IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 01.03.2021

CORAM:

THE HON'BLE Mr. JUSTICE D.KRISHNAKUMAR

CMA. No.2179 of 2013

The Branch Manager,
United India Insurance Co. Ltd.,
Vellore ... Appellant /2nd Respondent

..Vs..

1. K.Jagan @ Jagankumar ... 1st Respondent/Claimant
2. M. Navalkumar ...2nd Respondent/1st Respondent

Appeal filed under Section 173 of the Motor Vehicles Act, 1988, against the Judgement and decree dated 13.02.2012 made in M.C.O.P.No.303 of 2010 on the file of the Motor Accidents Claims Tribunal (Additional District Judge/Fast Track Court), Tirupattur.

For Appellant : Mr.D.Bhaskaran

For Respondents : Mr.P.A.Sudesh Kumar - R1

JUDGMENT

The matter is heard through "Video Conferencing".

Dissatisfied with the award passed by the tribunal, dated13.02.2012 made in M.C.O.P.No. 303 of 2010, the Insurance Company has preferred the present appeal challenging fastening liability against the Insurance Company.

2. It is the case of the claimants that on 19.04.2007 at about 7pm near the claimant was travelling as pillion rider in Hero Honda Motor Cycle bearing registration No. TN04-A-7947 belonging to the 2nd respondent. While the said motorcycle was proceeding near Palnangkuppam Junction Road in between Jolarpettai – Tirupattur, the rider Hero Honda Motor Cycle rode the same in a very rash and negligent manner and dashed against one person namely Samynathan who was proceeding on the extreme left side of the road in the opposite direction in his bicycle. Due to impact the claimant who was travelling in the said motor

cycle as pillion rider and said cyclist were sustained grievous and multiple injuries. Immediately after the accident the claimant and said injured Samynathan were taken to Government Hospital, Tirupattur. The claimant sustained grievous injuries on the left side ear, left side head and all over the body and became permanently disabled. Hence, for the injuries sustained by him, filed a claim petition claiming as sum of Rs.3,00,000/- as compensation. The Tribunal upon evaluation of materials placed, has fixed the negligence on the rider of the two wheeler and awarded a sum of Rs.81,200/-under various heads to the claimant payable by the Insurance Company being insurer of the vehicle.

3. Before the Tribunal, the 1st respondent examined him as P.W.1 and doctor was examined as PW2 and marked documents ExP1 to P13. No witness and documents were marked on the side of the Appellant/Insurance Company.

4. Challenging the said award, the Insurance Company has filed the present appeal on the ground that the Insurance Company is not statutorily required to cover the liability in respect of unauthorised passenger.

5. The learned counsel for the appellant/Insurance Company submitted that policy marked as Ex.P11 on the side of the claimant is a 'Liability Only' Policy, the Insurance Company owned no liability towards the gratuitous passengers. Further, the tribunal failed to note that the said insurance policy was a 'Statutory Policy' and the same did not cover the risk or death or bodily injury to gratuitous passengers. The main ground raised in the appeal is that the liability can be determined only on the basis of the premium collected and in the absence of additional premium; the Insurance Company cannot be made liable.

6. It is further submitted by the learned counsel for the appellant that the claimant/1st respondent had travelled as a pillion rider and since no additional premium was paid to cover pillion rider, the appellant/insurance company is not liable to pay the compensation of Rs.81,200/- awarded by the tribunal. Hence prayed to set aside the liability fastened against the appellant/Insurance Company.

7. Per contra, the learned counsel appearing for the 1st respondent/claimant has submitted that the tribunal has rightly observed that the claimant has no direct contract with the insurance company, therefore the claimant can be treated as 'third party' and as per the policy condition, the insurance company is liable to pay compensation. Therefore, the liability fastened on the appellant /insurance company does not require

any interference by this Court.

8. The learned counsel for the 1st respondent/claimant further submitted that the disability sustained by the claimant was proved before the tribunal through Ex.P13/Disability Certificate. The tribunal after assessment of records, has fixed the disability at 30% and by taking Rs.1750/- per percentage, the awarded the sum of Rs.52,500/- towards disability, which is fair and reasonable. The compensation awarded by the tribunal under other heads also does not require any modification. The appeal preferred by the Insurance Company is liable to be dismissed.

9.Heard the learned counsel appearing for the appellant/Insurance Company and the 1st respondent/claimant and perused the materials available on record.

10. Having considered the rival submissions made by the counsels and on evaluation documents, the following issues are to be decided in the appeal;

i. Whether the claimant who is a pillion rider can be treated as third party , if so,

ii. Whether, the said policy covers the pillion rider in the absence of the payment for additional premium.

11. In terms of Section 147 of the Act only in regard to reimbursement of the claim to a third party, a contract of insurance must be taken by the owners of the vehicle. It is imperative in nature. When, however, an owner of a vehicle intends to cover himself from other risks; it is permissible to enter into a contract of insurance in which event the insurer would be bound to reimburse the owner of the vehicle strictly in terms thereof.

12. The liability of the insurer to reimburse the owner in respect of a claim made by the third party, thus, is statutory whereas other claims are not.

13. The only question which, therefore, arises for consideration is as to whether the pillion rider on a scooter would be a third party within the meaning of Section 147 of the Act. Indisputably, a distinction has to be made between a contract of insurance in regard to a third party and the owner or the driver of the vehicle.

14. At this point, it is useful to rely upon the decision of the Hon’ble Supreme Court in the case law reported in 2008(2) TNMAC 16 (SC) in the case of Oriental Insurance Company Limited Vs. Sudhamaran K.V and Others.The relevant portion is extracted below;

"14. The provisions of the Act and, in particular, Section 147 of the Act were enacted for the purpose of enforcing the principles of social justice. It, however, must be kept confined to a third party risk. A contract of insurance which is not statutory in nature should be construed like any other contract.

15. We have noticed the terms of the contract of insurance. It was entered into for the purpose of covering the third party risk and not the risk of the owner or a pillion rider. An exception in the contract of insurance has been made, i.e., by covering the risk of the driver of the vehicle. The deceased was, indisputably, not the driver of the vehicle.

16. The contract of insurance did not cover the owner of the vehicle, certainly not the pillion rider. The deceased was travelling as a passenger, stricto sensu may not be as a gratuitous passenger as in a given case she may not be a member of the family, a friend or other relative. In the sense of the term which is used in common parlance, she might not be even a passenger.

In view of the terms of the contract of insurance, however, she would not be covered thereby.

…..

19. The law which emerges from the said decisions, is: (i) the liability of the insurance company in a case of this nature is not extended to a pillion rider of the motor vehicle unless the requisite amount of premium is paid for covering his/her risk (ii) the legal obligation arising under Section 147 of the Act cannot be extended to an injury or death of the owner of vehicle or the pillion rider; (iii) the pillion rider in a two wheeler was not to be treated as a third party when the accident has taken place owing to rash and negligent riding of the scooter and not on the part of the driver of another vehicle.

20. For the views we have taken, it is not necessary to refer to a large number of decisions cited at the Bar as they are not applicable in a case of this nature.

21. For the reasons aforementioned, the impugned judgment cannot be sustained. It is set aside accordingly. The appeal is allowed. No costs"

15. In Dr.T.V.Jose Vs.Chacko P.M @ Thankachan and Others reported in (2001) 8 SCC 748, the learned Judge had an occasion

to survey the law with regard to the liability of insurance companies in respect of gratuitous passengers. After referring to a number of decisions of this Court the learned Judge observed (vide para 20) "the law on this subject is clear, a third party policy does not cover liability to gratuitous passengers who are not carried for hire or reward, the insurer company was held not liable to reimburse the appellant. The relevant paragraph is extracted hereunder;

> " 20. Sections 95(a) and 95(b)(i) of the Motor Vehicles Act adopted the provisions of the English Road Traffic Act, 1960, and excluded the liability of the insurance company regarding the risk to the passengers. Section 95 provides that a policy of insurance must be a policy which insures the persons against any liability which may be incurred by him in respect of death 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. The plea that the words "third party" are wide enough to cover all persons except the person and the insurer is negatived as the insurance cover is not available to the passengers made clear by the proviso to sub-section which provides that a policy shall not be required:
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> (ii) except where the vehicle is a vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment, to cover liability in respect of the death of or bodily injury to persons being carried in or upon or entering or mounting or alighting from the vehicle at the time of the occurrence of the event out of which a claim arises.
>
> Therefore it is not required that a policy of insurance should cover risk to the passengers who are not carried for hire or reward. As under Section 95 the risk to a passenger in a vehicle who is not carried for hire or reward is not required to be insured the plea of the counsel for the insurance company will have to be accepted and the insurance company held not liable under the requirements of the Motor Vehicles Act."

16. The Full Bench of this Court in UNITED INDIA INSURANCE COMPANY VS. NAGAMMAL AND OTHERS reported in 2009 (1) CTC 2 has held as follows:

> "31.Thus from an analysis of the statutory provisions as explained by the Supreme Court in various decisions rendered from time to time, the following pictures

emerges:
(i)The Insurance Policy is required to cover the liability envisaged under Section 147, but wider risk can always be undertaken.
(ii)Section 149 envisages the defences which are open to the Insurance Company. Where the Insurance Company is not successful in its defence, obviously it is required to satisfy the decree and the award. Where it is successful in its defence, it may yet be required to pay the amount to the claimant and thereafter recover the same from the owner under such circumstance envisaged and enumerated in Section 149(4) and Section 149(5).
(iii)Under Section 147 the Insurance Company is not statutorily required to cover the liability in respect of a passenger in a goods vehicle unless such passenger is the owner or agent of the owner of the goods accompanying such goods in the concerned goods vehicle.

(iv)Since there is no statutory requirement to cover the liability in respect of a passenger in a goods vehicle, the principle of “pay and recover”, as statutorily recognised in Section 149(4) and Section 149(5), is not applicable ipso facto to such cases and, therefore, ordinarily the Court is not expected to issue such a direction to the Insurance Company to pay to the claimant and thereafter recover from the owner.
(v)Where, by relying upon the decision of the Supreme Court in Satpal Singh's case, either expressly or even by implication, there has been a direction by the Trial Court to the Insurance Company to pay, the Appellate Court is obviously required to consider as to whether such direction should be set aside in its entirety and the liability should be fastened only on the driver and the owner or whether the Insurance Company should be directed to comply with the direction regarding payment to the claimant and recover thereafter from the owner.
(vi)No such direction can be issued by any

> Trial Court to the Insurance Company to pay and recover relating to liability in respect of a passenger travelling in a goods vehicle after the decision in Baljit Kaur's case merely because the date of accident was before such decision. The date of the accident is immaterial. Since the law has been specifically clarified, no Trial Court is expected to decide contrary to such decision.
> (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 i.e., the driver or the owner, as the case may be."

17. In THE MANAGER, IFFCO – TOKYO GENERAL INSURANCE CO. LTD., V.G.RAMESH, (2012 (1) TN MAC 820) this Court referring Asha Rani's case and other judgments, has held as follows:-

> "......the question as to whether the Insurance Company is statutorily liable to cover the liability in respect of risk of gratuitous passenger, is clearly laid down by Hon'ble Apex Court in Asha Rani's case by reversing the earlier decision in Saptal Singh's case and further question as to whether the doctrine of "Pay and Recover" theory, which is applied till then, by directing the Insurer to satisfy the award and to recover the amount from the insured even though the Insurer was not statutorily required to cover the liability in respect of such passengers carried in goods vehicle, is clarified in Full Bench judgment of our High Court. As per which, after the decision of Baljit Kaur's case rendered on 06.01.2004 no such direction can be issued by the Trial Court to the Insurance Company on the principle of "Pay and Recover" relating to the liability in respect of risk of gratuitous

passengers traveling in a goods vehicle and no Trial Court is expected to decide contrary to the decision made thereon."

18. In view of the rulings cited above and considering facts and circumstances of the present case on hand, this Court is of the considered view that since, the policy is only an Act policy issued by the appellant Insurance company to the insurer and the injured claimant/1st respondent only an occupant of the rider of the motor cycle, cannot be considered as 'third party' of the vehicle and the policy is covered risks to the third party alone. The doctrine of pay and recovery also cannot be applied to the facts of the case, since the appellant Insurance company is not liable to pay the compensation in view of the aforesaid decision.

19. In view of the dictum laid down by the Hon'ble Supreme Court and taking note of the judgments of this Court, this Court holds that since the Act policy did not cover the risk, the Appellant/Insurance Company is not liable to pay any compensation to the claimant. Accordingly, the award against the appellant/Insurance Company is set aside. It is open to the claimant to recover the compensation amount from the owner of the vehicle in the manner known to law. No costs. Connected miscellaneous petition is closed. The Civil Miscellaneous Appeal is allowed.

Sd/-

Assistant Registrar(CS-VI)

//True Copy//

Sub Assistant Registrar

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To

1.The Motor Accident Claims Tribunal,
Additional District Judge/Fast Track Court),
Tirupattur.

2. The Section Officer,
V.R.Section, Madras High Court,
Chennai-104.

+1cc to Mr.D.Bhaskaran, Advocate SR.No.12446

CMA. No.2179 of 2013

LN(CO)
GN(21/12/2021)