

CMA(MD).No.351 of 2019

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : 07.06.2023

PRONOUNCED ON : 12.06.2023

CORAM

THE HONOURABLE MR.JUSTICE R.VIJAYAKUMAR

C.M.A(MD)No.351 of 2019
and CMP(MD).No.4399 of 2019

The Branch Manager
National Insurance Company Ltd.,
T.S.No.4132, Keelarajaveethi
Pudukkottai

....Appellant

Vs

1.Murugan

2.A.Abdul Rahman

....Respondents

PRAYER:- Civil Miscellaneous Appeal filed under Section 173 of Motor Vehicles Act, 1988, to set aside the decree and judgment dated 21.12.2018 made in MCOP.No.171 of 2017 on the file of the Principal District Judge, Pudukkottai.

For Appellant : Mr.A.Ilango

For R1 : No appearance

For R2 : Mr.D.Gnanasekaran



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JUDGMENT

The appeal has been filed by the Insurance Company challenging the award passed by the Motor Accident Claims Tribunal in MCOP.No. 171 of 2017 primarily on the ground of liability.

2.The injured claimant had contended that while he was driving a two wheeler at about 3.00 p.m on 25.01.2016, a tipper lorry belonging to the first respondent and insured with the second respondent coming from the opposite direction was driven in a rash and negligent manner and dashed against the two wheeler. In the said accident, the claimant had sustained grievous injuries and hence, he had prayed for a sum of Rs.30,00,000/- towards compensation.

3.The owner of the offending vehicle namely the tipper lorry had remained exparte and the insurance company had filed a counter contending that the driver of the lorry was not having a badge to drive the heavy vehicle at the relevant point of time. They have further questioned the manner of accident and the quantum of compensation as prayed for.

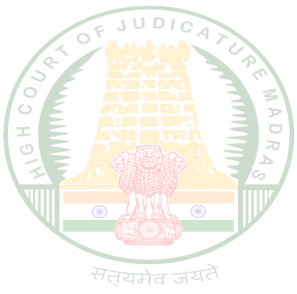


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4.The Tribunal after considering the oral and documentary evidence arrived at a finding that the accident has taken place only due to the rash and negligent driving on the part of the driver of the first respondent. The Tribunal had fixed the compensation at Rs.3,74,520/- and directed the insurance company to satisfy the award. Challenging the same, the present appeal has been filed.

5.According to the learned counsel appearing for the appellant, admittedly, the tipper lorry is a heavy vehicle and the same was proved by filing Exhibit R2 insurance policy which indicates the G.V.W of the vehicle. He had further contended that he had filed Exhibit R1 to establish the fact that the driver of the vehicle was not having endorsement or badge at the time of accident. Therefore, it is clear that at the time of accident, the driver of the offending vehicle did not have valid and effective driving licence. Hence, it is a clear case of violation of policy condition and the Tribunal ought not to have directed the insurance company to satisfy the said award instead the Tribunal ought to have permitted the insurance company to recover the award amount from the owner after satisfaction of the award.

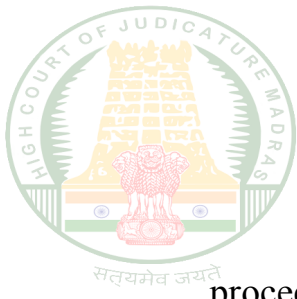


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6.The learned counsel for the appellant had relied upon the judgment of the High Court of Jharkhand at Ranchi reported in **2010 ACJ 95 (Tripurari Mandal Vs. Oriental Insurance Co.Ltd., and another)** to contend that a duty is cast upon the insurer to see that the driver was holding valid driving licence. Therefore, the burden is upon the insured person to establish that he had handed over the vehicle to the driver was holding valid driving licence.

7.Per contra, the learned counsel appearing for the respondent had relied upon the judgment of the Hon'ble Supreme Court reported in **2004 ACJ 1 (National Insurance Co.,Ltd., Vs. Swaran Singh and others)** to contend that mere absence of an invalid driving licence at the relevant point of time is not by itself a defence available to the insurer against the insured person or a third party. To avoid its liability towards 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 by a duly licensed driver. The learned counsel for the respondent had further contended that in order to avoid liability, the insurance company must not only establish the available defence raised in the said



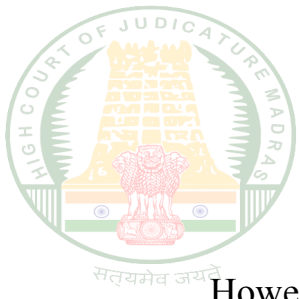
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proceedings but must also establish breach on part of the owner of the vehicle.

8. As per the said judgment of the Hon'ble Supreme Court cited supra, the burden of proof would be upon the insurance company to establish the same. The learned counsel had further relied upon the judgment of the Hon'ble Supreme Court in ***Civil Appeal No.3197 of 2005 dated 09.05.2005 (National Insurance Corporation Ltd., Vs. Kanti Devi and others)*** and contended that in a case where negligence on the part of the owner was not established, the Hon'ble Supreme Court was pleased to set aside the order of the Motor Accident Claims Tribunal and remitted the matter to the Tribunal for fresh consideration to let in further evidence in order to establish the negligence on the part of the owner in permitting his driver to drive the vehicle without valid driving licence.

9. The learned counsel for the respondent had further contended that the entire burden is upon the insurance company to establish that there was a negligence on the part of the owner of the vehicle in permitting his driver without valid driving licence to handle the vehicle.



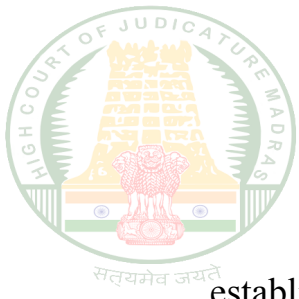
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However, in the present case, the insurance company has miserably failed to let in any evidence whatsoever. Therefore, following the judgement of the Hon'ble Supreme Court, this Court may be pleased to remit the matter back to the Tribunal so that the insurance company could let in evidence to establish that there is a negligence on the part of the owner. Without establishing the negligence on the part of the owner of the vehicle, the question of ordering pay and recovery against the owner of the vehicle would not arise.

10.I have considered the submissions made on either side and perused the materials available on record.

11. There is no dispute with regard to the fact that the offending vehicle is a tipper lorry which is classified as a heavy vehicle and it requires transport endorsement for driving the said vehicle. A perusal of Exhibits R1 and R2 clearly indicate that at the relevant point of time, the driver was not holding a transport endorsement. Therefore, it is clear that there was a violation of policy condition warranting invocation of principle of pay and recovery. However, the learned counsel appearing for the respondent had contended that unless the insurance company



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establishes that there was a negligence on the part of the owner in handing the vehicle to such a person was not having valid driving licence, the principle of pay and recovery cannot be invoked.

12. In paragraph No.5 of the counter filed by the insurance company, a specific stand has been taken that the driver of the tipper lorry was not having badge to drive the heavy vehicle. The owner of the vehicle was arrayed as the first respondent in the claim petition and notice was served upon him. However, the owner of the tipper lorry has chosen to remain ex parte. He has neither filed a counter nor let in any evidence to establish that he had handed over the vehicle to his driver after verifying his driving vehicle. The insurance company had examined the Regional Transport Officer as RW1 and official of the insurance company as RW2 to establish the fact that the driver of the offending vehicle did not have transport endorsement at the time of accident. The insurance company has marked Exhibit R1 which is a letter addressed by the Transport Corporation to the Court relating to the driving licence details of the driver of the offending vehicle. The company has also

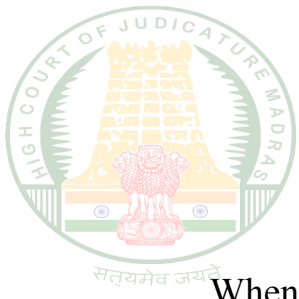


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marked Exhibit R2 which is the insurance policy of the tipper lorry to indicate that it is heavy vehicle requiring transport endorsement. Therefore, it is clear that the appellant/insurance company had discharged their burden by their pleadings and letting in oral and documentary evidence in support of their pleading to establish the fact that the driver of the offending vehicle was not having effective driving licence at the time of the accident. Therefore, the contention of the learned counsel appearing for the owner of the tipper lorry that the insurance company has not established the negligence on the part of the owner is not legally sustainable that too in the appellate stage.

13.The Tribunal has not properly appreciated the defence taken by the insurance company and has mulcted the liability upon the insurance company without invoking the principle of pay and recovery. Section 5 of the Motor Vehicles Act, 1988 mandates that the owner of the vehicle shall not permit any person to driver a vehicle who does not have any driving licence. Therefore, non-holding of an effective driving licence is not a mere violation of the policy condition, but it is a statutory violation.



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When the insurance company has alleged statutory violation on the part of the owner of the tipper lorry, the burden is upon the owner of the tipper lorry to establish that his driver was having valid and effective driving licence at the relevant point of time. Therefore, this Court is of the considered opinion that in view of the violation of the policy condition and statutory violation, the insurance company shall first satisfy the award and thereafter, can recover the same from the owner of the tipper lorry.

14. In view of the above said deliberations, the award of the Tribunal is set aside and modified as follows:

(i). The appellant insurance company shall satisfy the award and thereafter, recover the same from the first respondent in the claim petition.

(ii). The quantum, apportionment and interest awarded by the Tribunal are hereby confirmed.



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15.This civil miscellaneous appeal is allowed to the extent as stated above. No costs. Consequently, connected miscellaneous petition is closed.

12.06.2023

Index : Yes/No
Internet : Yes/No
NCC : Yes/No
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To

1. The Principal District Judge,
Pudukkottai.
- 2.The Record Keeper,
Vernacular Section,
Madurai Bench of Madras High Court,
Madurai.



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R.VIJAYAKUMAR,J.

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Pre-delivery Judgement made in
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12.06.2023

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