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(2017) 04 MAD CK 0063

In the Madras High Court

Case No : 985 of 2017

Kalaipriya, & Ors. APPELLANT

Vs

M.Velu, & Anr. RESPONDENT

Date of Decision : 25-04-2017

Acts Referred:

Motor Vehicles Act, 1988, Section 147, Section 147, Section 149(2)(a), Section 149(2)(a), Section 149(2), <a href=15711-149>Sec

Citation : (2017) 04 MAD CK 0063

Hon'ble Judges : S.Manikumar, M.Govindaraj

Bench : DIVISION BENCH

Advocate : S.Manikumar, M.Govindaraj

Final Decision : Allowed

Judgement

1. On 20/4/2017, we passed the following order :",

In the accident, involving a motorcycle bearing registration No.TN-23- AB-7491 and an auto rickshaw bearing registration",

No.TSL-9348, insured with the United India Insurance Company Limited, the motorcyclist sustained injuries and died.",

2. Legal representatives viz., wife and minor children and parents, filed MCOP.No.453 of 2012, on the file of the MACT [Principal",

District Judge], Vellore, claiming compensation of Rs.50,00,000/- under various heads.",

3. United India Insurance Company Limited, opposed the claim contending inter alia that it was the motorcyclist, who caused the",

accident. Notwithstanding the above, the company further submitted that the driver of the auto-rickshaw did not possess a valid and",

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effective driving licence at the time of accident and that therefore, the Insurance company cannot be fastened with liability to pay",

compensation. Without prejudice above, they disputed the age, avocation, income and compensation claimed under various heads.",

4. Adjudicating the disputes, the claims tribunal found that the driver of auto-rickshaw bearing registration No.TSL- 9348 and",

insured with United India Insurance Company Limited, was negligent in causing the accident. On the aspect of liability, to pay",

compensation, taking note of the testimony of RW2, Superintendent, Regional Transport Corporation Office, Vellore and entry in",

Ex.R8, charge sheet, the tribunal has categorically held that the driver of the auto-rickshaw, did not possess a valid and effective",

driving licence, at the time of accident. However, relying on certain decisions, tribunal has chosen to exonerate the Insurance",

Company, from payment of compensation to legal representatives of the deceased, admittedly a third party. The tribunal has directed",

the owner of the auto-rickshaw to pay compensation.,

5. Being aggrieved, against exoneration and the consequential, direction to the owner of the vehicle to pay compensation, instant",

appeal is filed by the legal representatives of the deceased, wife, minor children and father.",

6. The first respondent owner and the second respondent United India Insurance Company Limited, Divisional Office, Katpadi",

Road, Vellore, the insurer, have been served. Proof affividavit has been filed.",

7. Considering the limited challenge and in the light of the decision of this Court in ICICI Lombard General Insurance Company Vs.,

Annakkili, reported in 2012 (1) TN MAC 226 and the latest decision of the Hon''ble Supreme Court in S.Iyyappan Vs. M/s. United",

India Insurance Company ltd., and another, reported in (2013) 7 SCC 62, we deem it fit to direct Mr.M.B.Ragavan, learned",

Counsel present in Court, to take notice on behalf of the second respondent/ United India Insurance Company, to get suitable",

instructions.,

8. Post on 25.04.2017.""",

2. Going through the judgment, Mr.M.B.Raghavan, learned counsel for the United

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India Insurance Compnay Limited, Vellore/second respondent",

herein, submitted that there is no material irregularity in the impugned judgment, warranting reversal of liability, to pay compensation.",

3. We have given our anxious consideration to the rival contentions of the learned counsel for the parties, on the aspect of liability to pay",

compensation to the 3rd party victim.,

4. The question as to whether, it is open to the insurer to seek for total exoneration for payment of compensation to a third party victim or whether",

it has only a right of recovery under Sections 149 (4) and (5) of the Motor Vehicle''s Act, has been extensively considered in ICICI Lombard",

General Insurance Company Vs. Annakkili, reported in 2012 (1) TN MAC 226, wherein, one of us (Mr.Justice S.Manikumar), following the",

principles of law laid down by the Hon''ble Apex Court and the Hon''ble Division Bench judgments held that, payment of compensation to a third",

party victim or legal representatives of the deceased, as the case may be, is statutory and considering the interpretation given by the Supreme",

Court to Sections 147, 149 (4) and (5) vis-a-vis, the defences open to the Insurance Company under Section 149(2)(a)(ii) of the Motor Vehicles",

Act held that the very introduction of the words, ""pay compensation to the third party and recover the same from the insured"" in Section 149(4)",

and (5) of the Act, would reflect the divine intention of the legislature to protect the interest of the third parties, vis-a-vis inter-se disputes between",

the insured and insurer, and further held that the insurer cannot avoid its liability to pay compensation to a third party, but such avoidance can be",

made only, if willful breach of terms and conditions of the policy by the insured, by consciously and recklessly allowing the driver, who did not",

possess a valid and effective driving licence, to drive the vehicle and even if such breach is proved, payment of compensation to the third party",

victim cannot, at any stretch of imagination, be avoided by the Company and that the only remedy open to the insurer in law is to pay the",

compensation to the third party victims and recover from the insured. In view of the above, the insurer cannot be totally exonerated from payment",

of compensation to third party, but it can avoid its liability only to the insured.",

5. In a decision of this Court in Branch Manager, Oriental Insurance Company Ltd., Theni Vs. Mansoor Hussain and another, reported in 2013(2)",

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CTC 57, Hon''ble Mr. Justice, G.M.Akbar Ali, my Esteemed Brother, has considered a catena of decisions of the Hon''ble Supreme Court, as",

well as this Court and after extracting Section 149(2)(a)(ii), at paragraph Nos.19 to 29, held as follows:",

19. It has to be borne out in mind that only under Section 149 of the Act the Insurer has become a party in a tortuous claim",

otherwise, it is only a Suit between the victim and the tort feasor. Only under an Insurance Policy between the tort feasor and the",

Insurance Company the Insurer has undertaken to indemnify the insured. Therefore, the defences available to the Insurance Company",

is very limited.,

20. Section 149(2)(a)(ii) reads as follows:,

Duty of insurers to satisfy judgments and awards against persons insured in respect of third party risks. -",

(2) No sum shall be payable by an Insurer under subsection (1) in respect of any judgment or award unless, before the",

commencement of the proceedings in which the judgment or award is given the Insurer had notice through the Court or, as the case",

may be, the Claims Tribunal of the bringing of the proceedings, or in respect of such judgment or award so long as execution is",

stayed thereon pending an Appeal; and an Insurer to whom notice of the bringing of any such proceedings is so given shall be entitled,

MOTOR VEHICLES ACT, 1939","MOTOR VEHICLES ACT, 1988

96. Duty of insurers to satisfy judgments against persons insured

in respect of third party risks. -(3) Where a certificate of

insurance has been issued under sub-section (4) of Section 95

to the person by whom a policy has been effected, so much of

the policy as purports to restrict the insurance of the persons

insured thereby by reference to any conditions other than those

in clause (b) of sub-section (2) shall, as respects such liabilities

as are required to be covered by a policy under clause (b) of

sub-section (1) of Section 95, be of no effect:","149. Duty of insurers to satisfy judgments and awards against

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persons insured in respect of third party risks. -(4) Where a

certificate of insurance has been issued under sub-section (3) of

Section 147 to the person by whom a policy has been effected, so

much of the policy as purports to restrict the insurance of the

persons insured thereby by reference to any condition other than

those in clause (b) of sub-section (2) shall, as respects such

liabilities as are required to be covered by a policy under Clause

(b) of sub-section (1) of Section 147, be of no effect:

Provided that any sum paid by the Insurer in or towards the

discharge of any liability of any person which is covered by the

Policy by virtue only of this sub-section shall be recoverable by

the Insurer from that person.","Provided that any sum paid by the insurer in or towards the

discharge of any liability of any person which is covered by the

Policy by virtue only of this subsection shall be recoverable by the

Insurer from that person.

Insurer may be justified in refusing indemnity.""",

23. This anomaly was pointed out by Mr. S. Srinivasa Ragavan, an Advocate for Insurance Companies, in his article ''LIFTING",

THE LEGISLATIVE VEIL"" published in 2010 (4) CTC 68 J.S. It is pointed out that ''While drafting subsection (4) of Section 149",

of the M.V. Act in 1988, the parliament ought to have amended the provision of law by making clause (b) as clause (a)"". In my view,",

as expressed in the judgment in Iffco Tokyo General Insurance Company v. Jafter Sadiq, 2012 (1) TN MAC 394 (DB), whether it is",

the draftsman''s mistake or the wisdom of the parliament, in fact the New Act had denied the right of the Insurance Company to",

avoid its liability in cases of driving licences. In that case, even the defence of questioning the licence of the driver is not available to",

the Insurer. Though there was a suggestion on the side of the Insurance Company, that it is only a draftsman''s mistake, we held that it",

is the wisdom of the Parliament restricting the defences of the Insurer.,

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24. Therefore, as per the dictum laid down in National Insurance Co. Ltd. V. Swaran Singh and others, 2004 (1) TN MAC 104",

(SC) : 2004 (1) TAC 321 (SC); in United India Insurance Co. Ltd. V. S. Saravanan, 2009 (2) TN MAC 103 (DB); in Bajaj Allianz",

General Insurance Co. Ltd., Pune v. P. Manimozhi and others, 2010 (2) TN MAC 542 (DB), in Branch Manager, United India",

Insurance Co. Ltd., Dharmapuri Town v. Nagammal and others, 2009 (1) TN MAC 1 (FB) and in Jawahar Singh v. Bala Jain and",

others, 2011 (1) TN MAC 641 (SC); and in Iffco Tokyo General Insurance Company v. Jafer Sadiq, 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.",

25. However, in New India Assurance Co. Ltd. V. Chandran and another, 2010 (1) TN MAC 65, a learned Single Judge of this",

Court has held that Where the Insurance Company has positively proved that on the date of accident, the driver of the offending",

vehicle has not possessed of any licence at all, the owner of the vehicle alone liable to pay compensation. The order of the Larger",

Bench in National Insurance Co. Ltd. V. Swaran Singh and others, 2004 (1)TN MAC 104 (SC), directing the Insurance Companies",

to pay and later recover even in cases of ''did not hold any licence at all'' was negatived holding. It is not a precedent binding on the,

Courts.,

26. In my humble opinion in Sardari v. Sushil Kumar, 2008 (1) TN MAC 294 (SC) (cited supra) the question of pay and recover",

was not considered at all. In Branch Manager, New India Assurance Co. Ltd. V. Muralikrishnan and another, 2010(3) MLJ 271,",

P.K. Mishra, H. laid down a ratio decidendi which is as follows: ""The judgment of the Supreme Court in National Insurance",

Company Ltd. V. Vidhyather Mahariwala and others, 2008 (2) TN MAC 369 (SC) : 2008 (6) CTC 254 (SC) does not, as a rule,",

exclude the ""pay and recover"" policy in all cases."" It applies to Sardari''s case also. Similarly, the learned Single Judge has dealt with",

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only Article 142 of the Constitution of India and the self-contained relief under Section 149(4) of the M.V. Act was not urged before,

the Court for pay and recover.""",

27. I am of the considered view that the defence available under Section 149(2)(a)(ii) which relates to duly licenced includes no,

licence also. The contention that in the case of no licence at all the insured was guilty of negligence and failed to exercise reasonable,

care in the matter fulfillingthe Policy condition can not be acceptable as the victim can not suffer for the failure of the insured. The,

wisdom of the Three-Judges Bench of the Supreme Court in British India General Insurance Co. Ltd. V. Captain Itbar Singh and,

others, 1958-1965 ACJ 1, is very relevant. This Court is also bound by the decision of the Full Bench in Branch Manager, United",

India Insurance Co. Ltd., Dharmapuri Town v. Nagammal and others, 2009 (1) TN MAC 1 (FB) (cited supra) wherein it is held that",

- ""Where it (Insurance Company) 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......"" It is also relevant to refer to Jawahar Singh v. Bala Jain and others, 2011 (1) TN MAC 641",

(SC), where the Supreme Court upheld the order of the Tribunal directing the Insurer to pay and recover from the insured in case of",

a Minor who did not posses and could not have possessed any licence at all, caused the accident. Therefore, even in case of no",

licence if the Insurance Company establishes that the driver of the insured vehicle was not in possession of any type of licence, the",

Insurance Company is to be exonerated but as per sub-section (4) & (5) of Section 149 of the Act, they can be directed to pay and",

recover. Therefore, the questions are answered accordingly in all the Civil Miscellaneous Appeals. Since in all the above Appeals the",

Insurance Company has established no licnese to the drivers, the Appellants are exonerated but directed to pay the compensation",

and recover the same from the owner of the vehicle in the same proceedings.,

28. In Oriental Insurance Co. Ltd. V. Shri Nanjappan and others, 2004 (1) TN MAC 211 (SC) : 2004 (2) CTC 464 (SC) : 2004",

(1) ACC 524 (SC) the mode of recovery is being mentioned and therefore the

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Counsel of the Insurance Company requested this,

Court to incorporate such mode to enable the Insurance Company to recover the compensation paid from the owner. Since the,

mode of recovery is not mentioned in the orders of the Tribunal, I see there is a force in the argument of the learned Counsels for the",

Insurance Companies.,

29. In the result, all the Appeals are disposed of holding that in all the cases of no licence, the Insurance Company, though",

exonerated but directed to pay and recover the same from the owner of the vehicle. The Insurance Company is entitled to recover,

the compensation as per the mode incorporated in Paragraph 7 of Oriental Insurance Co. Ltd. V. Shri Nanjappan and others, 2004",

(1) TN MAC 211 (SC) ; 2004 (2) CTC 464 (SC) : 2004 (1) ACC 524 (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,

necessary 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"".",

6. Further, in yet another decision in S.Iyyapan v. United India Insurance Co. Ltd., reported in 2013 (7) SCC 62, the Hon''ble Supreme Court,",

while dealing with a similar contention of a valid and effective driving licence, at Paragraph 17, held as follows:",

Hence, in our considered opinion, the insurer cannot disown its liability on the ground that although the driver was holding a licence",

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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.""",

7. In view of the above discussion and the decisions stated supra, decision of the Tribunal, exonerating United India Insurance Company Limited,",

from payment of compensation to a third party victim and the direction issued to the owner to pay the same, are erroneous and liable to be",

interfered with. Deceased being a 3rd party, United India Insurance Company Limited is liable to pay the compensation and thereafter to recover",

the same from the owner.,

8. In the result, this Civil Miscellaneous Appeal is allowed as indicated above. The United India Insurance Company Limited, Vellore/second",

respondent herein is directed to deposit the entire award amount, with proportionate interest and costs, less the statutory deposit, to the credit of",

M.C.O.P.No.453 of 2012, on the file of the Motor Accidents Claims Tribunal, Principal District Judge, Vellore District, within a period of six",

weeks, from the date of receipt of the copy of this order. On such deposit, the appellants 1 and 5 are permitted to withdraw their share, as",

apportioned by the Tribunal, with proportionate interest, by making necessary applications. Share apportioned to the minors/appellants 2 to 4,",

shall be invested in any of the Nationalised Bank, proximate to the residence of the first appellant, till they attain majority. The first appellant/mother",

of the minors, is permitted to withdraw the share of the minors, once in three months. No costs.",

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