BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 12.09.2017

CORAM:

THE HONOURABLE MRS.JUSTICE J.NISHA BANU

CMA (MD).Nos.1216 to 1219 of 2011
and
M.P(MD)Nos.1, 1, 1 and 1 of 2011

The Assistant Manager,
Bajaj Allianz General Insurance
Company Ltd.,
12-G, K.M.A.Complex, I Floor, Ram Nagar,
Bye Pass Road, Madurai -10.
... Appellant/2nd Respondent in all the CMAs

Vs.

Jeyaraj ...1st respondent/Petitioner in CMA(MD)No.1216/11

Minor G.Gomathi
Rep.by father and next friend
Mr.Gopal ...1st respondent/Petitioner in CMA(MD)No.1217/11

Chandra ...1st respondent/Petitioner in CMA(MD)No.1218/11

Minor G.Darmaraj
Rep.by father and next friend
Mr.Gopal ...1st respondent/Petitioner in CMA(MD)No.1219/11

R.Rameshpandi ... 2nd Respondent /1st Respondent in all the CMAs

COMMON PRAYER: Appeals filed under Section 173 of the Motor Vehicles Act, 1988, against the Order and Decree, dated 16.11.2010 Passed in M.C.O.P.Nos.101 to 104 of 2010 respectively, on the file of Motor Accident Claims Tribunal, Chief Judicial Magistrate Court, Theni.

For Appellant in all CMAs : Mr.S.Srinivasa Raghavan
For Respondents in all CMAs : No Appearance

* * * * *

COMMON JUDGMENT

All these Civil Miscellaneous Appeals have been filed by the appellant/Insurance Company against the common award, dated 16.11.2010 passed in M.C.O.P.Nos.101 to 104, by the Motor

Accidents Claims Tribunal – cum - Chief Judicial Magistrate, Theni filed by the respective first respondent(s)/claimants.

2. Since all the appeals arise out of a common award passed in respect of the same accident occurred on 11.06.2006, these appeals are disposed of by this common judgment.

3.Four persons filed the claim petitions claiming various amounts for the injuries suffered by them in the accident that took place on 11.06.2006 at about 1.00 p.m., while they were travelling in the Mini Door Van bearing Registration No.TN-58-6274 belonging to the second respondent insured with the appellant.

4.According to the first respondents/claimants in all the appeals, they engaged the Van belonging to the second respondent for attending a condolence. The driver of the Mini Door Van drove the van in a rash and negligent manner and caused accident. In view of the accident, the first respondents/claimants in all the appeals sustained multiple injuries. The second respondent is the owner of the vehicle, insured with the appellant and therefore, they filed claim petitions claiming compensation, for the injuries sustained by them, from the second respondent and appellant.

5.The first respondent in the claim petition/second respondent herein, remained ex-parte before the Tribunal.

6.The second respondent/appellant filed counter statement and contended that the first respondent in all the appeals, who are the claimants, travelled in a goods carriage as passengers by paying money and carried the passengers in violation of permit and policy condition. In view of the same, the appellant is not liable to pay any compensation.

7.Before the Tribunal, all the claimants examined themselves as P.W.1 to P.W.4 and 8 documents were marked as Ex.P.1 to Ex.P.8. The appellant examined two witnesses as R.Ws.1 and 2 and marked two documents as Ex.R.1 and Ex.R.2.

8.The Tribunal considering the pleadings, oral and documentary evidence and judgment relied on by the counsel for the parties held that the first respondent in all the appeals/claimants travelled in a goods carriage as paid passengers in violation of condition of permit and policy. The Tribunal directed the appellant to pay compensation at the first instance and then recover the same from the owner of the vehicle.

9.Aggrieved against the said award, the appellant/Insurance Company has filed these appeals.

10.The learned counsel for the appellant contended that it is admitted by the claimants/first respondent in all the appeals that they travelled in a goods carriage as paid passengers. They are admittedly un-authorised passengers in a goods carriage. In the circumstances, the appellant is not liable to pay any compensation as terms and condition of permit and policy were violated. The Tribunal having held that the Insurance Company is not liable to pay compensation, the principles of pay and recovery does not arise.

11. In support of his contentions, the learned Counsel for the appellant-Insurance Company relied on the following judgments:

(i) In National Insurance Company Limited v. Savitri Devi and others reported in (2013) 11 Supreme Court Cases 554, the Honourable Supreme Court has considered the liability of insurer, when the passengers were carried in a goods vehicle in violation of terms of policy and held as follows:

> "8. After having gone through the award of the Claims Tribunal and the judgment and order passed by the learned Single Judge of the High Court, we are not able to understand as to how it has been found that the appellant Insurance Company can still be held liable to pay the amount of compensation as there has been a categorical finding by both the courts recording that the vehicle in question was insured only as "goods carrying vehicle". The custom of carrying barat in the village on the said truck will not be sufficient to hold the appellant Insurance Company liable to pay the amount of compensation. Admittedly, the appellant Insurance Company would not know unless the accident takes place as to for what purpose the vehicle in question was being used. The terms and conditions of the insurance policy are very clear and categorical and it creates a specific bar on carrying of any passengers, except the employees other than the driver, not exceeding six (6) in number, who should also come under the purview of the Workmen's Compensation Act.
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> 9. The specific case of the claimants was that the barat was being taken in the said open truck on 12-11-1996 when the accident had taken place. Thus, according to us, it clearly violates the terms and conditions of the policy.
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> 10. Dealing with similar circumstance, this Court has held in National Insurance Co. Ltd. v. Bommithi Subbhayamma (2005) 12 SCC 243, as under: (SCC p.246, paras 9-11)
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>> "9.... '....20. It is, therefore, manifest that in spite of the amendment of 1994, the effect of the provision contained in Section 147 with respect to persons other than the owner of the goods or his

authorised representative remains the same. Although the owner of the goods or his authorised representative would now be covered by the policy of insurance in respect of a goods vehicle, it was not the intention of the legislature to provide for the liability of the insurer with respect to passengers, especially gratuitous passengers, who were neither contemplated at the time the contract of insurance was entered into, nor was any premium paid to the extent of the benefit of insurance to such category of people.'

10. The same view was reiterated in National Insurance Co. Limited v. Challa Upendra Rao (2004) 8 SCC 517, Pramod Kumar Agrawal v. Mushtari Begum (2004) 8 SCC 667 and also in National Insurance Co. Limited. v. Chinnamma (2004) 8 SCC 697.

11. In view of the aforementioned authoritative pronouncements of this Court, the impugned judgment of the High Court cannot be sustained which is set aside, accordingly. This Appeal is allowed. We, however, make it clear that the claimant respondents will be entitled to recover the amount of compensation granted in their favour by the Motor Vehicles Accidents Claims Tribunal from the owner of the vehicle. No costs.”

11. Similar view has been reiterated in National Insurance Co. Limited v. Rattani, (2009) 2 SCC 75, paras 14 and 15 of which are reproduced hereunder: (SCC p.79)

“14. 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 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.

15. 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."

12. In the light of the aforesaid judgments, we have no doubt in our minds that the impugned judgment and order of the learned Single Judge dated 28-7-2005 cannot be sustained. The same is hereby set aside and quashed. No liability can be fastened on the appellant Insurance Company. The appeals of the appellant Insurance Company are allowed to this extent.

13. However, it is clarified that if any amount has already been paid by the Insurance Company, it shall not be permissible for it to recover the amount from the claimants. It is also clarified that the claimants, in any case, would be entitled to recover the balance amount of the compensation awarded to them vide impugned judgment and order of the learned Single Judge dated 28-7-2005 from the estate of the deceased owner. The appeals are allowed to this extent. The award and the finding of the learned Single Judge fastening the liability on the appellant Insurance Company is set aside. The parties to bear their own costs."

(ii) Iffco-Tokio General Insurance Co. Ltd. v. Muthumani reported in 2014 (2) TN MAC 442, wherein this Court held as follows:

"8. In fact, I had an occasion to deal with the same issue in the case of United India Insurance Company Ltd., Vs. M. Thangavel, 2011 (2) TN MAC 774. In the said case, by relying upon various judgments of the Hon'ble Supreme Court, it has been held that only in a case, where the Insurance Company is successful in its defence under Section 149, it may yet be required to pay the amount to the Claimant and thereafter, it may recover the same from the owner of the vehicle. When the Insurance Company is not statutorily required to cover the liability in respect of a passenger in a goods vehicle under Section 147, unless such passengers is the owner or agent of the owner of the goods accompanying such goods absolutely, there is no need for the Insurance Company to pay compensation since there is no contractual liability under the statute to pay the amount to the gratuitous passenger travelling in the goods carriage vehicle. Under such circumstances, a direction could not be given to the Insurance Company to pay the claimants and recover from the owner of the vehicle.

9. Now, it is the submission of the learned Counsel for the Claimants that if the matter has already been decided by the Trial Court by directing the Insurance Company to pay the Compensation amount to the Claimant and to recover the same from the owner of the vehicle, it is in the discretion of the appellate Court to decide as to whether the doctrine of 'Pay and Recover' could be applied, depending upon the facts and circumstances of the case. In this regard, the learned Counsel for the Claimants relied upon the judgment of a Full Bench of this Court reported in Branch Manager, United India Insurance Co. Ltd. Vs. Nagammal, 2009 (1) TN MAC 1 : 2009 (1) CTC 1. In that case, the Full Bench of this Court by relying upon various judgments of the Hon'ble Supreme Court, has held as follows:

> "31(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 discretion of the Appellate Court, depending upon the facts and circumstances 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 ie., the driver or the owner, as the case may be."

The learned Counsel for the Claimants has also produced number of judgments delivered by this Court and submitted that in all those cases, this Court has confirmed the order passed by the Tribunal, with regard to the doctrine of 'Pay and Recovery', in the case of gratuitous passengers travelling in a Goods Carriage vehicle."

10. But, a careful perusal of the judgment of the Full Bench of this Court in Branch Manager, United India Insurance Co. Ltd. Vs. Nagammal, cited supra, I find that in the said case, the Full Bench has held that if the matter has already been decided by the Trial Court before the decision of National Insurance Co. Ltd. v. Baljit Kaur, 2004 (1) TN MAC 1 (SC) and it would be in the discretion of the appellate Court, depending upon the facts and circumstances, to determine as to whether the doctrine of 'Pay and Recover' could be applied.

11. The Judgment in Baljit Kaur case, cited supra, was delivered by the Hon'ble Supreme Court in the year 2004. But, in the case on hand, the Award has been passed by the Tribunal only in the year 2012. Therefore, the dictum laid down in the above said

judgment of the Full Bench of this Court, cannot be made applicable to this case.

12. In fact, in the judgment reported in the case of National Insurance Company Ltd Vs. Savitri Devi and others, 2013 (11) SCC 554, the Hon'ble Supreme Court has set aside the order of the High Court, where the High Court had directed the Insurance Company to pay the compensation amount to the victims and to recover the same from the owner of the vehicle in the case of gratuitous passengers travelling in goods vehicle. Therefore, in my considered opinion, in the case of gratuitous passengers travelling in goods carriage vehicle, absolutely there is no need to pay compensation by the Insurance Company, since there is no contractual liability under the statute to pay the amount to the gratuitous passengers travelling in the Goods Carriage vehicle.

13. Therefore, the order of the Tribunal to the extent of directing the Insurance Company to pay the Compensation amount to the Claimants and to recover the same from the owner of the vehicle alone is set aside and the Insurance Company/appellant herein is exonerated from its liability to pay the Compensation amount. The Claimants can work out their remedy to get the Compensation amount from the owner of the vehicle in the manner known to law. The appellant / Insurance Company is permitted to withdraw the amount deposited by them if any before the Tribunal."

12.Though notice was served on the respondents in all the CMAs, they did not appear before this Court either in person or through counsel.

13. I have heard the learned counsels appearing for the appellant and perused all the materials available on record.

14.The only issue to be decided in all these appeals is whether the Tribunal is correct in ordering pay and recovery when the claimants/first respondents travelled as paid passengers/unauthorised passengers in a goods carriage. This issue is no longer res-integra. It is well settled law that in a goods carriage, only the owner of the goods or his agent can travel along with the goods. In such circumstances, they are entitled to compensation in the event of accident only from the owner of vehicle. It is well settled that unauthorised passengers in a goods vehicle are not entitled to claim compensation from the Insurance Company and Insurance Company is not liable to pay any compensation. In view of well settled judicial pronouncements in the judgments referred to above, the award of the Tribunal is liable to be set aside in sofaras ordering appellant to pay at the first instance and recover the same from second respondent herein and is hereby set aside. In all the other aspect the award of Tribunal is confirmed.

15.In the result, all the appeals are allowed and the award of the Tribunal, dated 16.11.2010 Passed in M.C.O.P.Nos.101 to 104 of 2010 respectively, on the file of Motor Accident Claims Tribunal, Chief Judicial Magistrate Court, Theni, in respect of directing the appellant to pay at first instance and recover the same from second respondent, the owner of the vehicle is set aside. The owner of the vehicle/second respondent is liable to pay compensation as awarded by the Tribunal. At the same time, if any amount is deposited by the appellant and the same is withdrawn by the first respondents/claimants, the appellant is not entitled to recover the same from the first respondents/claimants, but can recover only from the second respondent/owner of the vehicle as if the same is decreed in their favour. The appellant is entitled to withdraw the amount deposited by them to the credit of claim petitions, if the same is not withdrawn by the claimant, till date of balance amount if any. It is open to the first respondents/claimants in all the C.M.As., to recover the compensation awarded from the second respondent/owner of the vehicle. No costs. Consequently, connected miscellaneous petitions are also dismissed.

Sd/-
Assistant Registrar(CS-III)

/True Copy/

Sub Assistant Registrar.

To
The Chief Judicial Magistrate,
Motor Accidents Claims Tribunal,
Chief Judicial Magistrate Court,
Theni.

Copy to:
The Record Keeper,
Vernacular Section,
Madurai Bench of Madras High Court,
Madurai.

+1CC to Mr.S.Srinivasa Raghavan, Advocate, SR.No. 78247

CMA (MD).Nos.1216 to 1219 of 2011
12.09.2017

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