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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Dated : 03.02.2023

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THE HONOURABLE MRS.JUSTICE **N.MALA**

C.M.A(MD)No.890 of 2022

Ramesh ... Appellant/ Petitioner

Vs

1.Jayasingh

2.The United Insurance Company Limited,
Through its Branch Manager,
No.63-C, Palayamkottai Road,
Behind Government Hospital,
Tiruchendur. ...Respondents/ Respondents

PRAYER :-

This Civil Miscellaneous Appeal is filed under Section 173 of Motor Vehicles Act to fix the liability on the Insurance Company and enhance the award amount in M.C.O.P.No.6 of 2011 on the file of the Motor Accidents Claims Tribunal, Principal Sub Court, Tirunelveli, dated 11.02.2013.

For Appellant : Mr.T.Selvakumaran

For R1 : No Appearance

For R2 : Mr.J.S.Murali

JUDGMENT

The appeal is filed against the judgment and decree of the Motor Accidents Claims Tribunal in M.C.O.P.No.6 of 2011, dated 11.02.2013.

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2. The claimant is the appellant in the appeal. Though the appeal is filed for enhancement of compensation as well as direction to pay and recover, the learned counsel for the appellant at the time of argument restricted the appeal to the issue of pay and recover alone.

3. The summary of the facts are that on 06.11.2010, when the appellant was walking on the mud portion of the Tirunelveli - Tenkasi main road, the motor cycle bearing Registration No.TN-69-AY-2641 belonging to the first respondent insured with the second respondent came from east to west direction in high speed entered into the mud portion and knocked down the appellant. As a result of the impact, the appellant was thrown to some distance and sustained multiple fractures over the left leg besides multiple injuries all over the body. Soon thereafter, the appellant was rushed to the TVMC hospital, where he underwent surgery for implanting steel plates. According to the appellant, due to the accident, he was not able to stretch his left leg and there was complete restriction on the movement of the left leg. The appellant therefore filed claim petition claiming a sum of Rs.5,00,000/- towards compensation for the injuries sustained by him.

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4. The first respondent though appeared through counsel in the Tribunal did not file any counter and was set *ex parte* on 02.11.2011.

5. The second respondent insurance company filed a counter generally denying all the averments made in the claim petition and specifically stating that there was a breach of policy condition as the Driver of the two wheeler did not possess a valid driving licence at the time of the accident. On the issue of quantum, the second respondent insurance company stated that the claim was exorbitant and therefore prayed that the claim petition be dismissed.

6. The Tribunal on an assessment of the entire evidence on record both oral and documentary awarded a sum of Rs.1,07,000/- along with 9% interest as compensation and mulcted the liability on the owner of the vehicle on its finding that there was a breach of policy.

7. Aggrieved by the judgment and decree of the trial Court, the claimant has preferred the appeal.

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8. As stated supra, the only point that is agitated in the appeal is the failure of the Tribunal to direct pay and recover. At the outset, it is to be pointed out that though the first respondent, the owner of the vehicle was given notice through paper publication, he has remained absent even in this Court. The appeal is contested only by the Insurance Company.

9. The learned counsel for the second respondent/insurance company submitted that the Tribunal was justified in exonerating the insurance company on its finding that the rider of the two wheeler was a minor and he did not possess a valid driving licence. The learned counsel further submitted that the first respondent, being the father of the rider could not be heard to say that he had no knowledge that his minor son did not possess driving license. The learned counsel further submitted that the Tribunal was justified in exercising its discretion in not directing for pay and recover.

10. I have heard both the learned counsels and perused the entire materials on record.

11. The quantum of compensation and negligence are not in issue before me. The only point raised is whether the Tribunal is justified in

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exonerating the Insurance Company and not directing to pay and recover the compensation awarded by the Tribunal. The learned counsel for the appellant relied on the judgments of the Hon'ble Supreme Court in the case of ***National Insurance Company Limited Vs Swaran Singh and others*** reported in ***AIR 2004 SC 1531*** and ***Jawahar Singh Vs Bala Jain and others*** reported in ***(2011) 7 MLJ 833 (SC)*** to drive home the point that the Tribunal failed to exercise the discretion vested in it to order pay and recover.

12. The learned counsel for the second respondent on the other hand submitted that considering the relationship of the rider of the two wheeler with insurer, it is clear that that it was with the knowledge and permission of the insurer that the minor, who did not possess a valid driving licence drove the vehicle and caused the accident. The Hon'ble Supreme Court in the case of ***National Insurance Company Limited Vs Swaran Singh and others*** reported in ***AIR 2004 SC 1531*** has held as follows:

> *"105. The summary of our findings to the various issues as raised in these petitions are as follows:*
>
> *(i) ....*
>
> *(ii)...*
>
> *(iii) The breach of policy condition e.g., disqualification of driver or invalid driving licence of the driver, as contained in sub-section (2)(a)(ii) of section 149, have to be proved to have been*

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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."

13. From the aforesaid para, it is clear that the Insurance Company in order to fix liability on the insured has to prove as a fact that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the conditions of policy in the sense of the vehicle being driven by duly licensed driver.

14. In the present case, there is absolutely no evidence that with the knowledge and permission of the first respondent, the motor cycle was driven by the rider. In my view, in order to establish negligence of the insured it is incumbent on the insurer to prove that the insured with full knowledge of the consequence of his act, permitted the minor Driver to ride the vehicle without valid driving license. In the absence of any evidence on the said aspect, I am of the view that the act being a beneficial legislation the discretion to order

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pay and recover can be exercised. When the object of the act is to ensure that the victims of accident are not made to suffer, then it would be unjust and unfair not to direct the insurance company to pay and recover.

15. Therefore in the facts and circumstances of the case and in the interest of justice, I am of the view that the insurance company should be directed to pay the compensation amount and thereafter, recover the same from the insured. The appeal is therefore allowed and the judgment and decree of the trial Court is modified to the extent that the insurance company shall satisfy the award amount and recover the same from the insured. There shall be no order as to costs.

03.02.2023

NCC : Yes / No
Index : Yes / No
Internet : Yes / No
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To

1.The Motor Accidents Claims Tribunal,
Principal Sub Court, Tirunelveli.

2.The Section Officer, Vernacular Records,
Madurai Bench of Madras High Court, Madurai.

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N.MALA, J

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