



IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 30.09.2020

Pronounced on: 06.10.2020

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THE HONOURABLE DR. JUSTICE G.JAYACHANDRAN

C.M.A.No.1408 of 2016

United India Insurance Company Limited,
No.144-B, Kalpana Road,
Udumalpet.

...Appellant/III Respondent

/versus/

1. N.Thangavel,
S/o.Nachimuthu Gounder.

...1st Respondent/1st Claimant

2. Thatchanammal,
W/o.Thangavel.
Respondent Nos.1 & 2 are residing at
No.3/90, Chinnakumarapalayam,
Udumalpet.

...IInd Respondent/II Claimant

3. S.Karthik,
S/o.Selvaraj,
Medrathi, Thoongavi Post,
Udumalpet.

...IIIrd Respondent/I Respondent

4. J.Arvidan,
S/o.Jayapal,
No.47-K/3, Nandhanar Colony,
Kuppam, Uthamapalayam, Theni.

...IV Respondents/
II Respondent

Prayer: Civil Miscellaneous Appeal filed under Section 173 of the Motor Vehicles Act, 1988, against the judgment and decree dated 15.02.2013 made in M.C.O.P.No.176 of 2010, on the file of the MACT (Sub-Court), at Udumalpet.

For Appellant : Mrs.I.Malar

For R1 & R2 : Mr.D.R.Arun Kumar

For R3 & R4 : No appearance



J U D G M E N T

(The case has been heard through video conference)

This Appeal is filed by the Insurance Company aggrieved by the award passed by the Tribunal directing the Insurance Company to pay the award amount of Rs.6,73,000/- to the claimants and recover the same from the vehicle owner.

2. The facts of the case is that, Kalimuthu, aged about 22 years at the time of accident was working as Supervisor in Hudson Milk Dairy Farm and earning Rs.15,000/- per month. He along with his friends went to Kodaikanal in a Tata Sumo car bearing registration No.TN-59-H-9270, owned by the 2nd respondent. The 1st respondent was the driver of the Tata sumo. Near 13/14 Hairpin bend, the driver of the Tata sumo when he applied sudden brake to avoid the upcoming vehicle, lost the control of the vehicle and turned turtle. Mr.Kalimuthu, who was one of the occupants in the Tata sumo got crushed and died on the spot. Attributing negligence on the Tata sumo driver, claim petition for Rs.15,00,000/- has been filed by the parents of the deceased Kalimuthu against the driver, owner and the insurer.

3. The Insurance Company, in the counter contended that the car driver had no valid driving license. Hence, there is a violation of policy terms. The insurance coverage is only for the third party and one employee. No extra premium paid for the occupants. Therefore, the Insurance Company is not liable to pay compensation.

4. The Tribunal, on considering the rival submissions held that there is policy violation by allowing person to drive the vehicle without license. However, the occupant being a third party directed the insurer has to pay for the third party deceased. Taking note of the other documents, fixed the income of the deceased at Rs.4,500/- per month and awarded a total sum of Rs.6,73,000/- as compensation.

5. In the appeal, the Insurance Company contended that the vehicle insured was under Act only policy. It does not covers the occupants or passenger. Having proved that on the date of accident, the vehicle insured under the Act only policy, that is coverage only to third party and not the occupant or passengers, the appellant/insurer is not liable to pay any compensation. Further, the deduction of personal expenses of the deceased as 1/3rd instead of ½ also impugned as unsustainable.

6. In support of the submission, the Learned Counsel would relied upon the below mentioned judgments of the Hon'ble Supreme Court and High Court.

(i). United India Insurance Company Limited Vs. Tilak



Singh reported in 2006 (4) SCC 404.

(ii). New India Assurance Company Limited Vs. S.Krishnasamy and others reported in 2015 (1) TN MAC 19.

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7. Per contra, the Learned Counsel for the claimant/respondent would submit that the law laid down in Tilak Singh has been considered by the Hon'ble Supreme Court in the subsequent judgments and has been clarified that, any person other than the owner of the vehicle and the insurer, all others are third parties including the person travelling in the vehicle as gratuitous passenger or coolie. Therefore, the Insurance Company is liable to pay and recover it from the vehicle owner, if there is any violation of policy terms and conditions.

8. In support of this argument, the Learned Counsel for the respondent has circulated the following judgments.

(i). Manager, National Insurance Company Limited Vs. Saju P. Paul and another reported in 2012 1 TAN MAC 25 SC.

(ii). United India Insurance Company Limited Vs. Lalitha Dhamodharan and others reported in MANU/TN/1853/2015.

(iii). New India Assurance Company Limited Vs. Murugan S/o. Mathaiyan reported in 2017 (1) TN MAC 184.

9. Heard the Learned Counsel for the appellant and the Learned Counsel for the respondents.

10. The admitted facts of this case is that, the Tata sumo in which the deceased travelled turned turtle, due to negligence of his driver. The driver had no valid driving license. It is also not disputed that, the insurance coverage is an Act only policy. No additional premium paid for the passengers. The deceased was gratuitous passengers travelling along with his friends in the car owned by the 4th respondent/Aravindhnan.

11. In the year 2006, when the issue of gratuitous passenger without insurance coverage came up for consideration, the Hon'ble Supreme Court in United India Insurance Company Limited Vs. Tilak Singh, (cited supra), held that the third party policy does not cover liability to gratuitous passengers.

12. In the year 2013, in Saju P. Paul case, when a similar issue came up for consideration, the Hon'ble Supreme Court taking note of the previous case law on the subject and on examination of the Section 147 of Motor Vehicles Act, held that since the victim travelling in the offending vehicle as gratuitous passenger, insurance company cannot be held liable to suffer the liability, arising out of the accident, on the strength of the insurance policy. However, the Hon'ble Supreme Court considering the benevolent object of the Act and other



relevant factors, invoking its power under Section 142 of Motor Vehicles Act, directed the Insurance Company to pay the claimants and then recover it from the insured by applying the Principle of Pay and Recover.

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13. Whether applying the Principle of Pay and recover is legal, is now been put to test and referred for Larger bench. In some of the judgments of this Court, which is relied by the learned Counsel for the respondent, a very narrow interpretation for the word "third party" has been given.

14. In New India Assurance Company Limited Vs. Murugan S/o.Mathaiyan and others reported in 2017 (1) TN MAC 184. This Court has observed that,

"14. A careful reading of the ratio laid down by the Hon'ble Division Bench of this Court shows that a 'third party' is one who is neither the insurer nor the insured and the third party coverage must include all third parties. In the light of the Full Bench judgment of the Madhya Pradesh High Court, when a 'third party' includes everyone, be it a person travelling in another vehicle, one walking on the road or a passenger of the vehicle which is the subject matter of insurance policy, the finding given by the Tribunal that both the injured claimants, while travelling as coolies on the Trailer attached to the Tractor sustained injuries only due to the fault of its driver, are entitled to the compensation from the insurance company, does not warrant any interference. One another contention made by the learned counsel for the appellant that the owner of the vehicle had taken only an 'Act policy' and when there was no coverage on the employees, namely, loadmen of the Tractor, also cannot be accepted, in the light of the judgment of this Court in the New India Assurance Company Limited, Salem v. Vijayakumar and others, 2001(2)LW833, wherein this Court has held that even if it is an 'Act policy', the insurance company has to pay the amount quantified by the Tribunal."

15. In Manuara Khatun and others Vs. Rajesh Kr.Singh and others reported in 2017 (1) TN MAC (SC), the Tata Sumo had



head on collusion with the truck. The accident was due to negligence of the sumo driver; the gratuitous passenger died. Following the Principle laid in Saju P.Paul case, the Hon'ble Supreme Court ordered pay and recovery though, there was violation of policy conditions.

16. Going through this case law cited, this Court finds that based on facts in case of violation of policy condition, the Courts have decided either to exonerate the insurer or to direct the insurer to pay and recover. It all depending upon the nature of violation. In this case, there is no insurance coverage for gratuitous passenger. The owner of the vehicle ought to have paid additional premium for the passengers, which he has failed. Having taken a policy only to cover third party and personal accident for the driver/owner, this Court is of the view that the owner has taken the risk of compensating the gratuitous passenger, in case of any accident. When such gratuitous passengers are entitled for insurance coverage on payment of additional premium, the owner who has opted not to pay the additional premium cannot be given the benefit of coverage without paying the additional premium. Fastening liability on the insurance company to pay and recover thereafter, will amount to taxing the insurance company which has not collected any additional premium.

17. The Tata sumo is a private car in which the deceased Kalimuthu travelled as a gratuitous passenger. He cannot be considered as third party of the vehicle. The Third party coverage will not include a gratuitous passenger in a private car. The doctrine of "pay and recover" does not applied to the facts of the case. The owner of the vehicle in this case has allowed the person to drive without license and voluntarily decided not to pay additional premium to cover the passenger travelled in his car. Having taken a conscious decision to that effect, the insured/owner has to bare the liability and not the insurance company.

18. The Division Bench of this Court in New India Assurance Company Vs. S.Krishnasamy and others reported in 2015 (1) TN MAC 19, after considered the legal position and the pronouncement of the Apex Court has held that, in case of this nature, the Insurance Company cannot be mulcted with liability even to pay and liberty to recover.

19. In the result, this Court holds that, the law is not in favour of pay and recover in case of this nature. However, on considering the facts that pursuant to the interim order passed by this Court, the Insurance Company has already deposited the award amount with interest in the Tribunal M.C.O.P



amount vide cheque dated 07.05.2016. In such circumstances, if the whole or part of the award amount withdrawn by the claimant, to that extend the insurer is permitted to proceed against the insured, for recovery. If any amount laying in the M.C.O.P. Account, the insurer is permitted to withdraw the amount. The claimant for the unsatisfied award amount, if any, shall recover from the vehicle owner Mr.J.Aravinthan, as per the procedure laid down in Nanjappa vs. State of Karnataka. Accordingly, pointing out the error in the Tribunal award, the Civil Miscellaneous Appeal is allowed with directions. No costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-

Assistant Registrar(CS-IX)

//True Copy//

Sub Assistant Registrar

bsm

To

1. The Motor Accident Claims Tribunal,
(Sub-Court), Udumalpet.

2. The Section Officer,
V.R.Section, High Court, Madras.

+1cc to Mr.D.R.Arun Kumar, Advocate, S.R.No.32910

+1cc to Mr.T.Ravi Chandran, Advocate, S.R.No.32999

C.M.A.No.1408 of 2016

BS(CO)

CB(27/08/2021)