(2013) 08 MAD CK 0267

In the Madras High Court

Case No : C.M.A. No. 195 of 2011& M.P. No. 1 of 2011

Bajaj Allianz General Insurance Co. Ltd., Chennai — APPELLANT

Vs

Samiyathaal — RESPONDENT

Date of Decision : 23-08-2013

Acts Referred:

Citation : (2014) 1 MadWN(Civil) 257 : (2014) 1 TNMAC 122

Hon'ble Judges : G.M. Akbar Ali, J.

Bench : Single Bench

Advocate : S. Arun Kumar, Advocate, for the Appellant; N. Manoharan, Advocate, for the Respondent Nos.1 & 2; Ex parte, for the Respondent No. 3

Final Decision : Disposed Off

Judgement

G.M. Akbar Ali, J.—This Civil Miscellaneous Appeal is filed by the Appellant, Insurance Company against the Judgment and Decree in M.C.O.P. No.127 of 2008 dated 30.8.2010 on the file of the learned Motor Accident Claims Tribunal, Subordinate Judge, Gudiyattam, questioning the liability to pay the Compensation to the Claimants in case of no valid Driving Licence.

2. In this Civil Miscellaneous Appeal, the question for consideration is -

"Whether the Insurer has to be exonerated totally in a case where they have established that the driver of the insured vehicle did not possess valid and effective licence on the date of accident or whether the liability can be fastened on the Insurer by directing them to pay the Compensation to the Claimants with a liberty to recover the same from the insured."

3. In a catena of judgments, the Hon''ble Apex Court has dealt with the liability of the Insurance Company while interpreting Section 149(2)(a)(ii) and the Proviso appended to sub-sections (4) & (5) of the Motor Vehicles Act, 1988. A Full Bench of this Court in Branch Manager, United India Insurance Co. Ltd., Dharmapuri Town v. Nagammal and others, 2009 (1) TN MAC 1 (FB): 2009 (1) CTC 1 (FB): 2009 (1) LW 702, was considering a question of pay and recovery

and the Full Bench has held as follows:

"31. Thus from an analysis of the statutory provisions as explained by the Supreme Court in various decisions rendered from time to time, the following picture emerges:

(i) The Insurance Policy is required to cover the liability envisaged under Section 147, but wider risk can always be undertaken.

(ii) Section 149 envisages the defences which are open to the Insurance Company. Where the Insurance Company is not successful in its defence, obviously it is required to satisfy the decree and the award. Where it is successful in its defence, it may yet be required to pay the amount to the Claimant and thereafter recover the same from the owner under such circumstance envisaged and enumerated in Section 149(4) and Section 149(5)."

4. The First Bench decision of this Court at Principal seat reported in Bajaj Allianz General Insurance Co. Ltd. v. P. Manimozhi and others, 2010 (2) TN MAC 542 (SC), had considered the question of non-possession of a valid licence of the driver and after considering the decision of another Division Bench reported in United India Insurance Co. Ltd. v. S. Saravanan, 2009 (2) TN MAC 103 (DB), held that when there is a breach of condition under an Insurance Policy, then the Insurance Company must pay and recover. It is necessary to extract the relevant portion from the above decision, which is as follows:

"14. The next contention raised by the learned Counsel appearing for the Appellant is that the Third Respondent, the rider of the two wheeler did not have a valid Driving Licence on the date of the accident and therefore, the Insurer is not liable to pay. The Hon''ble Supreme Court as regards this point namely, possession of valid Driving Licence broadly classified the same under four different categories:

(i) Where, there was no licence

(ii) Where, the licence is forged/fake

(iii) Where, the licence is for a different class of vehicle from the offending vehicle, and

(iv) Where, the licence is for a learner

and held that when there is a breach of condition under an Insurance Policy is proved then the Insurance Company must pay and may recover. A Division Bench of this very Court in which one of us (T.S. Sivagnanam, J.) was a party, considered this very issue and after taking note of the decisions of the Hon''ble Supreme Court in the case of New India Assurance Co. Ltd. v. Kamla, 2001 (4) SCC 342; United India Insurance Co. Ltd. v. Lahru, 2004 (1) TN MAC 340 (SC); Skandia Insurance Co. Ltd. v. Kokilaban Chandravadan, 1987 (2) SCC 654; Sohan Lal Passi v. P. Sesh Reddy, 1996 (5) SCC 21; Oriental Insurance Co. Ltd. v. Swaran Singh, 2004 (1) TN MAC 104 (SC); and National Insurance Co. Ltd. v.

Laxmi Narain Dhut, 2001 (1) TN MAC 310 (SC) held that the Insurer must pay the amount and then may recover."

5. In a judgment reported in Divisional Manager, National Insurance Co. Ltd. v. A. Usha and another, 2010 (2) TN MAC 27 : 2011 (1) TLNJ 258 (Civil), my esteemed brother Justice S. Manikumar, had also dealt with a case of Insurance Company disputing the liability on the ground that the driver of the vehicle insured with them did not possess a valid and effective licence. After analysing the provisions of the Act and various decisions held as follows:

"18. It is well known that till a reference is decided by a Larger Bench of Supreme Court, the law which is applicable to the case falling under Section 149(4), has to be decided following the Division Bench of this Court in United India Insurance Co. Ltd. v. S. Saravanan, 2009 (5) MLJ 715, to maintain uniformity in claim cases, where there is no licence for the driver to drive the vehicle at the time of accident and the Compensation has to be paid by the Insurance Company to the Third Party victim, who is not aware as to whether the driver of the offending vehicle had the requisite and valid Driving Licence to drive that particular kind of vehicle. Though the issue is now pending before the Supreme Court, yet it should be noted that this Court in United India Insurance Co. Ltd. v. S. Saravanan, 2009 (5) MLJ 715, after considering a catena of decisions, held that the Insurer must pay so far as Third Party''s risk and recover the same from the Insurer, if so advised."

6. After analysing various judgment of the Supreme Court and this court, the dictum laid down in the judgment reported in Jawahar Singh v. Bala Jain & Ors., 2011 (1) TN MAC 641 (SC), was followed and ordered the Insurance Company to pay the Compensation and recover the same from the owner of the vehicle.

7. Therefore, in a case of expired licence or a forged/fake licence or learner''s licence, the dictum is, it is a breach of Policy condition where the owner of the vehicle was not prudent in verifying the licence produced by the driver and therefore, the Insurance Company is not liable; however, they can be directed to pay the Compensation to the victim with a liberty to recover the same from the insured. The learned Counsel for the Insurance Company would concede that in a case of fake or expired licence or invalid licence to drive a vehicle or a licence without Badge, though the Insurance Company has established the breach of Policy condition, they may be ordered to pay and later recover from the owner of the vehicle, but, not in the case of no licence at all.

8. However, according to the learned Counsel for the Claimants, as per the dictum laid down by the Apex Court in the celebrated case of National Insurance Co. Ltd. v. Swaran Singh, 2004 (1) TN MAC 104 (SC), wherein the Three-Judges of the Hon''ble Supreme Court has dealt in dealt with the licence and had settled the principles, 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, the Insurer would not be allowed to avoid its liability unless the said

breach of condition is so fundamental. According to the learned Counsel it does not make a difference between a fake licence or a expired licence and no licence.

9. Heard the learned Counsel for the Appellant/Insurance Company and the learned Counsel for the Respondents/Claimants. Though the name of the Third Respondent owner appeared in the cause list there is no representation. Since it is a well settled principle that if the owner remains ex parte before the Tribunal, notice is not necessary, as there is no subsequent changes in the Award. Perused the entire materials on record and also gone through the various judgments in this regard.

10. Therefore, as per the dictum laid down in National Insurance Co. Ltd. v. Swaran Singh, 2004 (1) TN MAC 104 (SC); United India Insurance Co. Ltd v. S. Saravanan, 2009 (2) TN MAC 103 (DB); Bajaj Allianz General Insurance Company Ltd. v. P. Manimozhi and others, 2010 (2) TN MAC 542 (SC); Branch Manager, United India Insurance Co. Ltd., Dhurmapuri Town v. Nagammal and others, 2009 (1) TN MAC 1 (FB) : 2009 (1) CTC 1 (FB) : 2009 (1) LW 702; Jawahar Singh v. Bala Jain & Ors., 2011 (1) TN MAC 641 (SC); and Iffco Tokyo General Insurance Co. Ltd. v. A. Jafer Sadiq and others, 2012 (1) TN MAC 394 (DB), it is settled that if the Insurer establishes that there is a breach of Policy condition under Section 149(2)(a)(ii), the Insurance Company though not liable, as it has successfully established its defence, can be directed to pay and recover from the insured. However, the Tribunal being not convinced with the evidences put forth by the Insurance Company directed the Insurance Company to pay the Compensation. Considering the submissions made by the learned Counsel for the Appellant-Insurance Company, this Court is of the view that the driver of the vehicle had no valid licence on the date of accident and hence the Insurance Company is directed to pay and then to recover from the owner.

11. In Oriental Insurance Co. Ltd v. Shri Nanjappan, 2004 (1) TN MAC 211 (SC) : 2004 (1) ACC 524 (SC), mode of recovery is being mentioned and therefore the learned Counsel representing the Insurance Company requested this Court to incorporate such mode to enable the Insurance Company to recover the Compensation paid from the owner.

12. Therefore, it is held that the Insurance Company is directed to pay and recover the same from the owner of the vehicle. However, the Insurance Company is entitled to recover the Compensation as per the mode incorporated in Paragraph 8 of Oriental Insurance Co. Ltd v. Shri Nanjappan, 2004 (1) TN MAC 211 (SC), which is incorporated as follows:

" For the purpose of recovering the Compensation amount from the insured, the Insurer shall not be required to file a Suit. It may initiate a proceeding before the concerned Executing Court as if the dispute between the Insurer and the insured was the subject matter of determination before the Tribunal and as if the issue is decided against the owner and in favour of the Insurer. A notice shall be issued to the insured to furnish security'' for the entire amount. The offending vehicle shall be attached as a part of the security. If necessity arises, the Executing Court shall take assistance of the concerned Regional Transport Authority. The Executing Court shall pass appropriate Orders in accordance with law as to the manner in which the insured/owner of the vehicle shall make payment to the Insurer. In case there is any default it shall be open to the Executing Court to direct realization by disposal of the securities to be furnished or from any other property of the insured".

13. In the result the Civil Miscellaneous Appeal is partly allowed. Consequently, connected M.P. is closed. No costs.