BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 25.08.2022

Pronounced on : 27.09.2022

CORAM

THE HONOURABLE MRS.JUSTICE **R.THARANI**

C.M.A(MD)Nos.46 and 163 of 2012

C.M.A(MD)No.46 of 2012:

The Manager,
Iffco Tokio General Insurance Company Ltd.
"Tulsi Chambers"
T.V.Swamy Road(west),
R.S.Puram, Coimbatore Town,
Coimbatore District. ...Appellant / 2nd respondent.

Vs

1.Sathish Kumar ... 1st respondent / claimant

2.P.Kumar ... 2nd Respondent /1st respondent

PRAYER :-

This Civil Miscellaneous Appeal is filed under Section 173 of Motor Vehicles Act 1988, to set aside the fair and decreetal order dated 12.08.2011, made in M.C.O.P.No.222 of 2009 on the file of the Motor Accidents Claims Tribunal (Additional District and Sessions Judge / Fast Track Court), Pudukkottai, and allow this Civil Miscellaneous Appeal.

For Appellant : Mr.S.Srinivasa Raghavan

For R1 : No appearance

For R2 : Mr.P.Ganapathi Subramanian

C.M.A(MD)No.163 of 2012:

The Manager,
Iffco Tokio General Insurance Company Ltd.
"Tulsi Chambers"
T.V.Swamy Road(west),
R.S.Puram, Coimbatore Town,
Coimbatore District. ...Appellant / 2nd respondent.

Vs

1.Chinnathal (Died)

2.Rasu

3.Marimuthu

4.Latchumi

5.Palaniyayee

6.Kavitha ... Respondents 1 to 6 / claimants

7.P.Kumar ... 7th respondent / 1st respondent

PRAYER :

This Civil Miscellaneous Appeal is filed under Section 173 of Motor Vehicles Act 1988, to set aside the fair and decreetal order dated 12.08.2011, made in M.C.O.P.No.223 of 2009 on the file of the Motor Accidents Claims Tribunal (Additional District and Sessions Judge / Fast Track Court), Pudukkottai, and allow this Civil Miscellaneous Appeal.

For Appellant	: Mr.S.Srinivasa Raghavan
For R1 to R6	: No appearance
For R7	: Mr.P.Ganapathi Subramanian

JUDGMENT

These Civil Miscellaneous Appeals are filed against the order in M.C.O.P.Nos.222 and 223 of 2009 on the file of the Motor Accident Claims Tribunal (Additional District and Sessions Judge / Fast Track Court), Pudukkottai.

2.(i) In C.M.A(MD)No.46 of 2012, the appellant is the second respondent, first respondent herein is the claimant and the second respondent is the first respondent in the claim petition in M.C.O.P.No.222 of 2009.

(ii) In C.M.A(MD)No.163 of 2012, the appellant is the second respondent, the respondents 1 to 6 are the claimants and the 7th respondent is the first respondent in the claim petition in M.C.O.P.No.223 of 2009.

3.Brief substance of the claim petition in M.C.O.P.No.222 of 2009 is as follows:

On 10.04.2006 at about 4.15 p.m., when the petitioner herein and other petitioners travelled in an auto bearing registration number TN 48 C 4303, the driver of the auto drove the vehicle in a rash and negligent manner, hit against a stone and the auto capsized. The petitioner sustained injuries. He was taken to the Government Headquarters Hospital, Pudukkottai and took treatment as inpatient. He claimed a sum of Rs.2,00,000/- as compensation.

4.Brief substance of the claim petition in M.C.O.P.No.223 of 2009 is as follows:

The petitioners herein travelled in the same auto. The second petitioner therein, sustained grievous injuries. The second petitioner undergone surgery and she died on 07.03.2010. The petitioners 3 to 7, who are the legal heirs of the second petitioner, have claimed a compensation of Rs.3,00,000/-.

5.Brief substance of the counter filed by the second respondent in both the petitions are as follows:

The allegations mentioned in the petitions are all denied. The age, occupation, income of the petitioners are to be proved. The nature of injuries, medical expenses and disability are to be proved. The compensation claimed is excessive. There were 18 other passengers who travelled in the mini door auto. Due to over load, the auto capsized. The petitioners in both the claim petitions, are unauthorized passengers in a goods vehicle. The seating capacity of the vehicle is 2 including the driver. There is violation of policy conditions. The respondents are not liable to pay compensation. The driver was not having valid driving license.

6.A joint trial was conducted in both claim petitions. Three witnesses were examined and nine documents were marked on the side of the petitioner. Three witnesses were examined and one document was marked on the side of the respondent. Four documents were marked as Ex.X1 to X4. The Tribunal awarded a sum of Rs.94,000/- as compensation for the claimant in M.C.O.P.No.222 of 2009 and awarded a sum of Rs.24,000/- as compensation in M.C.O.P.No.223 of 2009.

7.Aggrieved by the award, the second respondent filed these appeals in C.M.A(MD)Nos.46 and 163 of 2012 on the following grounds:

(i)The Tribunal ought to have directed the appellant to pay the claimants and to recover the amount from the owner of the vehicle. The injured are all unauthorized gratuitous passengers in a goods vehicle and Section 147 of the Motor Vehicle Act, does not contemplate coverage for the persons. The findings of the Tribunal as to the liability of the appellant, is incorrect and false and the Tribunal ought not to have ordered pay and recovery.

(ii)On the side of the appellant it is further stated that in both the cases, the claimants are unauthorized passengers. The Court ought to have exonerated the insurance company. The Tribunal has made an observation that the vehicle was not insured and the driving license was valid. The insurance company is not liable to pay compensation, the appellant could not be directed to pay and recover. Under Section 149 of the MV Act, the Tribunal can award pay and recover, when the policy is not in force and there is violation of policy conditions, with regard to the third parties. But there is no coverage for unauthorized passengers. After giving a finding that the insurance company is not liable to pay compensation, the Tribunal is wrong in ordering pay and recover.

8.On the side of the appellant, a judgment of this Court reported in **2011(2) TN MAC 774,** in the case of **United India Insurance company vs M.Thangavel and K.S.Kumar,** is referred, wherein it is held that,

> "*When Insurer is not statutorily required to cover liability in respect of a passenger in goods vehicle under Section 147, unless such passenger is owner or agent of owner of goods accompanying, there is no need for Insurer to pay compensation - Since there is statutory violation under Section 147, following principles laid down in Baljitkaur, held, Insurer is not liable to pay compensation - In absence of statutory liability to victim travelling as unauthorized passenger in goods vehicle, Insurer cannot be directed to pay and recover.*
>
> *Applicability - Only in case where Insurer is successful in its defence available under Section 149, MV Act, Doctrine of Pay and Recover can be applied - But, not in case where there is statutory violation and there is no statutory liability to pay compensation by Insurer - Motor Vehicles Act, 1988, Sections 147 & 149.*"

9.On the side of the respondent, it is stated that an order of pay and recover can be made and it is the duty of the insurer to satisfy the award at the first instance. A judgment of the Hon'ble Supreme Court reported in **(2017) 4**

Supreme Court Cases 796 in the case of **Manuara Khatun and others vs Rajesh Kumar Singh and others,** wherein it it held that,

> *"Death in a motor accident due to rash and negligent driving of a private vehicle i.e. Tata Sumo - Victims travelling as "gratuitous passengers" in that vehicle - On these facts, exonerating the insurer of the offending vehicle, award passed by Courts below only against the owner of the offending vehicle i.e., the person insured - Held, in such a case, appellant claimants were entitled for an order against the insurer to pay the awarded sum to claimants and then to recover the said amount from the insured in the same proceedings as per the law laid down in para 26 of the judgment made in Saju P.Paul, (2013)2 SCC 41*"

10.On the side of the appellant it is stated that under Article 142 of the Constitution, only the Hon'ble Supreme Court can pass such an order and even in that order, it is mentioned that only under special circumstances, the order was passed. Neither the Tribunal, nor the High Court has the power under Article 142 of the Constitution of India. A judgment of this Court in **Asha Rani case** rendered by Hon'ble Three Judges Bench, cannot be over ruled by a judgment of the Hon'ble Division Bench headed by two judges. Except the Hon'ble Supreme Court, no other Court is having the power to pass an order for pay and recover.

11. A Full Bench of this Court in C.M.A.Nos.1808 and 2833 of 2002 dated 23.12.2008 has made a mention 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 picture emerges:

(i)The Insurance policy is required to cover the liability envisages under Section 147, but wider risk can always be undertaken.

(ii)Section 149 envisages the defenses which are open to the Insurance Company. Where the Insurance Company is not successful in its defense, obviously it is required to satisfy the decree and the award. Where it is successful in its defense, it may yet be required to pay the amount to the claimant and thereafter recover the same from the owner under such circumstances 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 traveling 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 ie., the driver or the owner, as the case may be.*

32.With the above clarifications, the reference is answered. The learned Single Judge has already categorically held that the claimant was a passenger in a goods vehicle and the contention that he was the owner of the goods traveling in the goods vehicle has not been accepted. The learned Single Judge is now required to consider as to whether in the facts and circumstances of the case, the doctrine of "pay and recover" can be applied even though the liability in respect of a person, who was traveling in a goods vehicle, was not statutorily required to be covered under the policy."

12.The Hon'ble Division Bench of the Hon'ble Supreme Court of India in **Appeal (civil) No.5385 of 2001** in the case of **New India Assurance Vs Asha Rani and others** was held as follows:

"The other striking feature is with reference to Section 149(2) of the new Act. It is submitted that the defence available

to the insurer under it would be obliterated in view of the declaration of law in Satpal Singh(Supra). Under New Act, it would be a breach of condition in case vehicle is used for a purpose other than for which permit has been issued. Thus in a case, a permit is issued for a goods carriage it would not include any passengers and in case they travel it would be contrary to the mandate of the statute and thus in view of Section 149(2) no liability could be passed on to the insurance company. This apart, the effect of the deletion of sub-clause(ii) to the proviso to Section 95(1)(b) in the new Act also requires reconsideration.

Accordingly we feel it appropriate in view of what we have recorded above, Satpal Singh(Supra) requires reconsideration by a larger Bench. Let this matter be placed before Hon'ble the Chief Justice for constituting a larger Bench."

13.Under Article 142 of the Constitution of India, only the Hon'ble Supreme Court is having the power to pass an order of pay and recover and considering the judgment of the Full Bench of the Hon'ble Supreme Court, it is decided that there is no possibility of an order to pay and recover.

14.In view of the same, the appeal is allowed. The Insurance Company is exonerated. The liability is fixed on the owner of the vehicle. The order of the Tribunal is modified hereunder:

(i) The owner of the vehicle / 2nd respondent in the appeal, is liable to pay Rs.94,000/- (Rupees Ninety Four Thousand only) in C.M.A(MD)No.46 of 2012 with a proportionate interest 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;

(ii) The owner of the vehicle / 7th respondent in the Appeal, is liable to pay Rs.24,000/- (Twenty Four Thousand only) in C.M.A(MD)No.163 of 2012, with a proportionate interest 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;

(iii) On such deposit being made, the claimant in C.M.A(MD)No.46 of 2012, C.M.A(MD)No.163 of 2012 are permitted to withdraw their respective share in the award amount with proportionate interest and cost, by filing appropriate petition before the Tribunal to realize the award amount.

(iv) Since the Appellant/Insurance Company is exonerated from liabilities, the appellant in both CMAs is permitted to get refund of the amount already deposited before the Trial Court;

27.09.2022

Index: Yes / No
Internet : Yes / No
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R. THARANI, J

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To

1.The Motor Accidents Claims Tribunal (Additional District and Sessions Judge / Fast Track Court),
Pudukkottai.

2.The Record Keeper, Vernacular Records,
Madurai Bench of Madras High Court, Madurai.

C.M.A(MD)Nos.46 and 163 of 2012

27.09.2022