

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 21.01.2021

CORAM:

THE HON'BLE MR. JUSTICE D.KRISHNAKUMAR

CMA. No.684 of 2009

United India Insurance Co. Ltd.,
Attur. ... Appellant

..VS..

1.Murugesan
S/o Raji

2.Minor Narayani,
D/o Murugesan
(Minor rep. by Father and NF Murugesan) .

3.M.Raman ... Respondents

Appeal filed under Section 173 of the Motor Vehicles Act, 1988, against the judgment and decree dated 20.01.2007 in M.C.O.P.No.81 of 1998, on the file of the Motor Accident Claims Tribunal, Subordinate Court, Attur.

For Appellant : Mr. E.Rajadurai

For Respondents : Ms.MitraneSha
For Mr.V.Raghavachari for R1
R2 Minor rep. by R1
No Appearance for R3

J U D G M E N T

This Civil Miscellaneous Appeal has been filed by the appellant-Insurance Company against the judgment and decree dated 20.01.2007, made in M.C.O.P. No.81 of 1998, on the file of the Sub Court, Attur.

2.The appellant is the 2nd respondent in M.C.O.P. No.81 of 1998, on the file of the Sub Court, Attur. The 1st & 2nd respondents/claimants being legal heirs of the deceased Jayanthi, filed the said claim petition, claiming a sum of Rs.3,00,000/-.

3.According to the 1st & 2nd respondents/claimants, on 04.11.1993 at 11.00 am, while the deceased was travelling in the 3rd respondent's vehicle to attend her duty at Vellimalai, the driver drove the vehicle in a rash and negligent manner and dashed against the bridge, and caused death of Jayanthi. The accident occurred only due to rash and negligent driving by the driver of the 3rd respondent's vehicle driver and hence, filed the claim petition

claiming compensation against the 3rd respondent and Insurance company/appellant herein.

4.The Insurance Company/appellant herein had filed counter statement before the tribunal and denied the insurance of the alleged vehicle. The age, avocation and monthly income of the deceased was also denied by the Insurance Company. It is further stated in the counter that as per the policy conditions, after the accident, the owner of the vehicle should inform the occurrence of the accident immediately with all relevant documents, but the owner of the vehicle did not inform to the Insurance Company, therefore the insurance company is not liable to indemnify the owner of the vehicle/3rd respondent herein and the 3rd respondent is only liable to pay the compensation to the claimants' if any. It is further stated that at the time of the accident the driver of the vehicle did not possess valid driving licence to drive heavy goods vehicle, therefore the insurance company is not liable to pay the compensation

5. Before the Tribunal, the 1st respondent examined himself as P.W.1, and Doctor was as P.W3 and marked 8 documents as Exs.P1 to P8. The appellant examined one witness as R.W.1 and marked 2 document as Exs.R1 & R2.

6. On considering the pleadings, oral and documentary evidence, held that the accident occurred only due to rash and negligent driving by the driver of the 3rd respondent's vehicle and further held that the said vehicle was under coverage of insurance from 01.02.1993 to 31.01.1994 and therefore, the insurance company is liable to pay compensation. The tribunal has awarded a sum of Rs.2,00,00/- as compensation to the claimants.

7. Challenging the liability fastened on them by the tribunal in the award dated 20.01.2007, made in M.C.O.P. No.81 of 1998, the appellant - Insurance Company has come out with the present appeal.

8. The learned counsel appearing for the appellant/insurance company contended that at the time of the accident, the deceased had travelled in the goods vehicle for his personal reasons and not as agent or owner of the goods vehicle, therefore the liability fixed by the tribunal on the insurance company is not acceptable. Further, the learned counsel for the appellant has relied upon the decision of the Hon'ble Supreme Court reported in **2009 (1) CTC 1**, wherein the Hon'ble Supreme Court has held that the insurance company will not be held liable for unauthorisedly travelled passengers in a goods vehicle and even 'pay and recover' order cannot be permissible under the law. Therefore, the liability fastened on them is liable to be set aside.

9. Per contra, the learned counsel appearing for the 1st & 2nd respondents/claimants contended that the tribunal upon considering the evidence and documents, has rightly awarded the compensation and fixed the liability on the insurance company. Therefore, nothing warrants to interfere with the award passed by the tribunal.

10. Heard the learned counsel appearing for the appellant as well as the learned counsel appearing for the 1st & 2nd respondents and perused the materials available on record.

11. On careful consideration of the submissions of the learned counsels for the parties concerned, the legal issue to be considered in the appeal is as to whether the Insurance Company is liable to pay compensation under the principles of pay and recovery.

Or

The Insurance company is not liable to pay any compensation to the claimants, as the deceased travelled in the goods vehicle as unauthorised passenger?

12. As seen from the records, RW1 was examined on the side of the Insurance Company, he had deposed that the insurance was taken for the period from 01.02.1993 to 31.01.1994 and the same was valid, at the time of accident. The said policy is a third party Act Policy and the same was marked as Ex.R1. He further deposed

that the claimants have travelled in the said lorry as gratuitous passengers with the permission of the driver and the cleaner. coverage for the said policy is for only three person i.e two drivers and one cleaner. Thus, as per the policy, the Insurance Company is not liable to pay compensation to the claimants.

13. In this context, it is useful to extract the relevant portion of the judgment of this Court in the case of ***Bharati AXA General Insurance Co. Ltd., Rep. by its Manager, Bangalore Versus Aandi & Others ;***

27. The Hon'ble Supreme Court has repeatedly considered the effect of these provisions in various judgments. It should be pointed out at this juncture, Section 147(1)(b)(i), which read as follows:-

"(i) Against any liability which may be incurred by him in respect of the death of or bodily injury to any person or damage to any property of a third party caused by or arising out of the use of the vehicle in a public place."

was amended by Act 54 of 1994 with effect from 14.11.1994 to read as follows:-

"(i) Against any liability which may be incurred by him in respect of the death of or bodily injury to any person, including the owner of the goods or his authorised representative carried in the vehicle or damage to any property of a third party caused by or arising out of the use of the vehicle in a public place."

28. The addition of the words "including the owner of the goods or his authorised representative carried in the vehicle" introduced a class of persons who were otherwise not required to be covered statutorily. Therefore, it is only after 14.11.1994, the owner of the goods or the authorised representative of such owner were required to be covered by the Insurance Companies and not before that.

29. Therefore, a passenger in a goods vehicle even if he was the owner of the goods or the authorised representative of the owner of the goods was not covered prior to 14.11.1994 or there was no statutory requirement to cover

such person. A close reading of Section 147(1) would show that a policy of insurance covering risks relating to motor accidents are required to cover the persons or classes of persons specified in the policy, against any liability incurred by him in respect of death or bodily injury or damage to any property of a

1) third party.

2) the owner of the goods or his authorised representative carried in a goods vehicle.

3) against the death or bodily injury to the passenger of a public service vehicle.

30. Sub-Section 2 of Section 147 lays down the limits of liability. Sub-Section 5 of Section 147 is a non-abstanti clause, which makes the insurers liable to indemnify the person or class of persons specified in the policy, in respect of the liability covered by the policy.

14. In the light of the judgment cited supra and considering the facts of the present case that the policy was a Act Policy and covers only three person i.e two drivers and one cleaner and the

said accident had occurred prior to the year 1994, this Court is of the view that the Insurance Company is not liable to pay compensation to the claimants or indemnify the owner of the vehicle. Therefore the principle of pay the compensation amount to the claimants and recover from the owner of the vehicle does not apply to the facts of the instant case.

15. The learned counsel for the appellant /Insurance Company has also referred the same judgment and relied upon the following paragraphs of the judgment;

31. Section 149 of the Motor Vehicles Act imposes an obligation on the Insurance Company to satisfy the judgments and awards passed against the insured. Sub-section 2 of section 149 provides that the insurer must be heard in a proceeding before the claims Tribunal seeking compensation, it also sets out the defences that are available to the Insurance Company in such claims. One of the defences that is set out in Section 149(2)(a)(i)(c) is the purpose for which the vehicle was used at the time of the accident. Under the said provision it is open to the Insurance Company to plead and prove that the vehicle was used for the purpose

other than which it was permitted and extricate itself from the liability to pay compensation.

.....

49. We find that the judgments relied upon by the Hon'ble Supreme Court in Shivaraj v. Rajendra and another referred to supra in support of its conclusion that the Insurance Company can be directed to pay the compensation with liberty to recover the same even in respect of a gratuitous passenger or an unauthorised passenger in a goods vehicle, do not support the said conclusion.

50. In fact, we find that in none of the judgments referred to viz., National Insurance Co. Ltd. v. Swarn Singh & Ors. reported in (2004) 3 SCC 297, Mangla Ram v. Oriental Insurance Co. Ltd. reported in (2018) 5 SCC 656, Rani & Ors. v. National Insurance Co. Ltd. & Ors. reported in 2018 (9) Scale 310 and Manuara Khatun and Others v. Rajesh Kumar Singh And Others reported in (2017) 4 SCC 796, the question regarding the liability of the Insurance Company to pay the compensation in respect of an unauthorised passenger in the goods vehicle did arise for consideration. We are therefore of the considered opinion that the judgment of the two Judge bench in Shivaraj v.

Rajendra and another referred to supra cannot be taken as a precedent to conclude that the Insurance Company would be liable to pay the compensation even in respect of an unauthorised passenger, in a goods vehicle, in the light of categorical pronouncement of larger bench of the Hon'ble Supreme Court in New India Assurance Company v. Asha Rani and others and National Insurance Company Ltd., v. Baljit Kaur and others referred to supra. We therefore conclude that the Tribunal, in the case on hand, was not right in directing the Insurance Company to pay the compensation and giving it the liberty to recover the same from the owner.

51. No doubt true that in many cases the claimants may not be able to realise the award amount from the owners of the vehicles involved in the accident. But, the said factual situation alone cannot impel us to do something against the provisions of the statute and the decisions of the larger benches of the Hon'ble Supreme Court of India.

52. In fine, all the appeals will stand allowed only in respect of the question of liability of the Insurance Company to pay the compensation. The

quantum of compensation is affirmed and there will be an award only against the owner of the vehicle viz., 1st respondent in all the Original Petitions and the award against the Insurance Company will stand set aside. However, in view of the fact that the claimants are not before us. We do not impose any costs. Consequently, the connected Miscellaneous Petitions are closed.

16. Per contra, the learned counsel for the respondent/claimant has produced a case law reported in **2019 SCC 1006 (Anu Bhanvara ETC Vs. Iffco Tokio General Insurance Company Ltd & Others)** wherein the Hon'ble Supreme Court has decided the issue under the principles of 'pay and recovery'. The relevant portion is extracted hereunder'

"9. The next question is as to which of the respondents, that is the owner and driver, or the insurer of the vehicle, would be liable for payment of such compensation. As regard the liability for payment of compensation, it has been contended by the learned counsel for the appellants that since the vehicle was admittedly insured with the respondent no.1?insurance company, the principle of pay and recover would be invoked even in case

of a gratuitous passenger in a goods vehicle. The insurance company should thus be made liable for the payment of compensation to the appellants and in turn they would have the right to realise/recover the same from the owner and driver of the vehicle. In support of his submission, learned counsel for the appellants has relied on the following decisions of this Court, namely, Manuara Khatoon v. Rajesh Kumar Singh (2017) 4 SCC 796, Puttappa v. Rama Naik (Civil Appeal No.4397 of 2016, disposed of on 2 nd April, 2018); Manager, National Insurance Co. Ltd. v. Saju P. Paul (2013) 2 SCC 41; New India Assurance Co. Ltd. v. Vimal Devi (Civil Appeal Nos.1578?1579 of 2004, disposed of on 5th October, 2010); National Insurance Co. Ltd. v. Challs Anu Bhanvara Etc. vs Iffco Tokio General Insurance on 9 August, 2019 Upendra Rao (2004) 8 SCC 517; New India Assurance Co. Ltd. v. C. M. Jaya (2002) 2 SCC 278; Amrit Lal Sood v. Kaushalya Devi Thapar (1998) 3 SCC 744.

10. Per contra, learned counsel for the respondent?insurance company has contended that since the claimants were gratuitous passengers in a goods vehicle, in which case the liability for payment of compensation for death or

body injury to the passengers of such goods vehicle would not be covered, hence the principle of pay and recover would not apply. It has thus been contended that the order of the High Court is perfectly justified in law and calls for no interference by this Court. In support of her submission, learned counsel has relied on following decisions, namely, New India Assurance Co. Ltd. v. Asha Rani (2003) 2 SCC 223; National Insurance Co. Ltd. v. Baljit Kaur (2004) 2 SCC 1; National Insurance Co. Ltd. v. Kaushalya Devi (2008) 8 SCC 246; National Insurance Co. Ltd. v. Rattani (2009) 2 SCC 75; National Insurance Co. Ltd. v. Prema Devi (2008) 5 SCC 403; Bharat AXA General Insurance Co. Ltd. v. Adani MANU/TN/6503/2018; Bajaj Allianz General Insurance Co. Ltd. v. Lal Singh (2015) SCC Online Del 7508.

11. We have heard learned counsel for the parties and perused the record as well as the various decisions cited by learned counsel for the parties. The insurance of the vehicle, though as a goods vehicle, is not disputed by the parties. The claimants in the present case are young children who have suffered permanent disability on

account of the injuries sustained in the accident. Thus, keeping in view the peculiar facts and circumstances of this case, we are of the considered view that the principle of pay and recover should be directed to be invoked in the present case."

17. In the aforesaid judgment cited by the respondent/claimant, the Hon'ble Supreme Court has granted relief under pay and recovery by taking note of the peculiar circumstances of the said case. The aforesaid judgment will not be applicable to the facts of the present case on hand.

18. Therefore, by relying upon the judgment cited supra (***Bharathi Axa case***) especially para 39, this Court has come to the conclusion that the Insurance Company is not liable to pay compensation to the claimant and the owner of the vehicle alone has to pay compensation awarded by the tribunal to the claimant. Hence, by relying upon the same, this Court is inclined to modify the award passed by the tribunal only on the aspect of liability fastened against the insurance company, without interfering the compensation awarded by the tribunal. Accordingly, this Court absolved the liability fastened against the insurance company.

19. In the result, this Civil Miscellaneous Appeal is allowed and the appellant/insurance company is absolved from the liability. The owner of the vehicle/3rd respondent herein is directed to deposit the entire compensation amount awarded by the tribunal along with interest, within a period of twelve weeks from the date of receipt of a copy of this judgment. On such deposit being made, the respondents 1 & 2/claimants are permitted to withdraw the award amount along with interest and costs, after adjusting the amount, if any, already withdrawn, by filing necessary applications before the Tribunal. The appellant-Insurance Company is permitted to withdraw the amount already deposited by them . Consequently, connected Miscellaneous Petition is closed. No costs.

21.01.2021

Index :Yes/No
Internet : Yes
Speaking order/Non speaking order
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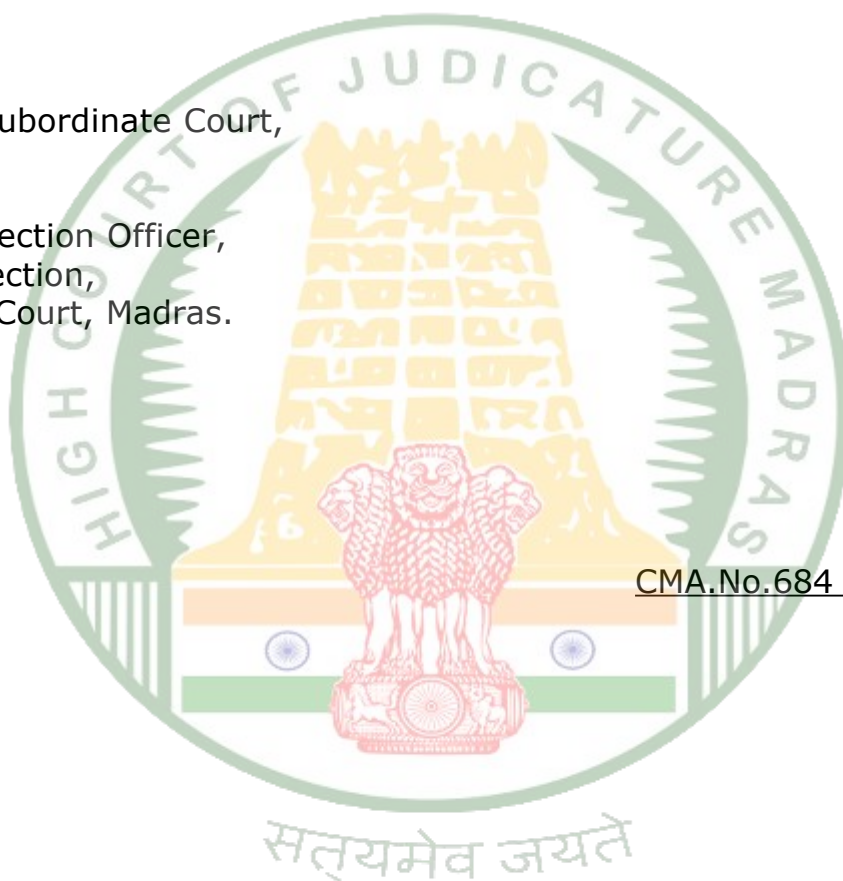
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D.KRISHNAKUMAR, J.,

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To

1. The Subordinate Court,
Attur.
2. The Section Officer,
VR Section,
High Court, Madras.



CMA.No.684 of 2009

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