IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 05.02.2024

CORAM:

**THE HONOURABLE MR. JUSTICE K. RAJASEKAR**

**C.M.A. No.2641 of 2021**
**and C.M.P. No.15101 of 2021**

The Branch Manager,
M/s. IFFCO-TOKIO General Insurance
Co. Ltd.,
Trichy. ... Appellant / 2nd Respondent

Vs.

1. Ambika
2. Minor. Adhikesavan
3. Minor. Anushka ... Respondents 1 to 3/ Petitioners

4. Ragupathi ... 4th Respondent/ 1st Respondent
5. The Branch Manager,
National Insurance Co. Ltd.,
Perambalur. ... 5th Respondent/ 3rd Respondent

Civil Miscellaneous Appeal filed under Section 173 of the Motor Vehicles Act, 1988 against the Judgment and decree dated 04.02.2021 passed in M.C.O.P. No. 570 of 2016 on the file of the Sessions Judge, Motor Accident Claims Tribunal, Mahila Court, Perambalur.

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|---|---|---|
| For Appellant | : | M/s. S. Arunkumar |
| For RR 1 to 3 | : | M/s. L.P. Balajiram |
| For R4 | : | M/s. R. Bharath Kumar |
| For R5 | : | M/s. N.B. Surekha |

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JUDGMENT

This Civil Miscellaneous appeal has been filed by the insurance company challenging the Judgment and decree passed in M.C.O.P. No. 570 of 2016, dated 04.02.2021 on the file of the Sessions Judge, Motor Accident Claims Tribunal, Mahila Court, Perambalur.

2. For the sake of convenience, the parties are referred herein according to their litigative status and rank before the Tribunal. The brief facts leading to filing of this appeal is as follows:

3. On 21.04.2015, at about 10:35 PM, the deceased Selvam was riding his two wheeler bearing Registration No.TN-46-R-0758 on the Vadaku Madhavi to Perambalur road, while he reached near Batcha Nagar, another two wheeler bearing Registration No.TN-46-R-5917, driven by the first respondent in a rash and negligent manner came in the opposite direction and dashed against the two wheeler of the deceased, which resulted in causing severe injuries to him and immediately, he was taken to hospital and thereafter, succumbed to injuries on 24.04.2015. A criminal case was registered in Cr.No.366 of 2015 under Section 279 and 337 of IPC

on the file of Perambalur Police Station. The claimants, who are the dependants of the deceased have filed claim petition seeking compensation for a sum of Rs.15,00,000/-.

4. The first and second respondents are the owner cum driver and insurer, respectively of the two wheeler bearing Registration No.TN-46-R-5917 and the third respondent is the insurer of the two wheeler of the deceased. The first respondent has not contested the claim and remained ex-parte.

5. The second respondent - insurance company has filed a counter and contended that the accident was taken place due to the contributory negligence of the deceased and stated that the first respondent has rode the two wheeler with due care and caution but due to the negligence on the part of the deceased, the accident has taken place. The second respondent - insurance company also disputed the age, avocation, income of the deceased and the dependency of the claimants and taken a stand that the first respondent was not having a valid driving licence to drive the two wheeler at the time of accident, hence there is a violation of policy condition, hence

the second respondent - insurance company is not liable to pay compensation.

6. The third respondent - insurance company contended that the accident has taken place only due to the negligence on the part of the first respondent, hence stated that the second respondent - insurance company is liable to pay the compensation.

7. After considering the evidence placed on record, the Tribunal has accepted the case of the claimants and held that the first respondent is the tortfeasor. The Tribunal further held that the second respondent - insurance company has failed to prove the fact that, the first respondent is not having a valid driving licence, hence directed the second respondent - insurance company to indemnify the first respondent and to pay compensation to the claimants. The Tribunal has also quantified and granted compensation for a sum of Rs.14,38,200/- along with interest @ 7.5% per annum from the date of filing of petition till the date of realization.

8. Aggrieved over the liability fixed, the second respondent -

insurance company has filed this appeal to set aside the award of the Tribunal. Claimants or other respondents have not come forward with an appeal against the award.

9. The learned counsel for the second respondent - insurance company submitted that they have examined R.W.1 - R.T.O. Official and also produced various documents to show that the first respondent was not in possession of a valid driving licence at the time of accident. The Tribunal has not appreciated the evidences placed on record and directed the second respondent - insurance company to indemnify the first respondent and to pay compensation to the claimants, hence prays to set aside the award of the Tribunal.

10. The learned counsel for the first respondent submitted that he was having a valid driving licence but he was not able to produce the same before this Court and the evidence of R.W.1 is not sufficient to prove the non-possession of driving licence, hence the Tribunal has rightly rejected the claim of the insurance company, hence prays to confirm the award of the Tribunal.

11. The learned counsel for the claimants submitted that, it is true that R.W.1 was examined and the R.T.O. Official has stated that there is no valid driving licence issued to the first respondent herein. However, the deceased in this case is the third party, hence the claimants herein are entitled to get compensation from the second respondent - insurance company and after satisfying the award of the Tribunal, the second respondent - insurance company may be directed to recover the same from the first respondent.

12. The third respondent - insurance company of the two wheeler of the deceased is only a formal party and she has supported the case of the claimants.

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

14. Before the Tribunal, R.W.1, namely Chitra, Official of the Regional Transport Authority was examined and according to her, the first respondent has not obtained any valid driving licence from their Office. In

the cross examination, she has admitted the suggestion that there is a possibility for the first respondent to get driving licence from any other Regional Transport Office. Based on this evidence, the Tribunal has held that the evidence of R.W.1 is not sufficient to prove the fact that the first respondent was not in a possession of valid driving licence. This Court is unable to appreciate the above reasoning of the Tribunal, since an individual eligible to get licence only from the place, where he is residing and the concerned Regional Transport Office issues licence only based on residential address of the applicant.

15. In this case, the first respondent was residing in Perambalur Taluk and the Official from Perambalur Regional Transport Authority has also been examined and there was no evidence available on record to show that the first respondent is residing in some other place and obtained driving licence from any other Regional Transport Authority. Before this Court, no documents or evidences have been produced to support the case of the first respondent that, he was having a valid driving licence at the time of accident. Hence, this Court is of the view that the Tribunal purely on assumption and without any valid evidence has taken a view that the first

respondent could have obtained a driving licence from any other Regional Transport Office, which is not proper and the same is liable to be set aside.

16. However, the deceased in this case is a third party to the second respondent - insurance company, as per the Hon'ble Apex 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.*
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> *(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."*

17. This Court has followed the above principle of Pay and Recover in various judgments. Accordingly, the insurance company herein shall pay the compensation to the claimants and thereafter recover the same from the insured, who is the owner of the vehicle. Accordingly, the award passed by the Tribunal is modified to the extent that the second respondent - insurance company shall pay the compensation as determined by the Tribunal and recover the same from the first respondent herein and the other aspects in the award are hereby confirmed.

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

**05.02.2024**

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

**K. RAJASEKAR, J.**

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To:

1. The Sessions Judge,
   Motor Accident Claims Tribunal,
   Mahila Court, Perambalur.

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

C.M.A. No. 2641 of 2021

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