IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 07.09.2020

PRONOUNCED ON : 14.09.2020

CORAM

THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN

Civil Miscellaneous Appeal No.1746 of 2016 and
M.P.No.1 of 2015 and
C.M.P.No.5744 of 2016
(Heard through video conferencing)

United India Insurance Company Ltd.,
represented by its Branch Manager,
G.P.M. Street, Ambapuram,
Gudiyattam, Vellore District. ... Appellant

Vs

1.Krishnaveni

2.Magitha

3.Rajesh ... Respondents

Prayer:- This Civil Miscellaneous Appeal has been filed under Section 173 of the Motor Vehicles Act, 1988 against the award and decree dated 11.07.2013 made in O.P.No.215 of 2009 on the file of the Motor Accident Claims Tribunal (Sub Court), Gudiyattam, Vellore District.

For Appellant :Mr.D.Baskaran

For Respondents 1 and 2 :Mr.K.A.Ravindran
For 3rd Respondent :No Appearance

JUDGMENT

Aggrieved by the award dated 11/07/2013 passed by the Motor Accident Claims Tribunal, Gudiyatham in M.C.O.P.No.215 of 2009, fixing the liability on the Insurer, the United India Insurance Co.,Ltd, has filed the above appeal.

2.The claim petition under section 166 of the Motor Vehicles Act, filed by the respondents 1 and 2 against the appellant (Insurer) and the 3rd respondent (Insured) herein was allowed by the Tribunal by awarding a sum of Rs 7,56,000/- with 7.5% interest payable by the Insurer and the Insured jointly and severely. The same is challenged by the Insurer as contrary to law and excessive.

3.The third respondent herein is the owner of the TATA Sumo Car bearing registration No. TN 32 A 4995. The vehicle had insurance coverage under the appellant. It has package policy valid between 18/09/2008 and 17/09/2009. On 29/03/2009, the vehicle capsized on the Bangalore – Chennai National Highways

near Neervallur Village when its Driver suddenly applied brake to avoid hitting a bullock crossing the road. The Driver and 4 others got injured. They all were taken to the Meenakshi Medical College Hospital. Later, the Driver Chakravarthy who was injured severely was shifted to Ramachandra Medical College for better treatment. Thiru.Rajesh, the owner of the car/the third respondent herein, who was one of the occupants in the Car gave the first information to the Police. Based on his information, FIR was registered against the Driver of the Car for his rash and negligent driving. The Driver died on 28/04/2008 in the hospital.

4.The wife and daughter of the deceased accident victim filed claim petition seeking Rs.20,00,000/- as compensation. The claim was based on the averments that the deceased was working as Driver earning a sum of Rs.16,000/- pm. He was 50 years old at the time of his death. The owner of the vehicle and its Insurer are liable to pay Rs.12,00,000/- for the medical expenses and Rs.8,00,000/- for pain and sufferings.

5.The Insurer denied their liability on the ground that the victim was the tortfeasor. He did not possess driving license. As an employee under the

owner/third respondent herein, the claimants are at the most entitled for compensation under the Workmen Compensation Act, 1923. The claim petition under the Motor Vehicles Act 1988 is not maintainable. The accident victim died while he was discharging his duties. The owner of the vehicle/third respondent alone is liable to pay the compensation, if any.

6.The Tribunal, on considering the evidence, relying upon the Judgement of this court in ***New India Assurance Co. Ltd –vs Manimaran and another*** reported in 2008 (2) TNMAC 137 (Mad), held that even if the accident had occurred due to the negligence of the Driver, his dependants are entitled to get compensation under the Motor Vehicles Act since, the Driver is a third party. Relying upon the judgement of the Hon'ble Supreme Court rendered in ***Oriental Insurance Co –vs-Dayaava and others*** reported in 2013(1) TNMAC 161 (SC), held that the claimants have the option to choose between Workmen Compensation Act,1923 and the Motor vehicles Act, 1988. Hence, the petition before the Tribunal which was filed under the Motor Vehicles Act is maintainable.

7.Having held so, the Tribunal based on the post mortem report, fixed the age of the victim as 60 years. Fixed his annual income as Rs.36,000/- after deducting 1/3rd for his personal expenses applied multiplier 9 as per the thumb rule prescribed in ***smt. Sarla Verma others Vs. Delhi Transport Corporation and another*** **– 2009 (2) TN MAC 1 (SC)** and awarded Rs.2,16,000/- towards loss of future income, Rs.5,14,842/- towards Medical expenses, Rs.5,000/- for funeral expenses, Rs.10,000/- for consortium (first claimant- wife) and Rs.10,000/- for loss of love and affection (second claimant-daughter) totally a sum of Rs.7,56,000/.

8.The learned counsel appearing for the appellant would submit that, the insurance policy is a package policy wherein, the employee is entitled for compensation only as per the provisions of Workmen Compensation Act. In this case, the claimants are the dependants of the Driver who is the tortfeasor and violator of the policy condition by driving the vehicle without valid driving license. A Division Bench of this Court in ***Oriental Insurance Co –vs- Kaliya Pillai and others*** reported in 2003 ACJ 1021 has held that, when the deceased himself was the tortfeasor and responsible for the accident, the insurance company

is liable only to the extent of liability of the insured under Workmen's Compensation Act and nothing more. If, in alternate, the claimants resort to section 140 of the Motor Vehicles Act under no fault liability, then also the choice should have been exercised by the claimants whichever is advantage to them.

9.The learned counsel for the appellant also would further submit that, in ***Oriental Insurance Co Ltd –vs- Krishnan and others*** (2004 ACJ 1790), a Division Bench of this Court following ***Kaliya Pillai*** case (cited supra) has held that the employee of the insured, resulting in accident while driving the vehicle negligently, claim under the provisions of Motor Vehicles Act is not maintainable. However, the liability under the Workmen's Compensation Act may be determined by the Court having regard to the extent of the coverage under the policy. Subsequently, when identical issue came for consideration before the Hon'ble Apex court in ***National Insurance Company –vs- Mastan and another*** reported in (2006 (2) SCC 641), the Hon'ble Supreme Court held that, " a party suffering an injury or the dependants of the deceased who has died in course of an accident arising out of use of a motor vehicle may have claims under different statutes. But when cause of action arises under different statutes and the claimant

elects the forum under one Act in preference to the other, he cannot be thereafter permitted to raise a contention which is available to him only in the former." Therefore, relying upon section 149 of the Motor Vehicles Act, and the judgements referred above, the learned counsel for the appellant summed up his arguments that, the Tribunal erred in entertaining the claim petition under section 166 of the Motor Vehicles Act. Having entertained, it should have applied the provisions of Workmen Compensation Act and should have applied the structured formula provided under Schedule IV of the Workmen Compensation Act. It should not have awarded medical expenses which was not provided under the Act before the amendment in the year 2010.

10.The learned counsel for the respondents / claimants submitted that, the accident victim was not the tortfeasor. When he was on wheels, to avoid hitting the bullock which crossed the road unexpectedly, he applied the brake. The vehicle capsized due to application of brake suddenly. The Tribunal right in holding that the Driver not guilty of negligence. Following the dicta of this court in ***Manimaran*** case (cited supra), considered him as a third party injured, awarded just and reasonable compensation.

11.In respect of dispute about the driving license, the learned counsel for the respondents claimants would submit that, the Tribunal has held the Insurer and the Insured jointly liable. The Insurer can pay the compensation and recover from the Insured for violation of policy condition following the dictum laid in ***National Insurance Co Ltd –vs- Swaran Singh***, 2004 ACJ 1 SC and ***Kusum Lata and others –vs- Satbir and others***, 2011 ACJ 926. He also draw support for his submission from the observation of the Hon'ble Supreme Court in ***National Insurance Co –vs- Kusum Rai*** 2006 ACJ 1336 (SC) followed by ***Oriental Insurance Co Ltd –vs- Brij Mohan and others***, 2007 ACJ 1909 to the proposition that the appellant may recover the amount from the owner.

12.Lastly, the learned counsel for the respondents claimants relying upon the recent judgement of the Hon'ble Apex Court in ***Sri Chanappa Nagappa Muchalagoda –vs- Divisional Manager, New India Insurance Co., Ltd*** reported in 2020(1) TN MAC 231 (SC) submitted that, in case the Court applies the structured formula under Schedule IV of the Workmen Compensation Act, the claimants are entitled for the medical expenses as awarded in the case cited above.

13.This Court on careful scrutiny of the evidence and the submissions made by the learned counsel on either side, find that the Tribunal has erred in holding that the Driver on the vehicle was a third party. This error has occurred due to wrong application of the observation made by the court in ***Manimaran*** case (cited supra) which was factually different from the instant case except, the similarity in the way the accident occurred. In that case, the Driver hit the near by tree to avoid the lorry coming towards him rash and negligently. In the instant case, the Driver applied sudden brake to avoid hitting the bullock and got capsized. In that case, the Driver was not the employee of the vehicle owner. Whereas, in the instant case, the Driver was the employee of the vehicle owner and the insurance policy covers the employee. The privity of contract between the Insurer and Insured is absent in the case cited, whereas in the instant case, it is very much present.

14.The issue for consideration before the Court in ***Manimaran*** case (cited supra) was, 'whether the Insurance Company can take defence otherwise provided under section 149(2) of the Motor Vehicles Act without obtaining leave under Section 170 of the Motor Vechile Act. While holding in negative, the Court has observed as follows:-

"17 The case-law relied on by the learned counsel for the petitioner would be relevant for deciding the liability to pay compensation, had the insurance company obtained the leave of the court under section 170 of the Act. The insurance company is statutorily prohibited from taking up the defence, otherwise provided under ***section 149 (2) of the Motor Vehicles Act. Pleadings*** *and evidence disclose that the petitioner is not the owner of the vehicle and the respondent No. 2 in this appeal is the owner of the vehicle. Therefore, the respondent No. 1-claimant is a third party insofar as the policy is concerned and he can seek for a just and reasonable compensation against the insured as well as the insurer."*

15.As pointed earlier, the policy is a package policy with coverage to the employee under Workmen Compensation Act. The policy marked as Ex P-6 additional premium of Rs.25/- collected for coverage of employee under the Workmen Compensation Act. Therefore, the Insurer in this case is liable only to the extent of the Insured liability under the Workmen Compensation Act and not more than that.

16.In ***Brij Mohan*** case (cited supra), relied by the learned counsel for the claimants for pay and recovery, the Hon'ble Apex Court has specifically said, "although we are of the opinion that the appellant (insurer) was not liable to pay the claimed amount as the driver was not possessing a valid license and the High court was erred in holding otherwise, we decline to interfere with the impugned award, in the peculiar facts and circumstances of the case, in exercise of our jurisdiction under Article 136 of the Indian Constitution but we direct that appellant may recover the amount from the owner in the same manner as was directed in ***Oriental Insurance Co. Ltd., v*** Najappan, 2004 ACJ 721 (SC)".

17.The Hon'ble Supreme Court in paragraph No.14 of the above judgement has stated that, they issue the above direction in exercise of their power under Article 142 of the Constitution of India to do complete justice to the parties.

18.Likewise, in ***Sri Chanappa Nagappa Muchalagoda*** case (cited supra) relied by the learned counsel for the claimants, it a case which arose from the claim petition before the Labour officer and Commissioner for Workmen's Compensation under the Workmen Compensation Act, 1923. The Commissioner

assessed the disability of the injured Driver as 50% and income as Rs.3,000/- pm. Taking the relevant factor as per schedule IV of the Workmen Compensation Act, computed the compensation as Rs.1,81,494/-. On appeal to the High Court, the High Court assessed the disability as 60% and income as Rs.4,000/- and enhanced the compensation to Rs.2,90,390/-. On further appeal to the Hon'ble Supreme Court, the Hon'ble Apex Court assessed the disability as 100% and enhanced the compensation to Rs.4,83,984/-.

19.While so, on enhancing the compensation, the Hon'ble Apex Court observing that the claimant was hospitalised for 65 days, an lump sum of Rs.1,00,000/- with 6% interest was awarded. This ex-gratia amount is not under any statute in force, but in exercise of the power under Article 142 of the Constitution of India.

20.The facts of the instant case is that the victim had committed the accident due to loss of control and diligence. He is the tortfeasor and he cannot claim any compensation under the Motor Vehicles Act. However, in a similar circumstances, the Division benches of this court in ***The Oriental Insurance Copmany vs.***

Kalliya Pillai and others (2003 ACJ 1021) and in ***The Oriental Insurance Co Ltd –vs- Krishnan*** (2004 ACT 1790) this Court has disposed the appeal by assessing the compensation under the Workmen Compensation Act in order to shorten the litigation.

21.The observation of the Division Bench of this Court in ***Kalliya Pillai*** case (cited supra) which is relevant to compute the compensation and interest are extracted below :-

> *".....It is well settled law that when the owner is not liable, the insurer cannot be held liable. Since the accident was caused only due to the rash and negligent act of the driver of the tractor, we hold that the question of vicarious liability will not arise when the claim is made by the tort-feasor himself or any other person claiming under the tortfeasor; accordingly the claim by the claimants is absolutely misconceived and they cannot claim any compensation from the owner of the vehicle; consequently they also cannot make any claim against the appellant-Insurance company. However, the insurer's liability is to be determined not only with reference to the provisions under the Motor Vehicles Act, but also with reference to the contract of insurance which would extend to the liability of the insured under the Workmen's Compensation Act. There is a specific finding by the Tribunal that*

the deceased tractor driver died in the course of his employment. Further, it is not disputed that there was a valid insurance on the date of the accident, and accordingly the insurer was liable to the extent of liability under the Workmen's Compensation Act. In other words, we hold that even though the insurance company was not liable under the provisions of the Motor Vehicles Act, it would be proper to assess the compensation under the Workmen's Compensation Act and award the same in favour of the claimants. On this ground, instead of directing the respondents/claimants to go before the Commissioner for Workmen's Compensation Act, in order to shorten the litigation and also in the interest of justice, we decided to dispose of the appeal by determining the appropriate compensation in favour of the claimants.

.....Therefore, we are of the view that the liability to pay interest would run from the date on which the right to receive compensation accrue in favour of the workman, namely, the date of the accident and not when orders are issued by the Commissioner for Wokrmen's Compensation. .....

..... In the light of what is stated above, we modify the order of the Tribunal and pass an award for Rs.2,16,000/- in favour of the claimants-respondents herein with interest at 12 per cent..... ”

22.Now applying the above dictum, the compensation for the claimants is computed taking into consideration the following factors. Age of the claimant as 60 years as fixed by the Tribunal based on the Post mortem report. Monthly income of the deceased is fixed at Rs.4,000/- per month and the factor 117.40 is fixed as per IV Schedule of Workmen Compensation Act. The compensation payable will be 60/100 x 4000 x 117.40 = Rs.2,81,760/- in addition for funeral expenses Rs.5000/- is awarded. Totally, the claimants are entitled for Rs.2,86,760/- with interest @ 12% per annum from the date of death till the date of realisation. The award amount shall be apportioned equally by the claimants.

23.The appellant is directed to deposit the award amount within a period of twelve weeks from the date of receipt of this judgment. On such deposit, the claimants are permitted to withdraw the same on filing appropriate petition before the Tribunal.

24.Accordingly, the Civil Miscellaneous Appeal is partly allowed. No order as to costs. Consequently, connected miscellaneous petitions are closed.

14.**09.2020**

jbm

Index: Yes/No
Speaking order/non speaking order

To

The Motor Accident Claims Tribunal
(Sub Court),
Gudiyattam,
Vellore District.

G.JAYACHANDRAN.J.,

jbm

Pre Delivery Judgment made in

C.M.A.No.1746 of 2015

14.09.2020