. The major contention of the learned counsel appearing for the claimants is that the Tribunal has not followed the principle of pay and recovery, approved by the Hon'ble Apex Court in ***Swaran Singh***'s case and totally absolved the insurance company from indemnifying the first respondent.

12. The Hon'ble Supreme Court in ***National Insurance Company Vs. Swaran Singh and Others, [(2004) 3 SCC 297],*** has considered the coverage of claim of third party risks and explained the Doctrine of "Pay and recovery". In para 110, summarized the position 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) An insurer is entitled to raise a defence in a claim petition filed under Section 163-A 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 the driver or invalid driving licence of the driver, as contained in sub-section (2)(a)(ii) of Section 149, has 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 the 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 a duly licensed driver or one who was not disqualified to drive at the relevant time.*

(iv) Insurance companies, 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 the said burden would be discharged, inasmuch as the same would depend upon the facts and circumstances of each 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 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 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 insurer under Section 149(2) of the Act.*

(vii) The question, as to whether the owner has taken reasonable care to find out as to whether the driving licence produced by the driver (a fake one or otherwise), does not fulfil the requirements of law or not will have to be determined in each case.

(viii) If a vehicle at the time of accident was driven by a person having a learner's licence, the insurance companies would be liable to satisfy the decree.

(ix) The Claims Tribunal constituted under Section 165 read with Section 168 is empowered to adjudicate all claims in respect of the accidents involving death or of bodily injury or damage to property of third party arising in use of motor vehicle. The said power of the Tribunal is not restricted to decide the claims inter se between claimant or claimants on one side and insured, insurer and driver on the other. In the course of adjudicating the claim for compensation and to decide the availability of defence or defences to the insurer, the Tribunal has necessarily the power and jurisdiction to decide disputes inter se between the insurer and the insured. The decision rendered on the claims and disputes interse between the insurer and insured in the course of adjudication of claim for compensation by the claimants and the award made thereon is enforceable and executable in the same manner as provided in Section 174 of the Act for enforcement and execution of the award in favour of the claimants.

(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. The certificate will be issued for the recovery as arrears of land revenue only if, as required by sub-section (3) of Section 168 of the Act the insured fails to deposit the amount awarded in favour of the insurer within thirty days from the date of announcement of the award by the Tribunal.

(xi) The provisions contained in sub-section (4) with the proviso thereunder and sub-section (5) which are intended to cover specified contingencies mentioned therein to enable the insurer to recover the amount paid under the contract of insurance on behalf of the insured can be taken recourse to by the Tribunal and be extended to claims and defences of the insurer against the insured by relegating them to the remedy before regular court in cases where on given facts and circumstances adjudication of their claims inter se might delay the adjudication of the claims of the victims.

13. The Hon'ble Apex Court in ***Shamanna and others vs. The Division Manager, Oriental Insurance Co. Ltd. [2018 (9) SCC 650 : 2018 (2) TNMAC 151]***, has considered various previous judgments regarding the

liability of Insurance Company relating to Third party risks, where insurer has committed fundamental breach has held in paragraph 7 as follows:

> *"7. As per the decision in Swaran Singh case, 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, "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 drier, does not fulfilled the requirements of law or not will have to be determined in each case."*

14. In ***Parminder Singh vs. New India Assurance Co. Ltd., [(2019) 7 SCC 217]***, the Apex Court has once again reiterated the adoption of principle of pay and recovery of third party risks as held in paragraph 7 as follows:

> *"7.On the issue of liability to pay the compensation awarded, we affirm the view taken by the High Court that the Respondent – Insurance company is absolved of the liability to bear the compensation, as evidence has been produced from the office of the Regional Transport Office to prove that the drivers of the two offending trucks were driving on the basis of invalid driving licenses. It is also relevant to note that the owners and drivers of the offending trucks have not appeared at any stage of the proceedings, including this Court.*
>
> *7.1. This Court in Shamanna & Ors. v. The Divisional Manager, The Oriental Insurance Co. Ltd. & Ors., held that if the driver of the offending vehicle does not posses a valid*

driving license, the principle of 'pay and recover' can be ordered to direct the insurance company to the pay the victim, and then recover the amount from the owner of the offending vehicle.

7.2. We deem it just and fair to direct the Respondent – Insurance Company to pay the enhanced amount of compensation as indicated in Para.6 above, to the Appellant within a period of 12 weeks from the date of this judgment. The Respondent – Insurance Company is directed to make out a Demand Draft in the name of the Appellant, which can be used for his care for the rest of his life. The Respondent – Insurance Company is entitled to recover the amount from the owners and drivers of the two offending trucks."

15. In view of the above settled principle of law, to grant compensation for non-possession of a valid driving licence by the driver of the offending vehicle in case of a claim made by the third parties, the Principle of pay and recovery is to be followed. But the Tribunal, having adjudicated to the judgment in ***Swaran Singh***'s case cited supra, has failed to apply the principle of pay and recover. Accordingly, the second respondent - insurance company is directed to pay the compensation to the claimants and recover the same from the first respondent, who is the owner of the offending TATA load mini van bearing Registration No.TN-23-AP-4963. The other aspects of the award passed by the Tribunal is hereby confirmed.

16. In the result, these Civil Miscellaneous Appeals are allowed. The second respondent - Insurance Company is directed to deposit the amount awarded by the Tribunal along with interest @ 7.5% per annum from the date of filing of petition till the date of realization, excluding the default period, if any within a period of six weeks from the date of receipt of a copy of this judgment to the credit of M.C.O.P. Nos. 107 and 108 of 2018 on the file of the Special District Judge, Motor Accidents Claims Tribunal No.1, Special District Court, Thiruvallur and the second respondent – insurance company is given liberty to recover the same from the first respondent. On such deposit, the appellants/ claimants are permitted to withdraw the award amount along with interest and costs, less the amount if any, already withdrawn, as per the apportionment fixed by the Tribunal. The Tribunal shall disburse the amount directly giving credit to the Savings Bank Account of the claimants. There shall be no order as to costs in the present appeal.

02.11.2023

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Index:Yes/No

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

To:

1. The Special District Judge,
   Motor Accident Claims Tribunal No.1,
   Special District Court, Thiruvallur.

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

K. RAJASEKAR, J.

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