BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Dated : **08.08.2017**

CORAM:

THE HONOURABLE MRS.JUSTICE J.NISHA BANU

C.M.A.Nos.297 and 302 of 2011

R.Theivanai
...Appellant/Claimant in CMA(MD)No.297 of 2011
G.Palani ...Appellant/Claimant in CMA(MD)No.302 of 2011

- Vs -

1. S.Gunasekar

2.The Divisional Manager,
Oriental Insurance Company,
12, K.J.R. Complex,
North Veli Street, Madurai.
...Respondents/Respondents in both the appeals

Common Prayer: Appeals filed under Section 173 of Motor Vehicles Act, 1988, against the judgment and decree dated 26.06.2009 passed in M.C.O.P.Nos.69 and 263 of 2003 by the Additional District Judge/Fast Track Judge I, Madurai, respectively.

For Appellant in both the appeals	:	Mr.M.Sarangan for Mrs.S.Vijayashanthi
For R1 in both the appeals	:	No Appearance
For R2 in both the appeals	:	Mr.K.Bhaskaran

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C O M M O N J U D G M E N T

Both the appeals are directed against the judgment dated 26.06.2009 passed in M.C.O.P.Nos.69 and 263 of 2003 by the Additional District Judge/Fast Track Judge I, Madurai.

2.Since both the claim petitions pertain to a single accident, the Tribunal pronounced a common Judgment and here also both the appeals were heard jointly and a common Judgment is pronounced.

3.The case of the claimants in the petition is briefly as follows:

The accident took place on the Thirumangalam-Periya Alangulam main road at O.Alangulam on 13.11.202 at about 12.30 hours. The petitioners along with other three passengers were travelling in a share auto-rickshaw bearing registration TN 58 F 5796 from Thirumangalam to O.Alangulam. At that time, the said auto was driven by its driver at a high speed in a rash and negligent manner and in a turning the auto capsized and due to the accident, the petitioners sustained grievous injuries all over the body. Hence, they filed a claim petition before the Tribunal for compensation

4. Before the Tribunal, on the side of the petitioner, P.Ws.1 to 3 were examined and Exs.P1 to P8 were marked. On the side of the respondents R.Ws.1 and 2 were examined and Exs.R1 to R6 were marked.

5. On a careful consideration of the evidence on record, in MCOP No.69 of 2003, the learned Tribunal has awarded a sum of Rs.48,000/- as compensation with interest at the rate of 7.5% payable by the first respondent. In MCOP No.263 of 2003, the learned Tribunal has awarded a sum of Rs.10,000/- as compensation with interest at the rate of 7.5% payable by the first respondent. Not satisfied with the quantum of award, these appeals have been filed by the appellants/claimants.

6.Heard the learned counsel for the appellants/claimants and the learned counsel for the second respondent and also perused the materials available on record. Though paper publication has been effected, the first respondent did not appear before this Court.

7.At the outset, the learned counsel for the appellants/claimants has submitted that he is not questioning the quantum awarded by the Tribunal, but he would submit that since the driver of the auto did not possess valid driving licence, the award was directed to be paid by the first respondent/owner of the vehicle and hence, he is requesting that the right to recover the award from the Insurance Company must be ordered. In support of his contention, he has relied on the Judgment of the Hon'ble Supreme Court in ***NATIONAL INSURANCE CO. LTD., v. SWARAN SINGH AND OTHERS*** reported in ***2004 (1) TN MAC 104***, wherein at paragraph Nos.96 and 99, it has been held as follows:-

> *"96.It is, therefore , evident form the discussions made hereinbefore that the liability of the insurance company to satisfy the decree at the first instance and to recover the awarded amount from, the owner of driver thereof has been holding the filed for a long time.*
>
> *99. We may, however, hasten to add that the Tribunal and the Court must, however, exercise their jurisdiction to issue such a direction upon consideration of the facts and circumstances of each case and in the event such a direction has been issued despite arriving at a finding of fact to the effect that the insurer has been able to establish that the insured has committed a breach of contract of insurance as envisaged under sub-*

clause (ii) of clause (a) of sub-section (2) of Section 149 of the Act, the insurance company shall be entitled to realise the awarded amount from the owner of driver of the vehicle, as the case may be, in execution of the same award having regard to the provisions of Sections 165 and 168 of the Act. However, in the event, having regard to the limited scope of inquiry in the proceedings before the Claims Tribunal it had not been able to do so, the insurance company may initiate a separate action therefor against the owner or the driver of the vehicle or both, as the case may be. Those exceptional cases may arise when the evidence becomes available to or comes to the notice of the insurer at a subsequent stage or for one reason or the other, the insurer was not given opportunity to defend at all. Such a course of action may also be resorted when a fraud or collusion between the victim and the owner of the vehicle is detected or comes to knowledge of the insurer at a later stage."

8.It is well settled law that the claimant should not suffer even after obtaining an order for compensation. The provisions relating to the award of compensation are benevolent provisions in favour of claimant. The Hon'ble Apex Court in various Judgments have formulated the policy of "pay and recovery". In the present case, there is no reason to deviate from the principle of "pay and recovery".

9.In the result, this Civil Miscellaneous Appeals are partly allowed and the second respondent/Insurance Company is directed to pay the amount awarded by the Tribunal at the first instance and then, recover the same from the owner of the vehicle/first respondent. The second respondent/Insurance Company shall deposit the award amount to the credit of M.C.O.P., on the file of claims Tribunal within a period of eight weeks from the date of receipt of a copy of this order and in the later stage, the second respondent/Insurance Company is entitled to recover the same from the owner of the vehicle/first respondent, by way of Execution Petition, without actually filing a suit as held by Hon'ble Apex Court in the judgment reported in ***2004(2)CTC 464 (Oriental Insurance Co., Ltd., vs. Shri Nanjappan and others)***. On making such deposit, the claimants are at liberty to withdraw the entire award amount along with accrued interest and costs, without filing a formal application seeking permission. No costs.

Sd/-
Assistant Registrar(CS-III)

/True Copy/

Sub Assistant Registrar

To

The Additional District Judge/Fast Track Judge I, Madurai.

+2cc to Mr.M.SARANGAN Advocate in SR. No. 71446,71447
+2cc to Mr.K.BHASAKARAN Advocate in SR. No. 71143,71144

RJ2
JS/SV.MMS/SAR.1/26.09.2017/4P-6C

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