



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 10.12.2020

Pronounced On : 19.01.2021

CORAM

THE HONOURABLE MR.JUSTICE K.MURALI SHANKAR

C.M.A(MD)No.1291 of 2015

and

M.P.(MD)No.1 of 2015

and

C.M.P.(MD)No.9800 of 2015

The Oriental Insurance Company Limited,
39/40, Saratha Shopping Centre,
Simmakkal, Madurai.

: Appellant / 2nd Respondent

Vs.

1.P.Thiruppathi (Minor) : 1st Respondent/ Petitioner
(Minor 1st Respondent represented by
his father and guardian Balakrishnan)

2.R.Nagarajan : 2nd Respondent/1st Respondent

(2nd Respondent remained exparte
before the trial Court)

(R1 dismissed for default vide order, dated 04.11.2019)

PRAYER:- Civil Miscellaneous Appeal filed under Section 173 of the Motor Vehicles Act, 1988, against the award made in M.C.O.P.No.164 of 2013, dated 21.08.2015, on the file of the Motor Accidents Claims Tribunal cum IV Additional Sub Judge, Madurai.

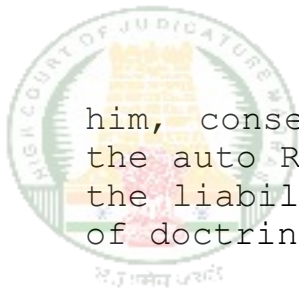
For Appellant : Mr.K.Bhaskaran

For R2 : No Appearance

J U D G M E N T

The Civil Miscellaneous Appeal has been filed under Section 173 of Motor Vehiclea Act, 1988, challenging the award made in M.C.O.P.No.164 of 2013, dated 21.08.2015, on the file of the Motor Accidents Claims Tribunal cum IV Additional Sub Judge, Madurai.

2.The Appellant/Insurance Company, which was made liable along with the owner of Auto Rickshaw to pay compensation of Rs.1,77,000/- with interest at 7.5% per annum to the claimant, who was a passenger in the auto Rickshaw, for the injury suffered by



him, consequent to an accident occurred on 09.03.2012, involving the auto Rickshaw bearing Registration No.TN 67 R 5349, questioned the liability mulcted on it and more particularly, the application of doctrine of 'pay and recovery' adopted by the Tribunal.

3.The Appellant/Insurance Company has neither challenged the finding of the Tribunal that the auto Rickshaw driver was responsible for the accident nor the quantum arrived at by the Tribunal. The main defence of the appellant/insurer is that the Auto was only covered by an Act Policy, that the injured/claimant was only a gratuitous passenger and that therefore, the appellant is in noway liable for the claim and the decision of the Tribunal fastening liability on it by invoking the doctrine of 'pay and recovery' is improper and is not in accordance with law. It is their further case that the auto driver was not possessing a valid driving license on the date of accident and on that ground also, they are not liable.

4.The only point that arises for consideration is Whether the Tribunal erred in applying and adopting the doctrine of 'pay and recovery' despite production of ample materials to show that the policy issued is an Act Policy, that the claimant was a gratuitous passenger in the said vehicle and that therefore, the Insurance Company is not at all liable for the claim?

5.Before entering into further discussion, it is necessary to refer the Insurance Policy under Ex.R.1, wherein, it has been specifically shown 'liability only policy' and it is further evident from Ex.R.1 that PA coverage for owner and driver was also taken. As rightly contended by the learned counsel for the Appellant, Ex.R.1 is not a 'comprehensive policy', and it is only 'liability only policy', which covers only third party risk. Before the Tribunal, the claimant had taken a stand that he was only a third party so far as the Insurance Company is concerned and that therefore, they are liable to pay compensation.

6.At this juncture, it is necessary to refer the decisions relied on by the learned counsel for the Appellant;

(i) **2015(1) TN MAC 19 (DB) :**

New India Assurance Company Limited Vs. S.Krishnasamy and others:

"18.In view of the rulings cited above, we are of the considered view that since, the Policy is only an Act Policy issued by the Appellant-Insurance Company to the Insurer and the deceased Palanisamy was only an occupant of the Private Car, cannot be considered as 'Third Party' of the vehicle and the Policy is covered risks to the third party alone. Hence, the deceased was only the occupant of the Private Car and



the said Policy will not cover the risk of the deceased. The Doctrine of Pay and Recovery cannot be applied to the facts of the case, since the Appellant-Insurance Company is not liable to pay the compensation. Hence, pay amount to the Claimants and then recover the same from the owner of the vehicle involved in the accident cannot be ordered and in view of the above, the rulings cited on the side of the Respondents 1 to 5/Claimants are not applicable to the facts of the present case.

19.Hence, we are of the considered view that since the Act Policy did not cover the risk, the Insurance Company is not liable to pay any Compensation to the Claimants/dependents of the deceased and the owner of the vehicle alone is liable to pay damages to the Claimants, as the accident occurred due to rash and negligent act of the driver of the vehicle."

(ii) **2019 (2) TN MAC 764 :**

Divisional Manager, National Insurance Company Limited Vs. M.Vasumathi and others:

"10. In the instant case, the specific contention of the Insurance Company is that, it is an "Act Policy", which would not cover the liability towards the inmates of the Car. A perusal of the Insurance Policy (EX.P.4) clearly shows that it is only an Act Policy. The observation of the Tribunal that the Insurance Company did not adduce any evidence to show that there is no coverage for the inmates of the Car, cannot be sustained, especially, when the Claimants themselves have filed a copy of the Insurance Policy (Ex.P.4). As already observed, the Tribunal has not given any specific finding with regard to the nature of the Policy issued in favour of the Owner of the vehicle and only a Comprehensive/Package Policy would cover the liability of the inmates of the car or a Pillion Rider in a Scooter and hence, the Insurance Company is not liable to pay compensation to the Respondents 1 & 2/Claimants."

7.Considering the above decisions, it is very much clear that the Tribunal has no power or jurisdiction to apply the doctrine of pay and recovery, if there is no insurance coverage. In the present case, as already pointed out, is only a liability only policy. The tribunal has referred to the decision relied on by the Appellant's Counsel, in **New India Assurance Company Limited, Vs. S.Krishnasamy and others** reported in **2015(1) TN MAC 19 (DB)**, and narrated the stand of the Appellant/Insurance Company.

<https://hcservices.ecourts.gov.in/hcservices> 8. As originally contended by the learned counsel of the



Appellant, the learned trial Judge has not given any specific finding in this regard. But on the other hand, after referring to the stand of the Appellant that the Auto Rickshaw driver was not having driving license and also the reply given by the claimant's side that though there is policy violation, the claimant is a third party, came to the conclusion that the Insurance Company has to be directed to pay compensation at the first instance and then to recover the same from the owner of the vehicle. But as rightly pointed out by the learned counsel for the Appellant, in the case on hand, it is not only a 'Policy Violation', but it is a case of 'No Insurance Coverage'.

9.Considering the above, this Court has no hesitation to hold that since the policy issued is 'liability only policy' and the claimant was the gratuitous passenger, the Appellant Insurance Company cannot be made liable and as such, this Court concludes that the decisions of the trial Court, in applying and adopting the doctrine of 'pay and recovery' is liable to be set aside. Considering the other facts and circumstances of the case, this Court further decides that the parties are to be directed to bear their own costs and the above point is answered accordingly.

10.In the result, the Civil Miscellaneous Appeal is partly allowed and the award of the tribunal, directing the Appellant to pay award amount to the claimant and recover the same from the owner of the offending vehicle is set aside. The Appellant/Insurance Company is exonerated from the liability and the second respondent/owner of the vehicle is liable for the claim and directed to deposit the award amount within a period of eight (08) weeks from the date of receipt of a copy of the judgment. In case if any amount has already been deposited in whole or in part of the award amount, the insurer is permitted to withdraw the same. In case, if the claimant has already been withdrawn the whole or in part of amount deposited, the Appellant is permitted to recover the same from the owner of the vehicle. Parties are directed to bear their own costs. Consequently connected Miscellaneous Petitions are closed.

Sd/-

Assistant Registrar (CS-II)

// True Copy //

/ /2021

Sub Assistant Registrar(CS)



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To

1.The IV Additional Sub Judge,
Motor Accidents Claims Tribunal
Madurai.

2.The Record Keeper-2 copies
Vernacular Section,
Madurai Bench of Madras High Court,
Madurai.

+1 CC to Mr.K.BHASKARAN, Advocate (SR-1216[F] dated 19/01/2021)

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KM (09.02.2021) 5P 5C