

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on : 19.12.2016

Judgment Pronounced on : 24.02.2017

CORAM : THE HONOURABLE Mr.JUSTICE N.SESHASAYEE

CMA.No.223 of 2008

The National Insurance Co. Ltd.,
No.751, Anna Salai,
Chennai.

...Appellant/2nd Respondent

Vs.

1.M.Padmini

2.M.Shalini (minor)

3.M.Dilli Babu (Minor)

4.A.Sarojammal

5.Sunil C.K.

...Respondents 1 to 4/

Petitioner

minor Petitioners rep by their mother and next friend the first
Petitioner herein 5th respondents/1st Respondent

Prayer : Civil Miscellaneous Appeal filed under Section 173 of
the Motor Vehicles Act, 1988 against the award and decree dated
20.02.2007 made in MCOP.No.5198 of 2005 on the file of the Motor
Accidents Claims Tribunal, Chief Judge, Court of Small Causes,
Chennai.

For Appellant : Mr.S.Arunkumar

For Respondents : Mr.U.Ravichandran [for R1 to R4]

No appearance [for R5]

JUDGMENT

The Insurance Company which was made liable along with the owner
of a jeep to pay a compensation of Rs.6,80,000/- with interest @
7.5% per annum to the claimant, a passenger in the jeep for the
injuries the latter had suffered, consequent to an accident
involving the said jeep on 19.12.2004, challenges the liability
fastened on it, in particular the application of doctrine of pay
and recover.

2. The learned counsel for the appellant submitted that the
policy cover as evidenced by Ex.R1 is only an "Act Policy" that
it does not cover any injury or death to passengers and unless a
specific contract for covering the death or injury to the
passengers is entered into with the insurer on payment of
additional premium, the insurance company shall not be mulcted
with any liability. The learned counsel submitted that the

Tribunal has correctly arrived at a conclusion on the question of insurance company's liability to pay the compensation, but it went wrong in applying the doctrine of "pay and recover" which was not available where there is no policy.

3. In response, the learned counsel for the respondents 1 to 4/claimants contended that the genuineness of the very policy is suspected since it is not a carbon copy or xerox copy, but only a computer print out and that there is variance in the policy number, both at the top and in the bottom of each of the pages of the document that constitute Ext.R-1. Arguing further, the learned counsel contended that the owner of the vehicle has paid Rs.350/- as "loading TP" and this is an additional premium that the insurance company insists as the one required to be paid, and hence it would take within its fold the insurance cover for the passenger of the vehicle. He added that as per the limitations mentioned in Ext.R-1 insurance policy, it covers the use of the vehicle for any purpose other than for 'hire or reward' and that on facts P.W.2 has deposed in his cross-examination that no fare was paid for travel in the jeep at that relevant time. When no fare is paid, it falls outside the purview of limiting circumstances stipulated in the policy and therefore, the insurance company cannot seek any exit route for escaping its liability.

4. Reacting to this argument, the learned counsel for the appellant replied:

- That 'loading TP' cannot be and should not be equated with additional premium intended for additional cover. The term or phrase 'loading TP' means an enhanced premium payable on an Act Policy based on insurer's perceived proneness of the vehicle to accidents. It is contractually determined and Ext.R-6 proposal form shows that the owner of the vehicle has accepted to pay 'loading TP' @ 100%.
- The allegation suspecting the genuineness of Ext.R-1 is baseless and in The Oriental Insurance Co. Ltd., Vs. Jalaja & Others [1995 ACJ 829] it is held that the presumption is always in favour of genuineness of the print out of the policy. On this aspect, variance alleged in the number provided in the bottom of the each sheet of Ext.R-1 with the policy number given at the top in all the pages is explainable in that the number given at the bottom is the access number through which relevant data could be accessed in the server to obtain the copy.

He added all these aspects have been considered by the Tribunal and the award on this aspect is in order. He reiterated that inasmuch as the Tribunal had held that the Insurance Company is not liable, it should not have invoked the doctrine of "pay and recover" since the said principle is applied only to cases

where there is violation of policy conditions and not in cases where there is no insurance cover. The effect of the award, contended the counsel, appears to be founded on a non existing premise that there is in existence a contract of insurance covering injuries or death of passengers of a vehicle which is fallacious in the face of Asha Rani and Tilak Singh cases.

5. It is not any easy route that the Tribunal has adopted to conclude that the appellant was not liable. It helped itself to be guided by several authorities commencing from New India Assurance Vs Asha Rani & Others [(2003)2 SCC 223] to United India Insurance Company Limited Vs Tilak Singh & Others [2006 (2) CTC 661], to arrive at its conclusion. I find the said finding is in order and does not call for any interference.

6. In this context, I find that the submissions of the learned counsel for the respondents/claimants suspecting the genuineness of Ext.R-1 less convincing. It does not stand to reason as to why should an insurance company go personal in this particular case to fabricate a document when it faces claims running to several lakhs every day. And Ext.R-6 proposal form does not support him either. As to the second leg of his argument in equating loading TP with additional premium, it needs to be stated that the expression TP is but an abbreviation for Third Party and the premium on a Third Party insurance is additionally loaded. In this regard General Regulations in GR.3 of IMT is relevant.

"G.R.3 Policy Forms:

Policies insuring Motor Vehicles are to be issued only as per the Standard Form(s) given in Section 6 of the Indian Motor Tariff.

A. Types of Policies

There are two types of Policies:

i.Liability Only Policy: This covers Third Party Liability for bodily injury and/or death and Property Damage. Personal Accident Cover for Owner-Driver is also included.

ii.Package Policy: This covers loss or damage to the vehicle insured in addition to (i) above.

Restricting the scope of cover under Section-I (loss of or damage to the vehicle insured) of the Package Policy without any reduction in Tariff rates is permitted. Excepting this, no alteration or extension of any of the Covers, Terms, Conditions, Exclusions etc. of any of the Policies/Endorsements laid down in this tariff is permitted without prior approval of the TAC.

B. Rating:

Rates provided under this Tariff are minimum rates. Loading on tariff premium rates by 100% may be applied for adverse claims experience of the vehicle insured and individual risk perception as per the insurer's assessment. If the experience continues to be adverse, a further loading of 100% on the expiring premium may be applied. No further loading shall apply. "

This explains what the terms loading TP connotes. If it has to be stated in a language that a laity understands it is topping up a premium for a vehicle based on adverse claims perception as regards the vehicle insured by the insurance company. Since, it is related to or confined to charging a higher premium for a specific class of claimants namely third parties, it cannot be expanded to include those who do not fall under the category of third parties.

7. This now takes this Court to consider the only aspect on which the appellant rested the sustainability of the appeal: The tenability of applying the doctrine of 'Pay & Recover'. For applying the said doctrine the Tribunal has drawn strength for its conclusion from the ratio in *Amrit Lal Sood & Another Vs Smt. Khaushalya Devi Thapar & Others* [1988 (2) SCJ 137], *National Insurance Co. Ltd., Baljit Kaur & Others* [2004 SCJ 428], *Pramod Kumar Agarwal and another Vs Mushtari Begum & Others* [2004 ACJ 1903].

8. The circumstances in which the doctrine of pay and recover might be applied is considered by a Full Bench of this Court in *Branch Manager, United India Insurance Co., Ltd., Nagammal* [2009 (1) CTC 1], where the Court inter alia held that in all cases that were decided after the decision of *National Insurance Co., Ltd., Vs Baljit Kaur & Others* [2004(1) CTC 210 (SC)], Tribunal cannot apply the doctrine of "pay and recover" where there is no insurance cover. So far as the present case is concerned, the award was passed by the Tribunal on 20-02-2007, some three years after the judgement in *Baljit Kaur* case (delivered on 06-01-2004). However, the judgement of the Full Bench in *Nagammal* case was pronounced only on 23-12-2008, and hence the Tribunal could not be blamed for applying the doctrine of "pay and recover". But, as on today *Nagammal's* case holds the territory and hence this Court has little option but to follow the dictum therein. Accordingly, this Court holds that the doctrine of 'pay and recover' cannot be applied in this case.

9. In the result, this appeal is allowed but without costs. If the appellant has deposited the whole or part of the award amount, it is permitted withdraw the same with all accrued interest. If however the claimants have withdrawn whole or part of the amount so deposited, the appellant shall realise the same

from the owner of the vehicle. The claimants are free to proceed against the owner of the offending vehicle for realising the entire compensation or so much left to realised.

Sd/-
Asst.Registrar (CCC)

/true copy/

Sub Asst. Registrar

ds

To:

1. The Motor Accident Claims Tribunal,
Chief Judge, Court of Small Causes,
Chennai.

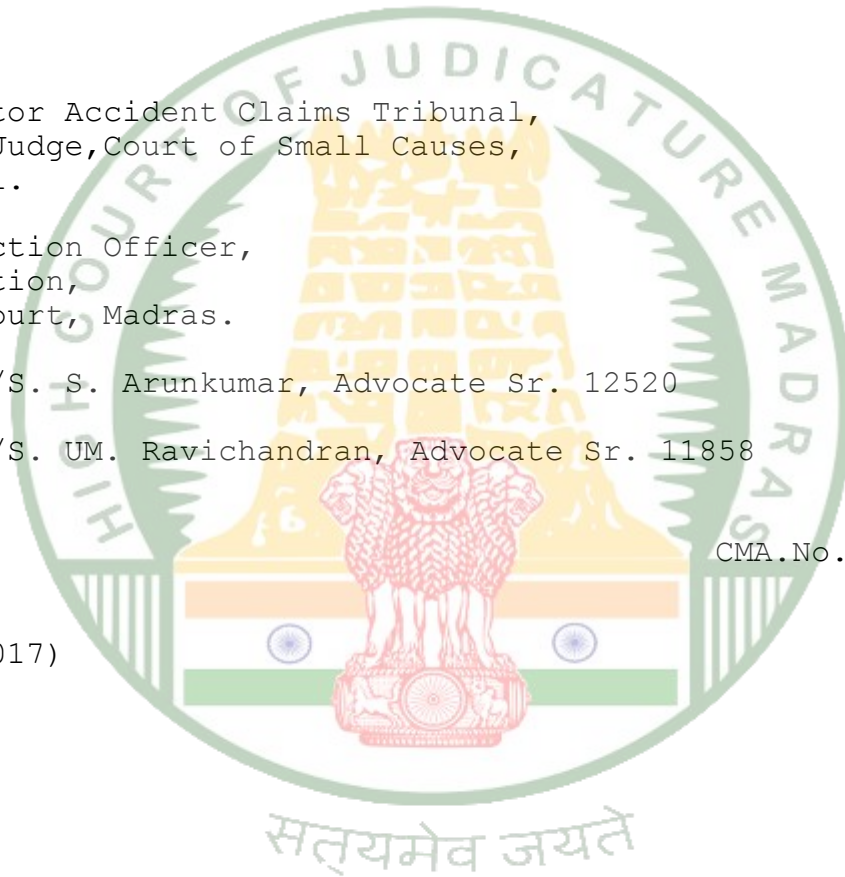
2. The Section Officer,
VR Section,
High Court, Madras.

+1cc to M/S. S. Arunkumar, Advocate Sr. 12520

+2cc to M/S. UM. Ravichandran, Advocate Sr. 11858

CMA.No.223 of 2008

MP (CO)
VR (24/4/2017)



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