BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON	**03.01.2022**
DELIVERED ON	**31.01.2022**

CORAM :

THE HONOURABLE MRS.JUSTICE S.ANANTHI

C.M.A.(MD).No.369 of 2014

M/s.National Insurance Company Limited,
Through its Branch Manager,
Pudukkottai. ...Appellant/2nd Respondent

Vs.

1.M.Deepa
2.R.Saraswathi
3.Ramu @ Ramamoorthy
4.Minor Dinesh ...Respondents/petitioners

[Represented through mother and guardian 1st respondent]
5.Joseph Rex ...Respondent/1st respondent

PRAYER: Civil Miscellaneous Appeal filed under Section 173 of the Motor Vehicles Act, against the Judgment and Decree, dated 19.08.2013 passed in M.C.O.P.No.709 of 2010 on the file of the Motor Accident Claims Tribunal/Additional District Cum Sessions Court, Dindigul.

For Appellant :M/s.P.Malini
For R-1 & R-4 :Mr.D.Ramesh Kumar
For R-2, R-3 & R-5:No appearance

ORDER

This Civil Miscellaneous Appeal has been filed against the Judgment and Decree, dated 19.08.2013 in M.C.O.P.No.709 of 2010 passed by the learned Motor Accident Claims Tribunal/Additional District Cum Sessions Judge, Dindigul.

2. It is a case of fatal accident. On 28.08.2006, the deceased Mohanraj and three others were travelled in 407 Van Goods vehicle to plant saplings in forest range in the lorry bearing Regn. No.TN-65-7099 which was belonged to the 5th respondent herein. Near Thachachalangaru Bridge, the said 407 Van was driven by its driver in rash and negligent manner and the said Van went and topple down without noticing the pit. Due the said accident, the said Mohanraj died and other three persons were sustained injuries.

3.The claimants have filed a claim petition in M.C.O.P.No.709 of 2010 on the file of the learned Motor Accident Claims Tribunal/Additional District and Sessions Judge, Dindigul, seeking compensation.

4.Before the Tribunal, on the side of the claimants two witnesses were examined as P.W.1 & P.W.2 and marked three documents as Exs.P.1 to P.3. Ex.R.1 to Ex.R.4 were marked.

5.The Tribunal, after considering the pleadings, oral and documentary evidences and the arguments of the counsel for the claimants and the insurance company and also on appreciating the evidences on record, 'pay and recover' was ordered. Aggrieved by the said order, the Insurance Company is before this Court.

6.Heard on either side. Perused the material documents available on record.

7. The claimants have filed a claim petition in M.C.O.P.No.709 of 2010 before the Tribunal seeking compensation for the death of husband of the 1st claimant who died in an accident on 28.08.2006 at 10.00 a.m., when the deceased along with three persons were travelled in a 407 van along with three persons, the driver of the Van drove the vehicle in rash and negligent manner and fell down in a pit. Due to the said accident, the deceased died in Government Hospital, Madurai.

8.The 1st claimant is wife and the 2nd and 3rd claimants are parents and the 4th claimant is minor son of the deceased. The tribunal has awarded a sum of Rs.6,93,000/-as compensation and directed the appellant/insurance company to pay the said award amount and the same shall be recovered from the 5th respondent herein/owner of the vehicle. Against the said 'pay and recover' order, the appellant/insurance company has preferred this appeal.

9. It is a admitted fact that the deceased Mohanraj and others were travelled in the Goods vehicle. They neither travelled as owner of Goods nor authorised representatives of owner. Further, they are not the employee of the alleged vehicle.

10(i).In the Judgment reported in ***2009(1)CTC 1, United India Insurance Co. Ltd., V. Nagammal and others,*** the Full Bench of this Court 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) & 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 recognized in Section 149(4) & 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 recovery 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".*

10(ii).The same was followed in a Judgment reported in ***2018(2) TNMAC 731 in the case of Bharati AXA General Insurance Co. Ltd., represented by its Manager Vs. Aandi and two others***, passed by the Division Bench of this Court. The relevant portion of paragraph No.50 is extracted hereunder:

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"In fact, we find that in none of the Judgments referred to viz., ***National Insurance Co. Ltd. V. Swaran Singh and others,*** *2004(1) TN MAC 104(SC) : 2004(3) SCC 297;* ***Mangla Ram V. Oriental Insurance Co. Ltd.,*** *2018(1) TN MAC 681 (SC) : 2018(5) SCC 656* ***: Rani & ors. v. National Insurance Co. Ltd. & ors.,*** *2018 (2) TN MAC 278 (SC) : 2018(9) Scale 310; and* ***Manuara Khatun and others v. Rajesh Kumar Singh and others,*** *2017 (1) TN MAC 289 (SC) : 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 Co. 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."*

11.From the above, this Court is of the opinion that, only owner of the vehicle is liable to pay compensation. The 'Pay and Recover' cannot be ordered.

12.This Court is inclined to modify the liability and therefore, 5th respondent herein/owner of the vehicle is liable to pay compensation instead of the appellant/insurance company.

13.Finally, this Civil Miscellaneous Appeal is allowed by modifying the Order and Decree, dated 19.08.2013 in M.C.O.P.No.709 of 2010 passed by the learned Motor Accident Claims Tribunal/Additional District Cum Sessions Judge, Dindigul, regarding liability. The 5th respondent herein/owner of the vehicle is directed to deposit the entire award amount as fixed by the Tribunal, within a period of six weeks from the date of receipt of copy of the order. The appellant/insurance company is entitled to withdraw the amount already deposited, if any. Already, if any award amount withdrawn by the claimants, the appellant/insurance company shall recover the same from the 5th respondent herein/owner of the vehicle. After depositing the award amount, the claimants are permitted to withdraw the same. No Costs.

Sd/-

Assistant Registrar (CS-I)

// True Copy //

/ /2022

Sub Assistant Registrar(CS)

ksa

Note: In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the Advocate/litigant concerned.

To

The Motor Accident Claims Tribunal/
Additional District Cum Sessions Judge,
Dindigul.

Copy to
The Section Officer, V.R.Section,
Madurai Bench of Madras High Court, Madurai

+1 CC to M/s.P.MALINI, Advocate (SR-3009[F] dated 31/01/2022)

C.M.A.(MD).No.369 of 2014
31.01.2022

SK(CO)
KB(23.02.2022) 5P 5C