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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 04.08.2015

CORAM

THE HONOURABLE MR.JUSTICE P.DEVADASS

C.M.A(MD)No.1938 and 1939 of 2013

E.Manoharan

.. Appellant/Claimant
in C.M.A.No.1938 of 2013

Raja

.. Appellant/Claimant
in C.M.A.No.1939 of 2013

Vs.

1.Suresh

2.The Branch Manager,
United India Insurance Company Limited,
501, 1st Floor, S.N.High Road,
Tirunelveli,
Tirunelveli District.

.. Respondents/Respondents
in both the CMAs

Prayer:- Civil Miscellaneous Appeals have been filed under Section 173 of the Motor Vehicles Act, to set aside the Fair and Decretal order passed by the Motor Vehicle Accident Claims Tribunal/Sub-Court, Srivilliputtur in M.C.O.P.No.84 of 2006 and M.C.O.P.No.177 of 2006, dated 11.08.2010 and allow these Civil Miscellaneous Appeals.

For Appellant	: Mr.M.Jothi Basu
For R1	: Mr.V.Sitharanjandas
For R2	: Mr.N.Sivakumar

JUDGEMENT

As against the decision of the Tribunal exonerating the Insurance Company/second respondent from paying the determined compensation amount. The injured/claimants in a road accident had directed the these appeals.

2.Since they are connected on facts, law and evidence, common arguments were heard and are disposed of by this common judgement.

3.On 20.12.2003, in a road accident, E.Manoharan and Raja have sustained grievous injuries. The offending vehicle belongs to first respondent. His driver is held liable for the accident as he has driven the vehicle in a rash and negligent manner.

<https://hcservices.ecourts.gov.in/hcservices/>

4.Mr.E.Manoharan and Raja sought for compensation, for personal injuries by filing M.C.O.P.No.84 of 2006 and M.C.O.P.No.177



of 2006 respectively before the Motor Accident Claims Tribunal/Sub Judge, Srivilliputhur.

5.The vehicle owner remained *ex-parte*. The Insurance Company filed counter resisting his liability. The claimants as well as the Insurance Company let in evidence.

6.Appreciating the evidence, the claims Tribunal fixed the negligence on the part of the driver of the first respondent. Ultimately, the Tribunal awarded Rs.73,040/- with 7.5% interest p.a., in M.C.O.P.No.84 of 2006 and Rs.58,270/- with 7.5% interest p.a., in M.C.O.P.No.177 of 2006.

7.The Tribunal accepted the contention of the Insurance Company that at the time of accident, there was no valid FC (Fitness Certificate) for the vehicle, in the circumstances, it had exonerated the Insurance Company from paying the award amount on behalf of the insured vehicle owner/first respondent.

8. In the circumstances, the claimants have directed these appeals only with regard to the exoneration of Insurance Company from paying their award amount.

9.It has been contented by the learned counsel for the appellant that in the facts and circumstances, the principles of Pay and Recovery can be applied in this case, however, the Trial Court overlooked this aspect. In support of his submission, the learned counsel for the appellant cited ***DIVISIONAL MANAGER, UNITED INDIA INSURANCE CO.LTD., VS. S.SOWKATH ALI & OTHERS (2009 (1) TN MAC 301)***.

10.On the other hand, the learned counsel for the Insurance Company submitted that not having fitness certificate goes to the root of the matter. In such circumstances, the petitioner cannot invoke the principle of Pay and Recover.

11. I have anxiously considered the rival submissions and perused the materials on record and also the decision cited.

12. In this case, at the time of accident, the vehicle in question is not having Fitness Certificate. Now, the question is whether in such circumstances, the Insurance Company can be directed to pay the award amount to the claimants and recover the same from the vehicle owner.



13. It is interesting to note that such an argument was also placed before the Tribunal, the decision in **SOWKATH ALI** (supra) was also cited before the Tribunal. But the Tribunal did not properly appreciate the arguments as well as the decision, simply stated that, it has no power, when actually it has power. The Tribunal has no large heart to exercise its power.

14. The very same question, as to the vehicle not having Fitness Certificate at the time of accident, came before a learned Single Judge of this Court. The learned Judge found favour with the submission of the claimants that in such circumstances, the principle of Pay and Recovery can be invoked.

15. It is profitable here to note the following observations of this Court made in **2009 (1) TNMAC 301 (D.M. UNITED INDIA INSURANCE CO., LTD., V. S. SOWKATH ALI & OTHERS)**.

"7. In Appeal, the learned counsel for the appellant contended that since the vehicle in this case did not have a valid Fitness Certificate and was allowed to be used by the owner contrary to the terms and conditions of the Insurance Policy, they are not liable to compensate the Claimants. There is breach of condition of Policy and on that ground, the owner alone is liable to compensate the Claimants. Learned counsel for the Claimants, on the other hand relied on the decision of a Division Bench of this Court in Velammal and others v. P. Kanaga and others, 2004(1) TN MAC 75(DB): 2006 ACJ 1039. In this case, the following two issues were considered by the Division Bench:

1. The vehicle was covered by an Insurance policy on the date of accident is not in dispute. But the Insurer seeks to avoid its liability on the ground of violation of policy conditions, namely-

(I) The vehicle has no valid Fitness Certificate.

(ii) the vehicle was driven by a driver who did not possess the authorisation to drive max cab or the driver was not possessed of a valid licence to drive the max cab.

8. The Division Bench while holding that the



Insurance Company is not liable for violation of policy condition, held that the Insurer insofar as a claim by third parties is concerned, has to first pay the claimant and proceed against the owner of the vehicle to recover the amount paid by it. The relevant portion reads as follows:

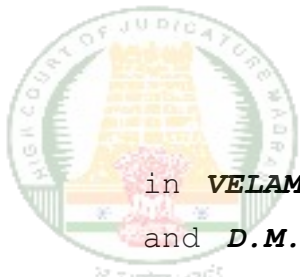
"In the result, we hold that the Insurer cannot avoid the liability to answer the claim of the third parties, but the Insurer is at liberty to proceed against the owner of the vehicle and recover the amount paid by it after paying the Claimants-appellants herein".

9. Following the ratio laid down in the above said Division bench Judgment, in this case, since the vehicle in question did not have a valid fitness Certificate on the date of accident, there is violation of policy condition and the owner will be liable for the breach. The Insurance Company, as far as the third party claim is concerned will at the first instance pay the claimant and recover the same from the owner of the vehicle in accordance with law."

16. The Principle of Pay and Recover is prevalent in contract of indemnity. When a person agreed to meet the risk or contingency, some financial responsibility of other, it is indemnification. This principle is prevalent in law of contract. Law of Insurance is a Law of Contract, but it is a special contract. The principle of Pay and Recover is intended to give immediate relief to the sufferer and collect the amount from the wrongdoer. In road accident cases depends of the deceased may get award. But, it is difficult to get the money from the vehicle owner or a wrongdoer. In such event, the award will be an useless paper decree for the claimants. In such circumstances, the Court has devised a the method, to pay the amount to the suffered, enabling them to recover the same from the wrongdoer. The Insurance Company as a decree holder and execute the right of claim amount from the wrongdoer under this principle of Pay and Recover.

Now, the concept of Pay and Recover comes to stay in Insurance cases.

Now, applying the above principles as well as the decisions rendered



in **VELAMMAL AND OTHERS V. P.KANAGA AND OTHER, 2004(1) TNMAC 75 (DB)**
and **D.M.UNITED INDIA INSURANCE CO. LTD., V. S.SOWKATH ALI & OTHERS,**
the Principle of Pay and Recover can be applied in this case.

17. In the circumstances, the common award amount in M.C.O.P.No.84 of 2006 (E.Manoharan) Rs.73,040/- and in M.C.O.P.No.177 of 2006 (Raja) Rs.58,270/- together with interest @ 7.5% p.a., and costs shall be paid by the second respondent, namely, United India Insurance Company. The second respondent is entitled to recover the said amount from the first respondent, namely, Suresh. The Insurance Company need not file a separate suit. It can be levied before the Execution Court in which the award will be executed. The Company is entitled to seek attachment before the judgment of the vehicle and also other remedies available as against the judgment debtor as provided in Order 21 C.P.C. The second respondent shall deposit the award amount before the Claims Tribunal within eight weeks from the date of receipt of a copy of this judgment. In other aspects, the common award of the Motor Accident Claims Tribunal/Subordinate Judge, Srivilliputhur, passed in M.C.O.P.No.84 of 2006 and M.C.O.P.No.177 of 2006, are confirmed. Accordingly, these two Civil Miscellaneous Appeals are disposed of.

18. It is made clear that, as already orders passed by this Court, dated 21.11.2013, in M.P(MD)Nos.1 & 1 of 2013 in CMA (MD)Sr.Nos.35214 & 35217 of 2013, while calculating the accrued interest, the interest for the delay period shall be excluded. No costs. Consequently, connected miscellaneous petitions are also dismissed.

Sd/-
Assistant Registrar (AE)

/True Copy/

Sub Assistant Registrar

To

The Motor Vehicle Accident Claims Tribunal/Sub-Court, Srivilliputtur.

+1cc to Mr.G.Marimuthu, Advocate Sr.No.44063

+2cc to Mr.N.Sivakumar, Advocate Sr.No.44799