IN THE HIGH COURT OF JUDICATURE AT MADRAS
Dated : 08.10.2018
CORAM:
THE HONOURABLE MR.JUSTICE M.V.MURALIDARAN
C.M.A.No.511 of 2015
and
M.P.No.1 of 2015 &
C.M.P.No.15852 of 2016

The Branch Manager,
Oriental Insurance Co. Ltd.,
Branch Office No.25-C, Arunagiri Complex,
III Floor,
Bye pass Road,
Hosur - 635 109. ... Appellant

Vs

1.N.Perumal

2.N.Sathiyamoorthi ... Respondents

Civil Miscellaneous Appeal filed under Section 173 of Motor Vehicles Act, 1988 against the award 24.11.2014 passed in M.A.C.T.O.P.No.55 of 2013 on the file of the Motor Accident Claims Tribunal Special Sub-Judge (Special Court for Motor Accident Claim Cases), Krishnagiri.

For Appellant : Mr.M.Krishnamoorthy

For Respondents: Mr.Mukund R.Pandiyan (for R1)

Mr.C.Prabhakaran (for R2)

O R D E R

Aggrieved by the award dated 24.11.2014 passed in M.A.C.T.O.P.No.55 of 2013 on the file of the Motor Accident Claims Tribunal (Special Court for Motor Accident Claim Cases), Krishnagiri, directing the appellant to pay compensation of Rs.6,90,985/- to the 1st respondent for the injuries sustained by him in the accident, the appellant insurance company has preferred this appeal.

2. Brief facts are that on 03.05.2007, the 1st respondent was travelling in the tractor bearing registration No.TN-24 A 5775 from Moramadugu towards Krishnagiri, as an employee for loading and unloading coolie along with other coolies to unload mangoes at Krishnagiri. When the tractor was proceeding near

Mandhiri Goundan Kottai at the curve road, in the road leading to Pudupeyanpalli, the driver of the tractor drove the same in a rash and negligent manner at an uncontrollable speed. Due to over speed, the driver could not control the tractor and the tractor capsized and caused the accident. Due to the impact, the 1st respondent and other coolies sustained injuries. Immediately after the accident, the 1st respondent was taken to the Government Hospital, Krishnagiri, where from he was taken to Sparsh Hospital, Bangalore and from 04.05.2007 to 14.05.2007, the 1st respondent had taken treatment at Narayana Hrudalaya Neuro. Regarding the accident, a criminal case was registered against the driver of the tractor in Crime No.360 of 2007 under Sections 279, 337 and 338 of IPC on the file of K.R.P. Dam Police Station. The 2nd respondent herein is the owner of the offending tractor and at the time of accident, the offending tractor was insured with the appellant. At the time of accident, the 1st respondent was aged 15 years and was studying in Government High School, Pachiganapalli. He was also doing coolie work during holidays and in leisure hours and was earning Rs.2,000/- per month from the coolie work. Stating that the accident occurred due to the rash and negligent driving of the drive of the tractor, the 1st respondent has filed the claim petition claiming compensation of Rs.10,00,000/-.

3. Resisting the claim petition, the appellant has filed the counter stating that at the time of accident, the petitioner and six others were travelling in the 2nd respondent's tractor as unauthorised passengers violating the policy conditions. It is stated that the tractor which was meant for only agricultural purpose was used for commercial purpose, which was also in violation of policy conditions and therefore, the appellant was not liable to indemnify the owner. The manner of accident stated in the claim petition was denied. The First Information Report reads that the 1st respondent and others were travelling on the mangoes, which was the negligence on their part by sitting without any grip. In the counter, the appellant also denied the age, occupation, monthly income, nature of injuries and the treatment taken by the 1st respondent. It is stated that the compensation claimed by the 1st respondent was excessive and prayed for dismissal of the claim petition.

4. Before the Tribunal, the 1st respondent examined himself as P.W.1 and two Doctors were examined as P.W.2 and P.W.3 and marked Exs.P1 to P12. On the side of the appellant, R.W.1 was examined and Exs.R1 and R2 were marked.

5. Upon consideration of the oral and documentary evidence, the Tribunal held that the accident occurred due to the rash and negligent driving of the driver of the tractor. The Tribunal held that at the time of accident, the driver of the offending

tractor had no valid driving licence, however, since the offending vehicle was insured with the appellant and premium for coolies was collected, the appellant was directed to pay the compensation to the 1st respondent. As far as quantum of compensation is concerned, the Tribunal has awarded total compensation of Rs.6,90,985/-. Aggrieved by the fastening of liability, the appellant has preferred this appeal.

6. Challenging the fastening of liability on the appellant insurance company, the learned counsel for the appellant submitted that the Tribunal ought to have exonerated the appellant and it ought to have fastened the liability only on the second respondent, the owner of the tractor insured with the appellant as the 1st respondent was travelling as an unauthorised passenger in the trailer over the mango loads along with six more persons. He would submit that the Tribunal erred in considering the defence taken by the appellant and also erred in completely overlooking the evidence of RW1, who had deposed denying the liability on the ground that the 1st respondent was an unauthorised passenger. The Tribunal discussed only the absence of driving licence. Further, the 1st respondent was not an employee of the 2nd respondent. The 2nd respondent by violating the policy conditions, used the tractor and therefore, the appellant is not liable to pay compensation to the 1st respondent.

7. Per contra, the learned counsel for the 1st respondent submitted that before the Tribunal, the 1st respondent proved that the accident occurred due to the rash and negligent driving of the driver of the tractor. Moreover, at the time of accident, the offending tractor was insured with the appellant and considering the factual aspects, the Tribunal rightly held that the appellant insurance company is liable to pay the compensation to the 1st respondent. Therefore, there is no need to interfere with the award passed by the Tribunal and prayed for dismissal of the appeal.

8. The main grievance of the appellant insurance company is that since the 1st respondent was travelling in the offending tractor as an unauthorised passenger, the appellant has to be exonerated from the liability. Admittedly, nothing has been produced by the 1st respondent to show that he travelled in the offending tractor as loadman. In the claim petition itself, the 1st respondent stated that at the time of accident, he was aged 15 years and was studying. It was averred in the petition that on holidays and leisure hours, the 1st respondent used to do coolie work.

9. It is to be pointed out that while fastening the liability on the appellant insurance company, the Tribunal has

failed to analyse whether the 1st respondent travelled in the offending tractor as loadman or passenger. Though the appellant contended that the 1st respondent travelled on the mangoes loaded in the trailer, nothing has been produced to prove the same. Since at the time of accident, the 1st respondent was aged 15 years only, it could safely be concluded that he travelled in the tractor as passenger even though the tractor could accommodate only one person viz., the driver.

10. Though the Tribunal found that at the time of accident the driver of the offending tractor was not possessing valid driving licence, considering the valid policy existing on the date of accident, it had fastened the liability on the appellant insurance company.

11. In National Insurance Co. Ltd. v. Swaran Singh,(2004) 3 SCC 297, the Hon'ble Supreme Court examined the liability of the insurance company vis-a-vis the owner and held that the liability of the Insurance Company would arise both from contract as well as from statute. Considering the insurer's contractual liability as well as statutory liability vis-a-vis the claims of third parties, the Hon'ble Supreme Court held as under:

> "31. The right of the victim of a road accident to claim compensation is a statutory one. He is a victim of an unforeseen situation. He would not ordinarily have a hand in it. The negligence on the part of the victim may, however, be contributory. He has suffered owing to wrongdoing of others. An accident may ruin an entire family. It may take away the only earning member. An accident may result in the loss of her only son to a mother. An accident may take place for a variety of reasons. The driver of a vehicle may not have a hand in it. He may not be found to be negligent in a given case. Other factors such as unforeseen situation, negligence of the victim, bad road or the action or inaction of any other person may lead to an accident.
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> ....
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> 72. A beneficent statute, as is well known, must receive a liberal interpretation. (See Bangalore Water Supply & Sewerage Board v. A. Rajappa (1978) 2 SCC 213, Steel Authority of India Ltd. v. National Union Waterfront Workers (2001) 7 SCC 1, ITI Ltd. v. Siemens Public Communications Network Ltd.(2002) 5 SCC 510, Amrit Bhikaji Kale v. Kashinath Janardhan Trade (1983) 3 SCC 437 and Kunal Singh v. Union of India (2003) 4 SCC 524)
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> ....

82. Proviso appended to sub-section (4) of Section 149 is referable only to sub-section (2) of Section 149 of the Act. It is an independent provision and must be read in the context of Section 96(4) of the Motor Vehicles Act, 1939. Furthermore, it is one thing to say that the insurer will be entitled to avoid its liability owing to breach of terms of a contract of insurance but it is another thing to say that the vehicle is not insured at all. If the submission of the learned counsel for the petitioner is accepted, the same would render the proviso to sub-section (4) as well as sub-section (5) of Section 149 of the Act otiose, nor can any effective meaning be attributed to the liability clause of the insurance company contained in sub-section (1) of Section 149. The decision in NEW INDIA ASSURANCE CO.LTD. VS. KAMALA, (2001 ACJ 843= 2001 4 SCC 342) has to be read in the aforementioned context.

83. Sub-section (5) of Section 149 which imposes a liability on the insurer must also be given its full effect. The insurance company may not be liable to satisfy the decree and, therefore, its liability may be zero but it does mean that it did not have initial liability at all. Thus, if the insurance company is made liable to pay any amount, it can recover the entire amount paid to the third party on behalf of the assured. If this interpretation is not given to the beneficent provisions of the Act having regard to its purport and object, we fail to see a situation where beneficent provisions can be given effect to. Sub-section (7) of Section 149 of the Act, to which pointed attention of the Court has been drawn by the learned counsel for the petitioner, which is in negative language may now be noticed. The said provision must be read with sub-section (1) thereof. The right to avoid liability in terms of sub-section (2) of Section 149 is restricted as has been discussed hereinbefore. It is one thing to say that the insurance companies are entitled to raise a defence but it is another thing to say that despite the fact that its defence has been accepted having regard to the facts and circumstances of the case, the Tribunal has power to direct them to satisfy the decree at the first instance and then direct recovery of the same from the owner. These two matters stand apart and require contextual reading. ...... "

12. After referring to various decisions, in Swaran Singh, supra, the Hon'ble Supreme Court summarized its findings as

under:

"110. The summary of our findings to the various issues as raised in these petitions is as follows:

(i) Chapter XI of the Motor Vehicles Act, 1988 providing compulsory insurance of vehicles against third-party risks is a social welfare legislation to extend relief by compensation to victims of accidents caused by use of motor vehicles. The provisions of compulsory insurance coverage of all vehicles are with this paramount object and the provisions of the Act have to be so interpreted as to effectuate the said object.

(ii) An insurer is entitled to raise a defence in a claim petition filed under Section 163-A or Section 166 of the Motor Vehicles Act, 1988, inter alia, in terms of Section 149(2)(a)(ii) of the said Act.

(iii) The breach of policy condition e.g. disqualification of the driver or invalid driving licence of the driver, as contained in sub-section (2)(a)(ii) of Section 149, has to be proved to have been committed by the insured for avoiding liability by the insurer. Mere absence, fake or invalid driving licence or disqualification of the driver for driving at the relevant time, are not in themselves defences available to the insurer against either the insured or the third parties. To avoid its liability towards the insured, the insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by a duly licensed driver or one who was not disqualified to drive at the relevant time.

(iv) Insurance companies, however, with a view to avoid their liability must not only establish the available defence(s) raised in the said proceedings but must also establish "breach" on the part of the owner of the vehicle; the burden of proof wherefor would be on them.

(v) The court cannot lay down any criteria as to how the said burden would be discharged, inasmuch as the same would depend upon the facts and circumstances of each case.

(vi) Even where the insurer is able to prove breach on the part of the insured concerning the policy condition regarding holding of a valid licence by the driver or his qualification to drive during the relevant period, the insurer would not be allowed to avoid its liability towards the insured unless the said breach or breaches on the condition of driving licence is/are so fundamental as are found to have contributed to the cause of the accident. The Tribunals in interpreting the policy conditions would apply "the rule of main purpose" and the concept of "fundamental breach" to allow defences available to the insurer under Section 149(2) of the Act.

(vii) The question, as to whether the owner has taken reasonable care to find out as to whether the driving licence produced by the driver (a fake one or otherwise), does not fulfil the requirements of law or not will have to be determined in each case.

(viii) If a vehicle at the time of accident was driven by a person having a learner's licence, the insurance companies would be liable to satisfy the decree.

(ix) The Claims Tribunal constituted under Section 165 read with Section 168 is empowered to adjudicate all claims in respect of the accidents involving death or of bodily injury or damage to property of third party arising in use of motor vehicle. The said power of the Tribunal is not restricted to decide the claims inter se between claimant or claimants on one side and insured, insurer and driver on the other. In the course of adjudicating the claim for compensation and to decide the availability of defence or defences to the insurer, the Tribunal has necessarily the power and jurisdiction to decide disputes inter se between the insurer and the insured. The decision rendered on the claims and disputes inter se between the insurer and insured in the course of adjudication of claim for compensation by the claimants and the award made thereon is enforceable and executable in the same manner as provided in Section 174 of the Act for enforcement and execution of the award in favour of the claimants.

(x) Where on adjudication of the claim under the Act the Tribunal arrives at a conclusion that the insurer has satisfactorily proved its defence in accordance with the provisions of Section 149(2) read with sub-section (7), as interpreted by this Court above, the Tribunal can direct that the insurer is liable to be reimbursed by the insured for the compensation and other amounts which it has been compelled to pay to the third party under the award of the Tribunal. Such determination of claim by the Tribunal will be enforceable and the money found due to the insurer from the insured will be recoverable on a certificate issued by the Tribunal to the Collector in the same manner under Section 174 of the Act as arrears of land revenue. The certificate will be issued for the recovery as arrears of land revenue only if, as required by sub-section (3) of Section 168 of the Act the insured fails to deposit the amount awarded in favour of the insurer within thirty days from the date of announcement of the award by the Tribunal.

(xi) The provisions contained in sub-section (4) with the proviso thereunder and sub-section (5) which are intended to cover specified contingencies mentioned therein to enable the insurer to recover the amount paid under the contract of insurance on behalf of the insured can be taken recourse to by the Tribunal and be extended to claims and defences of the insurer against the insured by relegating them to the remedy before regular court in cases where on given facts and circumstances adjudication of their claims inter se might delay the adjudication of the claims of the victims.

13. All the subsequent cases are guided by Swaran Singh's case. Onus is always upon the insurance company to prove that the driver had no valid driving licence and that there was violation of breach of policy conditions. In the facts and circumstances of each case, Court/Tribunal has to consider the nature of alleged breach of policy conditions and the Court may in its discretion direct the insurer to pay first and order recovery.

14. In Mangla Ram v. Oriental Insurance Co. Ltd. & Ors. reported in (2018) 5 SCC 656, the Hon'ble Supreme Court examined the question of no premium received, no policy issued and the fraudulent cover note issued by the Development Officer and held as under:

"26. The next question is about the liability of insurer to pay the compensation amount. The Tribunal has absolved the insurance company on the finding that no premium was received by the insurance company nor any insurance policy was ever issued by the insurance company in relation to the offending vehicle. The respondents no.2 and 3 had relied on a Cover Note which according to respondent No.1 - Insurance Company was fraudulently obtained from the then Development Officer, who was later on sacked by respondent No.1 Insurance Company. The possibility of misuse of some cover notes lying with him could not be ruled out. The respondent Nos.2 & 3 have relied on the decision of this Court in Rula (supra). That decision will be of no avail to respondent Nos.2 & 3. In that case, the Court found that the insurance policy was already issued after accepting the cheque; whereas in the present case, the respondent No.1 Insurance Company has been able to show that no payment was received by the company towards the insurance premium nor any insurance policy had been issued in respect of the offending vehicle (jeep). However, the claim of respondent Nos.2 & 3 to the extent that they possessed a cover note issued by the then Development Officer of the Oriental

Insurance Company (respondent No.1) will have to be accepted coupled with the fact that there is no positive evidence to indicate that the said Cover Note is ante dated. Pertinently, the Cover Note has been issued by the then Development Officer at a point of time when he was still working with respondent No.1 Insurance Company. It must follow that the then Development Officer was acting on behalf of the Insurance Company, even though stricto sensu the respondent No.1 Insurance Company may not be liable to pay any compensation as no insurance policy has been issued in respect of the offending vehicle, much less a valid insurance policy. But for the Cover Note issued by the Development Officer of respondent No.1 Insurance Company at a point of time when he was still working with respondent No.1, to do substantial justice, we may invoke the principle of "pay and recover", as has been enunciated by this Court in the case of National Insurance Co. Ltd. v. Swaran Singh & Ors., (2004) 3 SCC 297 (para 110)"

15. In Shivaraj v. Rajendra and another, reported in 2018 (2) TN MAC 273 (SC), the Hon'ble Supreme Court held:

"9. The High Court, however, found in favour of respondent No.2 (insurer) that the appellant travelled in the tractor as a passenger which was in breach of the policy condition, for the tractor was insured for agriculture purposes and not for carrying goods. The evidence on record unambiguously pointed out that neither was any trailer insured nor was any trailer attached to the tractor. Thus, it would follow that the appellant travelled in the tractor as a passenger, even though the tractor could accommodate only one person namely the driver. As a result, the Insurance Company (respondent No.2) was not liable for the loss or injuries suffered by the appellant or to indemnify the owner of the tractor. That conclusion reached by the High Court, in our opinion, is unexceptionable in the fact situation of the present case.

10. At the same time, however, in the facts of the present case the High Court ought to have directed the Insurance Company to pay the compensation amount to the claimant (appellant) with liberty to recover the same from the tractor owner, in view of the consistent view taken in that regard by this Court in National Insurance Co. Ltd. Vs. Swarna Singh & Ors., (2004) 3 SCC 297 Mangla Ram Vs.

Oriental Insurance Co. Ltd., (2018) 5 SCC 656 Rani & Ors. Vs. National Insurance Co. Ltd. & Ors., 2018 (9) SCALE 310 and including Manuara Khatun and Others Vs. Rajesh Kumar Singh And Others, (2017) 4 SCC 796. In other words, the High Court should have partly allowed the appeal preferred by the respondent No.2. The appellant may, therefore, succeed in getting relief of direction to respondent No.2 Insurance Company to pay the compensation amount to the appellant with liberty to recover the same from the tractor owner (respondent No.1)."

16. Sub-section (5) of Section 147 of the Motor Vehicles Act, 1988 lays down as under :

> "147. Requirements of policies and limits of liability.—(1) to (4)................
> (5) Notwithstanding anything contained in any law for the time being in force, an insurer issuing a policy of insurance under this Section shall be liable to indemnify the person or classes of persons specified in the policy in respect of any liability which the policy purports to cover in the case of that person or those classes of persons."

17. The above provision, thus, provides that an insurer issuing a policy of insurance under Section 147 of the Motor Vehicles Act, 1988 shall be liable to indemnify the person or classes of persons specified in the policy in respect of any liability which the policy purports to cover in the case of that person or those classes of persons. In the present case, the Tribunal recorded that premium of Rs.25/- for coolies was collected. The said fact has not been disputed by the appellant.

18. It is relevant to extract the law laid down by the judgment of this Court in Bajaj Allianz General Insurance Co. Ltd., Chennai vs. Samiyathaal and others, 2014 (1) TN MAC 122, wherein it is held as follows:

> "8....... as per the dictum laid down by the Apex Court in the celebrated case of National Insurance Co. Ltd., vs. Swaran Singh, 2004 (1) TN MAC 104 (SC), wherein the Three-Judges of the Hon'ble Supreme Court has dealt with the licence and had settled the principles, even where the Insurer is able to prove breach on the part of the insured concerning the Policy condition regarding holding of a valid licence by the driver, the Insurer would not be allowed to avoid its liability unless the said breach of condition is so fundamental.

According to the learned counsel it does not make a difference between a fake licence or a expired licence and no licence. Therefore, as per the dictum laid down in National Insurance Co. Ltd. vs. Swaran Singh, 2004 (1) TN MAC 104 (SC); United India Insurance Co. Ltd. vs. S.Saravanan, 2009 (2) TN MAC 103 (DB); Bajaj Allianz General Insurance Company Ltd. vs. P.Manimozhi and others, 2010 (2) TN MAC 542 (SC); Branch Manager, United India Insurance Co. Ltd., Dharmapuri Town vs. Nagammal and others, 2009 (1) TN MAC 1 (FB): 2009 (1) CTC 1 (FB) : 2009 (1) LW 702; Jawahar Singh vs. Bala Jain & Ors., 2011 (1) TN MAC 641 (SC); and Iffco Tokyo General Insurance Co. Ltd. vs. A.Jafer Sadiq and others, 2012 (1) TN MAC 394 (DB), it is settled that if the insurer establishes that there is a breach of policy condition under Section 149(2)(a)(ii), the Insurance Company though not liable, as it has successfully established its defence, can be directed to pay and recover from the insured. However, the Tribunal being not convinced with the evidences put forth by the Insurance Company directed the Insurance Company to pay the compensation. Considering the submissions made by the learned counsel for the appellant-Insurance Company, this Court is of the view that the driver of the vehicle had no valid licence on the date of accident and hence the Insurance Company is directed to pay and then to recover from the owner."

19. In a catena of decisions, this Court as well as the Hon'ble Supreme Court held that in case of violation of policy conditions and/or when no valid driving licence is possessed by the driver of the offending vehicle, the Court/Tribunal has to exercise its discretion and direct the insurer to pay first and order recovery. In view of the consistent view taken in that regard, this Court is of the view that it would be appropriate to direct the appellant to pay the compensation amount to the 1st respondent with liberty to recover the same from the 2nd respondent - owner of the tractor.

20. The Tribunal awarded total compensation of Rs.6,90,985/- to the 1st respondent for the injuries sustained by him in the accident. Since the issue regarding determination of compensation amount by the Tribunal is not questioned by the appellant in this appeal, this Court finds that the Tribunal had taken into account all the relevant aspects and awarded just and proper compensation amount under different heads as are

permissible and this Court does not want to elaborate upon the same.

21. In so far as rate of interest is concerned, the Tribunal has awarded interest at 6% per annum from the date of filing of claim petition and the rate of interest awarded by Tribunal is on the lower side. As held by the Hon'ble Supreme Court in TNSCTC v. S.Rajapriya, reported in 2005 AIR SCW 2542, the rate of interest is enhanced to 7.5% per annum from the date of filing of the claim petition.

22. The learned counsel representing the appellant insurance company requested this Court to incorporate the mode stated in Oriental Insurance Co. Ltd., vs. Shri.Nanjappan, 2004 (1) TN MAC 211 (SC) : 2004 (1) ACC 524 (SC), to enable the appellant to recover the compensation paid from the owner. The mode incorporated in paragraph 8 of Shri.Nanjappan, supra, which is incorporated as follows:

> "For the purpose of recovering the compensation amount from the insured, the insurer shall not be required to file a Suit. It may initiate a proceeding before the concerned Executing Court as if the dispute between the insurer and the insured was the subject matter of determination before the Tribunal and as if the issue is decided against the owner and in favour of the insurer. A notice shall be issued to the insured to furnish security for the entire amount. The offending vehicle shall be attached as a part of the security. If necessity arises, the Executing Court shall take assistance of the concerned Regional Transport Authority. The Executing Court shall pass appropriate orders in accordance with law as to the insurer. In case there is any default it shall be open to the Executing Court to direct realization by disposal of the securities to be furnished or from any other property of the insured."

23. In the result, the Civil Miscellaneous Appeal is partly allowed. The total compensation of Rs.6,90,985/- awarded by the Tribunal is confirmed. The appellant insurance company is directed to pay the compensation amount of Rs.6,90,985/- with interest at the rate of 7.5% per annum from the date of petition till the date of deposit within a period of eight weeks from the date of receipt of a copy of this order and after paying the compensation, the appellant insurance company may recover the amount from the 2nd respondent - owner of the tractor in the same manner as was directed by the Hon'ble Supreme Court in the

decisions cited supra. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

To

1.The Special Sub-Judge,
The Motor Accident Claims Tribunal,
Special Court for Motor Accident Claim Cases,
Krishnagiri.

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

+1cc to Mr.Mukund R.Pandiyan, Advocate, S.R.No.69347

+1cc to Mr.M.Krishnamoorthy, Advocate, S.R.No.69094

+1cc to Mr.C.Prabakaran, Advocate, S.R.No.70238

C.M.A.No.511 of 2015 and
M.P.No.1 of 2015
and C.M.P.No.15852 of 2016

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