IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 14.08.2015

C O R A M

THE HONOURABLE Ms.JUSTICE K.B.K.VASUKI

C.M.A.No.1542 of 2009
and
M.P.No.1 of 2009

The National Insurance Company Ltd.,
rep. by its Manager
638, Nattar Colony, Attur. ...Appellant

Vs.

1. Dhanasamy
2. C.Balaji ... Respondents

(R-2 remained ex parte in Lower Court)

PRAYER:

Civil Miscellaneous Appeal filed against the judgement and decree, dated 04.04.2007, passed in M.C.O.P.No.108 of 2003, on the file of the Motor Accidents Claims Tribunal, Additional District Judge, Dharmapuri.

For Appellant : Mr.N.Vijayaraghava

For Respondent-1 : Mr.R.Subramanian

JUDGEMENT

The second respondent/Insurer before the Tribunal is the appellant herein. The present Civil Miscellaneous Appeal is filed not against the award of compensation, but only against the Doctrine of Pay and Recover applied by fastening the liability on the Insurance Company to pay the compensation amount to the claimant with liberty given to the Insurance Company to recover the same from the owner of the Vehicle.

2. According to the learned counsel appearing for the appellant/Insurance Company, the Tribunal, having rejected the petitioner's theory regarding the capacity, in which, he was travelling in the Vehicle as owner of the goods, and, having found that the claimant travelled in the goods carrier vehicle as one of the gracious passengers, ought to have fastened the liability on the owner of the vehicle and ought not to have applied Pay and Recovery theory.

3. The learned counsel appearing for the appellant/Insurance Company in support of his contentions that Doctrine of Pay and Recovery is not applicable with regard to liability in respect of the passengers travelling in the goods vehicle, cited the decision of the Hon'ble Full Bench of our High Court, reported in (2009) 1 C.T.C. 1 in (Branch Manager, United India Insurance Co. Ltd., Dharmapuri Town, Vs. Nagammal and two others), wherein, the following guidelines were issued:-

> "i) The Insurance Policy is required to cover the liability envisages under Section 147, but wider risk can always be undertaken.
>
> ii) Section 149 envisages the defences which are open to the Insurance Company. Where the Insurance Company is not successful in its defence, obviously, it is required to satisfy the decree and the award. Where it 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 under such circumstance envisaged and enumerated in Section 149(4) and Section 149(5).
>
> iii) Under Section 147 Insurance Company is not statutorily required to cover the liability in respect of a passenger in a goods vehicle unless such

passenger is the owner or agent of the owner of the goods accompanying such goods in the concerned goods vehicle.

iv) Since there is no statutory requirement to cover the liability in respect of a passenger in a goods vehicle, the principle of "pay and recover" as statutorily recognized in Section 149 (4) and Section 149(5), is not applicable ipso facto to such cases, and therefore, ordinarily the Court is not expected to issue such a direction to the Insurance Company to pay to the claimant and thereafter recover from the owner.

v) Where by relying upon the decision of the Supreme Court in Satpat Singh's case, either expressly or even by implication, there has been a direction by the Trial Court to the Insurance Company to pay, the Appellate Court is obviously required to consider as to whether such direction should be set aside in its entirety and the liability should be fastened only on the driver and the owner or whether the Insurance Company should be directed to comply with the direction regarding payment to the claimant and recover thereafter from the owner.

vi) No such direction can be issued by any Trial Court to the Insurance Company to pay and recover to liability in respect of a passenger travelling in a goods vehicle after the decision in Baljit Kaur's case merely because the date of accident was before such decision. The date of the accident is immaterial. Since the law has been specifically clarified, no Trial Court is expected to decide contrary to such decision.

vii) Where, however, the matter has already been decided by the Trial Court before the decision in Baljit Kaur's case, it would be in the decision of the Appellate Court, depending upon the facts and circumstance of the case, whether the doctrine of "pay and recover" should be applied or as to whether the claimant would be left to recover the amount from the person liable i.e. the driver or the owner, as the case may be. "

4. The present case admittedly falls within clause vi) of the aforesaid guidelines.

5. The learned counsel appearing for the first respondent/claimant would, at this juncture, draw the attention of the Court to the averments raised in the Claim Petition to the effect that the claimant was travelling in the Vehicle as owner of the goods, and the oral evidence of the claimant as P.W.1 and the driver of the vehicle as P.W.3, in support of the same. However, the Tribunal rejecting such theory raised in the Claim Petition, and disbelieving the oral version given by P.W.1 and P.W.3, for the inconsistency in the same and placing reliance on the version given in Ex.P.1/First Information Report filed on the side of the claimant that the claimant travelled along with two other passengers as gracious passengers, rendered a specific finding that insured is not liable to indemnify the owner. Such factual findings are not questioned by the claimant. In that event, the claimant cannot be in this Appeal permitted to question the correctness of such findings.

6. Insofar applicability of doctrine of pay and recovery is concerned, it is liable to be set aside by applying the guidelines issued by the Full Bench of our High Court in the authority cited above. At this juncture, it is brought to the notice of this Court that the appellant/Insurance Company, at the stay application stage, deposited entire award amount, and 50% of the award amount was permitted to be withdrawn by the claimant, and the claimant, in pursuance of such order, withdrew the

same. The learned counsel for the appellant/Insurance Company would now fairly concede that they do not intend to take any proceedings to recover the amount from the claimant, and the same is recorded by this Court.

7. In the result, the Civil Miscellaneous Appeal is allowed, by setting aside the part of the impugned award, insofar it relates to the doctrine of pay and recover applied and the owner of the vehicle is held liable to pay the compensation without prejudice to the right of the claimant to recover the balance amount of 50% of the compensation from the owner and with liberty given to the insurer to recover 50% of the amount already withdrawn by the claimant from the owner of the vehicle, by filing separate Execution Petition. Consequently, connected Miscellaneous Petition is closed. No costs.

Sd/-
Asst.Registrar (CS II)

/true copy/

Sub Asst. Registrar

sd

To
1. The Motor Accidents Claims Tribunal,
Additional District Judge, Dharmapuri.

2. The Section Officer,
VR Section, High Court, Madras - 104.

+1 cc to Mr.N.Vijayaraghavan, Advocate, sr.43222

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