



C.M.A.(MD)Nos.1572, 1573 and 1574 of 2010

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Reserved on : 11.09.2023

Pronounced on : 30.11.2023

CORAM:

THE HON'BLE MR.JUSTICE K.MURALI SHANKAR

C.M.A.(MD)Nos.1572, 1573 and 1574 of 2010

and

C.M.P.(MD)Nos.2, 2 and 2 of 2010 and 1, 1 and 1 of 2012

C.M.A.(MD)No.1572 of 2010

The Oriental Insurance Co. Ltd.,
New Delhi, represented through its
Branch Manager,
Madurai Road,
Virudhunagar.

...Appellant/
Respondent No.2

Vs.

1. Vasantha

2. Jeyalakshmi Gowri

3. Venkatraman

4. Seenivasan

5. Rajalakshmi

...Respondents 1 to 5/
Petitioners 1 to 5



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6. Shanthi.

...6th Respondent/
1st Respondent

For Appellant	: Mr.K.Balasubramanian
For R1 to R5	: Mr.D.Shanmugaraja Sethupathi
For R6	: No appearance

C.M.A.(MD)No.1573 of 2010

The Oriental Insurance Co. Ltd.,
New Delhi, represented through its
Branch Manager,
Madurai Road,
Virudhunagar.

...Appellant/
Respondent No.2

Vs.

1. Krishnamoorthy

...1st Respondent/
Petitioner

2. Shanthi

...2nd Respondent/
1st Respondent

For Appellant	: Mr.K.Balasubramanian
For R1	: Mr.D.Shanmugaraja Sethupathi
For R6	: No appearance



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C.M.A.(MD)No.1574 of 2010

The Oriental Insurance Co. Ltd.,
New Delhi, represented through its
Branch Manager,
Madurai Road,
Virudhunagar.

...Appellant/
Respondent No.2

Vs.

1. Sriramulu

2. Mariammal

...Respondents 1 & 2/
Petitioners 1 & 2

3. Shanthi

...3rd Respondent/
1st Respondent

(R1 dismissed)

For Appellant : Mr.K.Balasubramanian

For R2 : Mr.D.Shanmugaraja Sethupathi

For R3 : No appearance

Common Prayer : These Civil Miscellaneous Appeals filed under Section 173 of the Motor Vehicles Act, to set aside the award of Rs.2,94,172/- (Rupees Two Lakhs Ninety Four Thousand One Hundred and Seventy Two only), Rs.34,237/- (Rupees Thirty Four Thousand Two Hundred and Thirty Seven only) and Rs.35,100/- (Rupees Thirty Five Thousand and



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One Hundred only) passed in M.C.O.P.Nos.4, 5 and 6 of 2007, dated 31.12.2008, on the file of the Motor Accidents Claims Tribunal cum Additional District Judge, (FTC), Virudhunagar.

COMMON JUDGMENT

These Civil Miscellaneous Appeals are directed against the common order passed in M.C.O.P.Nos.4 of 2007, 5 of 2007 and 6 of 2007 dated 31.12.2008 on the file of the Motor Accident Claims Tribunal/Additional District Court (Fast Track Court), Virudhunagar.

2. The appellant/insurer in C.M.A.(MD)No.1572 of 2010, who was made liable to pay compensation of Rs.2,94,172/- (Rupees Two Lakhs Ninety Four Thousand One Hundred and Seventy Two only) with interest at 7.5% per annum to the respondents 1 to 5/claimants for the death of Madanmohanram Chowdry, consequent to an accident occurred on 16.02.2007, challenged the liability mulcted on it and for invoking the doctrine of pay and recovery.

3. The appellant/insurer in C.M.A.(MD)No.1573 of 2010, who was made liable to pay compensation of Rs.34,237/- (Rupees Thirty Four



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Thousand Two Hundred and Thirty Seven only) with interest at 7.5% per annum to the first respondent/claimant for the disability suffered by him, consequent to an accident occurred on 16.02.2007, challenged the liability mulcted on it and for invoking the doctrine of pay and recovery.

4. The appellant/insurer in C.M.A.(MD)No.1574 of 2010 , who was made liable to pay compensation of Rs.35,100/- (Rupees Thirty Five Thousand and One Hundred only) with interest at 7.5% per annum to the first respondent/claimant for the disability suffered by him, consequent to an accident occurred on 16.02.2007, challenged the liability mulcted on it and for invoking the doctrine of pay and recovery.

For the sake of convenience and brevity, the parties herein after will be referred to as per their status/ranking in the Tribunal.

5. The case of the claimants is that on 16.02.2007, the deceased Madanmohanram Chowdry and the injured claimants in M.C.O.P.Nos.5 of 2007 and 6 of 2007 along with their relatives were proceeding from their native Koppuchithanpatti Village to a temple at Mullaiseval Village in a



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van bearing Registration No.TN-69-T-0716 along with their goods, that the deceased and the injured claimants travelled in the said van as owner of the goods for the safety of their goods, that when the van was proceeding on Sattur – Kovilpatti main road and at the place near Chinnaodaipatti, its driver had driven the vehicle in a rash and negligent manner and due to the jolting of the vehicle, the deceased and the injured claimants were thrown out of the vehicle and as a result of which, they have sustained multiple injuries and that the accident was occurred only due to the rash and negligent driving of the first respondent's van driver.

6. It is their further case that after the accident, the deceased Madanmohanram Chowdry was taken to Government Hospital, Sattur and after first aid treatment, he was referred to Government Rajaji Hospital, Madurai and despite treatment, he succumbed to the injuries, that the injured claimants were also taken to Government Hospital, Sattur and after first aid treatment, they were referred to Government Rajaji Hospital, Madurai and Government Hospital, Aruppukkottai respectively and after inpatient treatment therein, they were subsequently admitted in Prabhu Clinic, Panthalkudi and Gomathi Hospital, Aruppukkottai respectively and



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that both of them have sustained permanent disability and they were not in a position to do any work as before.

7. The first respondent has filed a counter statement stating that the first respondent has adopted all the traffic rules, that it is false to say that the driver of the vehicle bearing Registration No.TN-69-T-0716 drove the vehicle without adopting traffic rules so rashly and negligently, that the said vehicle is fully covered with insurance of all risk inclusive of the third party and that therefore, the first respondent is not liable for the claim.

8. The defence of the second respondent is that the accident was occurred only by the negligence of the deceased and the van driver is not responsible for the accident, that the vehicle involved in the accident is a goods carriage vehicle, that as per the permit, only three persons are allowed including the driver, that as per FIR, 36 persons had travelled in the said vehicle at the time of accident and due to non-availability of space, the backside door was opened and allowed to hang and in the space between the iron hooks and in the door space, the threads were tied and in



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the make-shift space, the deceased and others were allowed to travel, that since the temporary arrangement gave way, the accident had taken place and that the accident was occurred only due to the carelessness and negligence of the deceased and the injured claimants.

9. It is their further defence that the deceased and the injured claimants were not taking any goods with them, that they have travelled only as gratuitous passengers in the goods vehicle and that therefore, the second respondent is not liable for the claim.

10. Before the Tribunal, joint trial of all the three claim petitions was ordered and the evidence was ordered to be recorded in M.C.O.P.No.4 of 2007.

11. During trial, the first claimant in M.C.O.P.No.4 of 2007 and the claimant in M.C.O.P.Nos.5 of 2007 and 6 of 2007 were examined as P.W.1 to P.W.3 respectively. On the side of the claimants, 15 documents were exhibited as Ex.P.1 to Ex.P.15. On the side of the respondents, 4 witnesses were examined as R.W.1 to R.W.4 and 7 documents were exhibited as Ex.R.1 to Ex.R.7.



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12. The learned trial Judge, upon considering the evidence both oral and documentary and on hearing the arguments of both the sides, has passed the impugned common order dated 31.12.2008 by holding that the accident was occurred only due to the rash and negligent driving of the first respondent's vehicle driver, mulcted liability on the second respondent and directed them to pay compensation with interest and costs and then to recover the same from the first respondent/owner of the vehicle. Aggrieved by the impugned common order, the second respondent has preferred the present three appeals.

13. It is pertinent to note that the second respondent has not challenged the finding of the tribunal that the accident was occurred only due to the rash and negligent driving of the first respondent's van driver. The second respondent has also not disputed the quantum of compensation awarded at by the Tribunal.

14. The only challenge made by the second respondent is that since the deceased and the injured claimants had travelled only as gratuitous passengers in the goods vehicle, the second respondent is not liable for the



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claim and that therefore, the question of applying the doctrine of pay and recovery does not arise at all.

15. As already pointed out, in the claim petitions, they have alleged that they were travelling in the vehicle as owner of the goods for the safety of their goods. But, it is pertinent to note that on the basis of the complaint lodged by one Ramachandran, who allegedly travelled in the said van at the time of accident, FIR came to be registered in Crime No.47 of 2007 against the van driver for the offences under Sections 279, 337 and 338 IPC under Ex.P.1, wherein, the mode of accident has been explained in the following manner,

□.... இன்று 16.2.07-ம் தேதி காலை 08.00 மணிக்கு எனது பங்காளிகளான கிருஷ்ணமூர்த்தி, (ஓய்வு வி.ஏ.ஓ) சாவீத்திரி, ஸ்ரீராமலு மற்றும் சீனிவாசன் குடும்பத்தினருடன் எங்கள் குல தெய்வம் சாமி கும்பிட வேண்டி மேலக்கரந்தை ராஜேந்திரன் மகன் காளிராஜன், என்பவர் டிரைவராக டி.என்.69டி.0716 என்ற டாடா 209 லோடு வேனில் சாத்தூர், உப்பத்தூர் அருகே உள்ள முள்ளிச் செவல் அருகே உள்ள குருநாதன், அங்காளபரமேஸ்வரி சாமி கும்பிட வேண்டி புறப்பட்டோம். அப்போது டிரைவர் காளிராஜ் டி.என்.69டி.0716 லோடு வேனில் பின்புற கதவை திறந்து அதில் உள்ள கொக்கியில் இருபறமும் கயிறால் கட்டி சீட் அமைத்து கொடுத்தார். அதில் சாவீத்திரி,



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கிருஷ்ணமூர்த்தி, ஸ்ரீராமலு, சீனிவாசன் ஆகிய நான்கு பேரும் அமர்ந்து திறந்த கதவில் உட்கார்ந்து வந்தனர், நான் வேனுக்குள் இருந்தேன், மேலக்கரந்தை, மசார்பட்டி, இருக்கன்குடி வந்து சாத்தார் வந்து சாத்தார் டீ கோவில்பட்டி தேசிய நெடுஞ்சாலையில் சின்ன ஓடைப்பட்டி விலக்கின் தெற்கே, பெரியஓடைப்பட்டிக்கு வடக்கே, ரோட்டில் வடக்கிலிருந்து தெற்கு நோக்கி போகும் போது டிரைவர் காளிராஜ், அதிக வேகமாகவும் அஜாக்கிரதையாகவும், ஓட்டிச் சென்றார். அப்போது பின் புறமாக கதவில் கயிரால் கட்டியது டோர் கொக்கியில் கட்டிய கயிறு உறுவி, கொக்கிகள் வளைந்து டோர் கீழே விழுந்தது. அதில் பயணம் செய்த சாவீத்திரி, கிருஷ்ண மூர்த்தி, ஸ்ரீராமலு, சீனிவாசன் ஆகியோர்கள் கீழே ரோட்டில் விழுந்துவிட்டனர்.□

16. The jurisdictional police, after completing the investigation, has filed the final report under Ex.P.4, wherein, they have concluded,

□..... டி.என். 69.டி.0716 என்ற டாடா லோடு வேன் பின் பக்க கதவை திறந்து அதில் பயணிகளை ஏற்றி உட்கார ஏதுவாக கதவின் கொக்கியில் கயிரால் கட்டி அஜாக்கிரதையாக பயணிகளை ஏற்றி□

17. P.W.1-wife of the deceased Madanmohanram Chowdry, who is not an occurrence witness, would say in her cross-examination that she



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had sent her husband in the said van and that they have taken the goods required for their temple visit. In her cross-examination made on behalf of the second respondent, she would say that the vehicle in which her husband was travelling is a goods carriage vehicle, but they had proceeded to temple and that when a suggestion was made to her that more than 36 persons had travelled at that time, she would say that 10, 15 persons had travelled at that time.

18. P.W.2-the claimant in M.C.O.P.No.5 of 2007 and P.W.3-the claimant in M.C.O.P.No.6 of 2007 in their chief examination would reiterate the version raised in their claim statements to the effect that they have travelled with the goods required for their temple visit. P.W.2 in his cross- examination,

□வண்டியை மதனகோபால் செளத்ரி என்பவர்தான் வாடகைக்கு பிடித்தார். சாமிகும்பிடுவதற்கான சாமான்களை ஏற்றிச்செல்ல அவர் வாடகைக்கு பிடித்தார். சாமிகும்பிடுவதற்கான சாமான்களை அந்த வண்டியில் ஏற்றிப்போனோம். அவரவர் சாமான்களை ஏற்றிக்கொண்டு அவரவர் வண்டியில் ஏறிக்கொண்டோம்.□

19. During the cross-examination made on behalf of the second



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respondent, P.W.2 would say that,

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□சரக்கு வாகனத்தில் பின்னால்கதவை திறந்துவைத்து
விட்டு இடையே கயிறு கட்டி அதில் நாங்கள்
பயணம்செய்தோம் என்றால் சரிதான்.□

20. P.W.3 would also reiterate the version given by P.W.2 that they have travelled in the goods vehicle by opening the back door and by tying thread in between the doors.

21. At this juncture, it is necessary to refer the judgment of the Hon'ble Supreme Court in *National Insurance Co. Ltd. Vs. Rattani and others* reported in *AIR 2009 SC 1499*, wherein, the deceased and some other injured persons were travelling as a member of a marriage parties in a Tata 407 vehicle and though an attempt was made to show that the deceased and other injured person were travelling in the said truck as a representatives of the owner of the goods, rejecting the same the Hon'ble Apex Court has held as follows,

“13. The question as to whether burden of proof has been discharged by a party to the lis or not would depend upon the facts and circumstances of the case. If the facts are admitted or, if otherwise, sufficient materials have been brought on record so as to enable a court to arrive at a



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definite conclusion, it is idle to contend that the party on whom the burden of proof lay would still be liable to produce direct evidence to establish that the deceased and the injured passengers were gratuitous passengers.

As indicated hereinbefore, the First Information Report as such may or may not be taken into consideration for the purpose of arriving at a finding in regard to the question raised by the appellant herein, but, when the First Information Report itself has been made a part of the claim petition, there cannot be any doubt whatsoever that the same can be looked into for the aforementioned purpose.

14. An admission made in the pleadings, as is well-known, is admissible in evidence proprio vigore. We, thus, are of the opinion that the Tribunal as also the High Court committed a serious error in opining that the insurance company was liable.

.....

We, therefore, in the facts and circumstances of the case, have no hesitation to hold that the victims of the accidents were travelling in the truck as gratuitous passengers and in that view of the matter, the appellant herein was not liable to pay the amount of compensation to the claimants.”



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22. In the case on hand also, though the claimants were taking a stand that the deceased and the injured have travelled with goods for the safety of their goods, as already pointed out, even according to the complaint lodged by the relative of the deceased and the injured claimants, since there was no sufficient space for some of the relatives to travel in the van, the driver of the van by opening the back door, made a temporary arrangement by tying the thread in between the doors and allowed four persons including the deceased and the injured claimants to travel in the van. Though P.W.1 has denied that more than 35 persons had travelled, would admit that 10, 15 persons had travelled in the vehicle. It is not the case of the claimants that they have loaded mainly goods in the vehicle and they had accompanied the goods. On considering the entire evidence above referred, this Court has no hesitation to hold that the deceased and the injured claimants have not travelled as owner of the goods but hired the vehicle for their travelling to the temple and as such, travelled only as gratuitous passengers. Hence, the finding of the tribunal that all the injured and the deceased have to be termed as gratuitous passengers and they are not entitled to get compensation from the second respondent cannot be found fault with.



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23. After recording such a finding, the Tribunal, taking note of the decisions of this Court as well as some other High Court and also the judgment of the Hon'ble Apex Court, has applied the doctrine of pay and recovery and thereby directed the second respondent to pay the award amounts to the claimants and then to recover the same from the owner of the vehicle. In the *National Insurance Co. Ltd.'s* case above referred, the Hon'ble Apex Court, by observing that the Tribunal as well as the High Court have committed serious error in mulcting the liability on the insurer, has specifically held that the victims of the accidents by travelling in a goods vehicle as gratuitous passengers are not entitled to get any compensation from the insurer.

24. A Division Bench of this Court in *Bharati AXA General Insurance Co. Ltd. Vs. Aandi and others* reported in *2018 (2) TN MAC 731*, after referring to various judgments of this Court as well as the Hon'ble Supreme Court, has specifically held that the insurance company cannot be directed to pay the compensation with liberty to recover the same in respect of the gratuitous passenger or an unauthorized passenger



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in a goods vehicle and the relevant concluding passages are extracted
hereunder;

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“50. In fact, we find that in none of the judgments referred to viz., National Insurance Co. Ltd. Vs. Swarn Singh & Ors. reported in (2004) 3 SCC 297, Mangla Ram Vs. Oriental Insurance Co. Ltd. reported in (2018) 5 SCC 656, Rani & Ors. Vs. National Insurance Co. Ltd. & Ors. reported in 2018 (9) Scale 310 and Manuara Khatun and Others Vs. Rajesh Kumar Singh And Others reported in (2017) 4 SCC 796, the question regarding the liability of the Insurance Company to pay the compensation in respect of an unauthorized passenger in the goods vehicle did arise for consideration. We are therefore of the considered opinion that the judgment of the two Judge bench in Shivaraj Vs. Rajendra and another referred to supra cannot be taken as a precedent to conclude that the Insurance Company would be liable to pay the compensation even in respect of an unauthorized passenger, in a goods vehicle, in the light of categorical pronouncement of larger bench of the Hon'ble Supreme Court in New India Assurance Company Vs. Asha Rani and others and National Insurance Company Ltd., Vs. Baljit Kaur and others, referred to supra. We therefore conclude that the Tribunal, in the case on hand, was not right in directing the Insurance Company to pay the



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compensation and giving it the liberty to recover the same from the owner.

51. No doubt true that in many cases the claimants may not be able to realise the award amount from the owners of the vehicles involved in the accident. But, the said factual situation alone cannot impel us to do something against the provisions of the statute and the decisions of the larger benches of the Hon'ble Supreme Court of India.”

25. Applying the legal position above referred, this Court has no other option but to hold that the impugned common order directing the second respondent to pay the compensation with their liberty to recover the same from the first respondent/owner of the vehicle, is not in accordance with the law and the same is liable to be set aside.

26. Considering the other facts and circumstances of the case, this Court further decides that all the parties are to be directed to bear their own costs.

27. In the result, these Civil Miscellaneous Appeals are allowed and the impugned common order dated 31.12.2008 passed in M.C.O.P.Nos.4, 5



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and 6 of 2007 directing the appellant to pay the compensation and then to recover the same from the owner of the vehicle is set aside. The owner of the vehicle is directed to satisfy the awards. If the amount was already deposited by the appellant, the amount shall be withdrawn by them. In case, if the amount deposited on or any portion thereof, was already withdrawn by the claimants, then the appellant is permitted to recover the same from the owner of the vehicle. Parties are directed to bear their own costs. Consequently, connected Miscellaneous Petitions are closed.

30.11.2023

NCC :yes/No
Index :yes/No
Internet:yes/No
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To

1. The Motor Accident Claims Tribunal/
Additional District Court (Fast Track Court),
Virudhunagar.
- 2.The Record Keeper,
Vernacular Section,
Madurai Bench of Madras High Court,
Madurai.



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K.MURALI SHANKAR,J.

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Pre-Delivery Judgment made in
C.M.A.(MD)Nos.1572, 1573 and 1574 of 2010
and
C.M.P.(MD)Nos.2, 2 and 2 of 2010 and 1, 1 and 1 of 2012

Dated : 30.11.2023