

(2010) 11 MAD CK 0450

In the Madras High Court

Case No : Appeal No. 438 of 2010 and M.P. No. 1 of 2010

United India Insurance Co. Ltd.

APPELLANT

Vs

E. Rajamanickam and Balasubramani

RESPONDENT

Date of Decision : 12-11-2010

Acts Referred:

Constitution of India, 1950 — Article 141
Motor Vehicles Act, 1988 — Section 3, 4, 5

Citation : (2011) 2 MLJ 207

Hon'ble Judges : R. Subbiah, J

Bench : Single Bench

Advocate : M.J. Vijayaraghavan, for the Appellant; M. Selvam, for R1, for the Respondent

Final Decision : Allowed

Judgement

R. Subbiah J.

1. This appeal has been preferred by the insurance company challenging the award dated 31.08.2009 passed by the Motor Accidents Claims Tribunal (Additional District Judge, Fast Track Court No. I), Salem, in M.C.O.P. No. 207 of 2005.

2. It is the case of the 1st Respondent/claimant before the Tribunal that on 24.12.2004 while he was walking towards the old bus stand, Salem on Anna Nagar Housing Board Road, a TVS 50 XL Super bearing registration No. TN-30-F-1931 came from the opposite direction in a rash and negligent manner and dashed against him and thus, caused the accident. At the time of the accident, the said two wheeler was driven by one Mariappan. For the injuries sustained in the accident, the claimant made a claim for a sum of Rs. 4 lakhs against the owner of the vehicle, the 2nd Respondent herein as well as the insurer of the vehicle, the Appellant herein. The Appellant insurance company contested the claim petition by taking a defence that at the time of accident, the rider of the two wheeler did not possess a driving licence to drive that vehicle and as such,

the claim petition against them has to be dismissed. In order to prove the claim, the claimant examined himself as P.W.1 besides examining one doctor as P.W.2 and marked Exs.A-1 to A-10 and on the side of the insurance company, one Sankaranarayanan was examined as R.W.1 and Exs.B-1 to B-3 were marked. The Tribunal, after analysing the evidence both oral and documentary, awarded a sum of Rs. 74,163/- and directed the owner as well as the insurer of the vehicle to pay the same. Aggrieved over the same, the insurance company has filed the present appeal.

3. Learned Counsel for the Appellant insurance company submitted that when the rider of the vehicle did not have any driving licence at the time of accident, the insurance company cannot be made liable to pay the compensation amount. Therefore, the finding of the Tribunal in fixing the liability on the part of the insurance company to be set aside and consequently, the Appellant has to be exonerated from their liability in paying the compensation. In support of his contentions, the learned Counsel has also relied upon the decisions reported in the case of Sardari and Ors. v. Sushil Kumar and Ors. 2008(1) TN MAC 294 SC, Oriental Insurance Co.Ltd. Pondicherry v. Anbu Thiagarajan and Anr. 2009(2) TN MAC 364 and Divisional Manager, New India Assurance Co.Ltd. v. V.Chandran and Anr. 2010 (1) TN MAC 65.

4. Per contra, the learned Counsel for the 1st Respondent/claimant submitted that the non-possession of the driving licence is only a violation to the conditions of the policy and under such circumstance, the insurance company has to be directed to pay the compensation amount and permitted to recover the same from the owner of the vehicle. In support of his contention, the learned Counsel relied on the decisions reported in the case of National Insurance Co.Ltd. v. Swaran Singh and Ors. 2004(1) TN MAC 104 (SC), United India Insurance Co. Ltd. v. K.G. Vimala and Ors. 2010(1) TN MAC 340 and United India Insurance Co. Ltd. v. Asha Devi 2010(1) TN MAC 680(DB)(All.)

5. By way of reply, the learned Counsel for the Appellant submitted that when the rider of the vehicle did not have a driving licence, the question of paying and recovering the compensation amount from the owner of the vehicle does not arise.

6. Heard the learned Counsel for the parties.

7. In view of the submissions made by the learned Counsel appearing on either side, the question that has arisen in this case is, whether the insurance company can be held liable to pay the compensation when the rider of the vehicle did not possess a driving licence as prescribed under law, at the time of accident. In this regard, a reference could be placed on the judgments relied on by the learned Counsel on either side. In 2008(1) TN MAC 294 (SC) (supra), the Hon"ble Apex Court has held as follows:

7. The concurrent finding of fact herein is that Sushil Kumar never held a license. The owner of the vehicle has a statutory obligation to see that the driver of the

vehicle whom he authorized to drive the same holds a valid license. Here again, a visible distinction may be noticed, viz. where the license is fake and a case where the license has expired, although initially when the driver was appointed, he had a valid license.

The question came up for consideration before this Court in *United India Insurance Co. Ltd. Vs. Gian Chand and others*, wherein it was held;

12. Under the circumstances, when the insured had handed over the vehicle for being driven by an unlicensed driver, the Insurance Company would get exonerated from its liability to meet the claims of the third party who might have suffered on account of vehicular accident caused by such unlicensed driver...

A three Judges' Bench of this Court in *National Insurance Co. Ltd. Vs. Swaran Singh and Others*, upon going through the provisions of the Act as also the precedents operating in the field, laid down the following dicta:

84. We have analysed the relevant provisions of the said Act in terms whereof a motor vehicle must be driven by a person having a driving licence. The owner of a motor vehicle in terms of Section 5 of the Act has a responsibility to see that no vehicle is driven except by a person who does not satisfy the provisions of Section 3 or 4 of the Act. In a case, therefore, where the driver of the vehicle, admittedly, did not hold any licence and the same was allowed consciously to be driven by the owner of the vehicle by such person, the Insurer is entitled to succeed in its defence and avoid liability. The matter, however, may be different where a disputed question of fact arises as to whether the driver had a valid licence or where the owner of the vehicle committed a breach of the terms of the contract of insurance as also the provisions of the Act by consciously allowing any person to drive a vehicle who did not have a valid driving licence. In a given case, the driver of the vehicle may not have any hand in it at all e.g. a case where an accident takes place owing to a mechanical fault or vis major. (See *Jitendra Kumar* 22)

In *National Insurance Co. Ltd. Vs. Kusum Rai and Others*, a Bench of this Court (wherein one of us was a member) held:

11. It has not been disputed before us that the vehicle was being used as a taxi. It was, therefore, a commercial vehicle. The driver of the said vehicle, thus, was required to hold an appropriate licence therefor. Ram Lal who allegedly was driving the said vehicle at the relevant time, as noticed hereinbefore, was holder of a licence to drive a light motor vehicle only. He did not possess any licence to drive a commercial vehicle. Evidently, therefore, there was a breach of condition of the contract of insurance. The Appellant, therefore, could raise the said defence.

14. This Court in *Swaran Singh* clearly laid down that the liability of the Insurance Company vis-a-vis the owner would depend upon several factors. The owner would be liable for payment of compensation in a case where the driver

was not having a licence at all. It was the obligation on the part of the owner to take adequate care to see that the driver had an appropriate licence to drive the vehicle. The question as regards the liability of the owner vis-a-vis the driver being not in possession of valid license has also been considered in para 89 in Swaran Singh (supra).

8. This Court in a decision in 2009(2) TN MAC 364, has held as follows:

12. Following the principles laid down by the Hon'ble Supreme Court on this proposition, this Court is of the considered view that since it is manifest on the basis of the records that the driver of the vehicle did not possess any type of license on the date of accident, the Insurance Company cannot be fastened with the liability to pay compensation to the claimant and the owner has to satisfy the award.

9. The Madurai Bench of this Court in (2010 (1) TN MAC 65) (supra) has observed as follows:

29. From the close reading of the decisions referred to above, it is made clear that if there is any violation of the conditions of contract of insurance, the concerned insurance company cannot be fastened with liability and further it is made clear that if violation of policy condition arises, the question of pay and recover does not arise as per law and it is purely discretion of the Court....

34. It has already been stated in many places that the findings given by the Larger Bench of the Honourable Apex Court in National Insurance Co. Ltd. Vs. Swaran Singh and Others, , with regard to pay and recover is applicable only to that case and the Larger Bench of the Honourable Apex Court has categorically stated to the effect that "this order may not be considered as a precedent". Therefore with regard to principle of pay and recover, the Larger Bench of the Honourable Apex Court has not settled anything finally so as to bind other Courts. As per the categories culled out by the Honourable Apex Court under Article 141 of the Constitution of India "if an order has been passed with the consent of parties, and with reservation that it should not be treated as a precedent, the same is not binding upon other Court". Since the Larger Bench of the Honourable Apex Court has not finally settled the principle of pay and recover to the effect that the said principle applies invariably in all cases, the said finding cannot be treated as things finally decided or settled.

35. It is a settled principle of law that for applying "stare decisis, stare decisis et non quieta movere", the point or principles of law in question must be settled by a competent Court. Therefore, it is quite clear that the principle of stare decisis cannot be applied on the basis of the finding given in the decision reported in National Insurance Co. Ltd. Vs. Swaran Singh and Others, , in preference to the decision reported in Sardari and Others Vs. Sushil Kumar and Others, .

10. A reading of the above judgments would show that if there is any violation of the conditions to the policy, the insurance company cannot be fastened with

liability. In the instant case, the driver of the two wheeler had not possessed with any type of driving licence at the time of accident and at least, if the case of the insurance company that the rider of the two wheeler did not have a valid driving licence, this Court can order "pay and recover". But, this is the case of "no licence". Therefore, the principle of "pay and recover" cannot be applied to this case. Though the learned Counsel for the 1st Respondent relied upon the judgments, namely 2004(1) TN MAC 104 (SC); 2010(1) TN MAC 340 and 2010(1) TN MAC 680(DB)(All.), they cannot be made applicable to the facts of this case since all the decisions dealt with the case of non-possession of a valid driving licence. If a person rides the two wheeler without licence, he is not legally authorised to drive the vehicle. Therefore, it is clear that the Appellant insurance company had discharged its burden to the effect that the driver of the 2nd Respondent/owner of the vehicle has not possessed of any licence on the date of accident. Further, neither the 2nd Respondent nor his driver had chosen to give any evidence to that effect. Under such circumstances, the question of "pay and recover", in the instant case, does not arise. But, without considering these aspects, the Tribunal has erroneously fixed the liability on the part of the Appellant insurance company. Hence, in my considered opinion, the insurance company cannot be fastened with the liability and as such, the finding of the Tribunal is liable to be set aside and, accordingly, the same is set aside.

In fine, the civil miscellaneous appeal is allowed and the insurance company is exonerated from its liability in paying the compensation. The 1st Respondent/claimant can work out his remedy as against the 2nd Respondent, the owner of the vehicle, in recovering the compensation amount. No costs. Consequently, connected M.P.is closed.