



C.M.A.(MD)No.318 of 2019

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 08.09.2023

Pronounced on : 30.11.2023

CORAM:

THE HON'BLE MR.JUSTICE K.MURALI SHANKAR

C.M.A.(MD)No.318 of 2019

Branch Manager,
IFFCO – TOKIO General Insurance Company Limited,
4th Floor, Narain Manzil,
No.23, Barakhamba Road,
New Delhi – 1.

... Appellant/
2nd Respondent

Vs.

1. Dharmaraj

... 1st Respondent/
Petitioner

2. Rajasekaran

... 2nd Respondent/
Respondent No.1

Prayer : This Civil Miscellaneous Appeal filed under Section 173 of the Motor Vehicles Act, to set aside the judgment and decree dated 12.04.2018 passed in M.C.O.P.No.43 of 2014 on the file of the Chief Judicial Magistrate/Motor Accidents Claims Tribunal of Pudukottai by allowing this appeal.



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For Appellant : Mr.V.Sakthivel
For R1 : Mr.A.Arun Prasad
For R2 : No appearance

JUDGMENT

The Civil Miscellaneous Appeal is directed against the award passed in M.C.O.P.No.43 of 2014 dated 12.04.2018 on the file of the Motor Accident Claims Tribunal/Chief Judicial Magistrate Court, Pudukottai.

2. The appellant/insurer, who was made liable to pay compensation of Rs.10,49,000/- (Rupees Ten Lakhs and Forty Nine Thousand only) with interest at 7.5% per annum to the first respondent/claimant for the disability suffered by him, consequent to an accident occurred on 16.04.2007, challenged the liability mulcted on it and for invoking the doctrine of pay and recovery.

3. Admittedly, the appellant/insurer has not challenged the quantum of compensation awarded at by the Tribunal.



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For the sake of convenience and brevity, the parties herein after will be referred to as per their status/ranking in the Tribunal.

4. The case of the claimant is that on 16.04.2007, the claimant had taken the first respondent's vehicle bearing Registration No.TN-55-D-8092 for hire to carry the paddy seed bags for his agricultural field from Gandarvakkottai and also to take woods from Thethuvasalpatty to Gandarvakkottai, that while the claimant was proceeding in the said vehicle as owner of the goods, at about 10.20 a.m. the first respondent's vehicle driver had driven the vehicle in a rash and negligent manner and dashed against the back side of the Government bus bearing Registration No.TN-45-1116, which was standing at B.Sanathur bus stop and as a result of which, the claimant had sustained fractures in his left leg, right fibula and right wrist and injuries all over his body, that the claimant was immediately taken to Gandarvakkottai Hospital and after first aid treatment was referred to Thanjavur Medical College Hospital, that the claimant, after taking inpatient treatment, was subsequently admitted in Thanjavur Vinodhagan Hospital, that the claimant's left leg was amputated below knee level and thereby, the claimant had suffered permanent



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disability and that the accident was occurred only due to the rash and negligent driving of the driver of the first respondent's vehicle.

5. The defence of the second respondent is that the first respondent's driver drove the vehicle carefully, slowly, blowing the horn and observing all the traffic rules, that the Government bus bearing Registration No. TN-45-1116 was parked on the middle of the road without giving any signal and the first respondent's driver is no way responsible for the accident and that since the bus driver was at fault, the very claim petition is bad for non-joinder of necessary party i.e., Transport Corporation.

6. During trial, the claimant has examined himself as P.W.1 and exhibited 10 documents as Ex.P.1 to Ex.P.10. The first respondent had remained *ex parte*. The second respondent has examined the first respondent's driver Sivakumar as R.W.1, the staff attached to the Regional Transport Office, Pudukottai, Tmt. Radha as R.W.2 and their Area Manager Sivaraman as R.W.3 and exhibited 3 documents as Ex.R.1 to Ex.R.3.

7. The learned trial Judge, upon considering the evidence both oral and documentary and on hearing the arguments of both the sides, has



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passed the impugned order dated 12.04.2018 by holding that the accident was occurred only due to the rash and negligent driving of the first respondent's vehicle driver and that the first respondent, by allowing more passengers, has violated the policy conditions, directed the second respondent to pay the compensation awarded at Rs.10,49,000/- with interest and costs to the claimant and then to recover the same from the first respondent/owner of the vehicle. Aggrieved by the impugned award, the second respondent has preferred the present appeal.

8. The learned counsel appearing for the second respondent would submit that the vehicle bearing Registration No.TN-55-D-8092 is a goods vehicle and permitted to carry only the goods, that the claimant has not produced any records to show that he carried seed bags in the said vehicle at the time of accident, that the claimant is only a gratuitous passenger in the said goods vehicle, that the Tribunal has failed to consider that the claimant is not covered under the policy issued by the second respondent to the said vehicle, that the vehicle in question at the time of accident was used to transport 16 passengers and that therefore, since the second respondent is not at all liable for the claim, the impugned order invoking



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the doctrine of pay and recovery is legally unsustainable and the same is liable to be set aside.

9. The learned counsel appearing for the claimant would submit that the claimant had travelled in the front portion of the vehicle along with driver as owner of the goods, that the vehicle of the first respondent was admittedly insured with the second respondent and the same was in force on the date of accident, that the Tribunal, taking note of the violations committed by the first respondent in allowing more persons, has rightly applied the doctrine of pay and recovery and that therefore there is nothing to interfere with the impugned award.

10. It is pertinent to note that the second respondent has not disputed the finding of the Tribunal that the accident was occurred only due to the rash and negligent driving of the first respondent's driver.

11. In Ex.P.1-FIR, which came to be registered on the basis of the complaint given by the bus driver, it has been stated that 407 lorry driver had driven the vehicle rashly and negligently and dashed the against the



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back side of the bus, which was parked in a bus stop and that the passengers in the bus as well as the persons travelled in the 407 lorry had suffered injuries.

12. In the claim statement, as already pointed out, the claimant has alleged that he hired the 407 lorry to carry the paddy seeds bags for his agricultural field and to take woods from Thethuvasalpatty to Gandarvakkottai.

13. The learned counsel appearing for the claimant would submit that the claimant being the owner of the goods has travelled in the said vehicle. No doubt, the claimant, in his chief examination affidavit, would reiterate the contentions raised in the claim statement, but in cross-examination, he would admit that he was not aware as to how many persons had travelled in the first respondent's vehicle at the time of accident, that the said vehicle is a goods vehicle and that he does not know as to whether only three persons are permitted to travel in the said vehicle. As rightly pointed out by the learned counsel appearing for the second respondent, though the claimant has alleged that he alone had taken the



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said vehicle for hire, he has not chosen to say about the number of persons travelled in that vehicle at the time of accident, but conveniently disowned knowledge about the persons travelled in the said vehicle.

14. As already pointed out, the second respondent has summoned and examined the first respondent's vehicle driver as R.W.1 and he would say that two persons were travelling in the front side of the mini lorry and three persons in the back side. More importantly, R.W.1, in his chief examination, would say that they have not taken any goods at the time of accident. In cross-examination, he would say that he was informed by the trader that three persons were travelling in the back side, but he does not know as to how many persons were travelling on the backside. R.W.1, in his further cross-examination, would say that he does not know as to whether the claimant had taken the vehicle for handing over the paddy seeds in his house and to bring wood.

15. As already pointed out, there was no reference either in Ex.P.1-FIR or in Ex.R.3-charge sheet that goods were taken in that vehicle at the time of accident. The claimant has also not chosen to examine any other



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witnesses to show that he was taking paddy seeds bags in that vehicle at that time and to take woods from Thetehuvasalpatty to Gandarvakkottai.

In the absence of any evidence, as rightly contented by the learned counsel appearing for the second respondent, the Tribunal has mechanically recorded a finding that the claimant had travelled in the said vehicle as owner of the goods. Considering the evidence, it can easily be inferred that more than three persons including the claimant were travelling in the said vehicle as gratuitous passengers.

16. At this juncture, it is necessary to refer the judgment of the Hon'ble Supreme Court in *National Insurance Co. Ltd. Vs. Rattani and others* reported in *AIR 2009 SC 1499*, wherein, the deceased and some other injured persons were travelling as member of a marriage parties in a Tata 407 vehicle and though an attempt was made to show that the deceased and other injured person were travelling in the said truck as a representatives of the owner of the goods, rejecting the same, the Hon'ble Apex Court has held as follows,

“13. The question as to whether burden of proof has been discharged by a party to the lis or not would depend upon the facts and circumstances of the case. If the facts are



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admitted or, if otherwise, sufficient materials have been brought on record so as to enable a court to arrive at a definite conclusion, it is idle to contend that the party on whom the burden of proof lay would still be liable to produce direct evidence to establish that the deceased and the injured passengers were gratuitous passengers.

As indicated hereinbefore, the First Information Report as such may or may not be taken into consideration for the purpose of arriving at a finding in regard to the question raised by the appellant herein, but, when the First Information Report itself has been made a part of the claim petition, there cannot be any doubt whatsoever that the same can be looked into for the aforementioned purpose.

14. An admission made in the pleadings, as is well-known, is admissible in evidence proprio vigore. We, thus, are of the opinion that the Tribunal as also the High Court committed a serious error in opining that the insurance company was liable.

.....

We, therefore, in the facts and circumstances of the case, have no hesitation to hold that the victims of the accidents were travelling in the truck as gratuitous passengers and in that view of the matter, the appellant herein was not liable to pay the amount of compensation to the claimants.”



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17. The second respondent has produced the copy of the insurance policy as Ex.R.2 and whereunder, it is evident that apart from basic premium for third party, additional premium of Rs.50/- was collected towards legal liability to driver (IMT-28) and no additional premium was paid for any other persons including coolies/employees.

18. Viewing from that angle also, since additional premium was not paid, the second respondent cannot be made liable. Considering the above, as rightly contented by the learned counsel appearing for the second respondent, since there was no coverage, the question of invoking the doctrine of pay and recovery does not arise and the first respondent/owner of the vehicle alone is liable to pay the compensation. Hence, this Court concludes that the impugned award directing the second respondent to pay the award amount and then to recover the same from the first respondent is not in accordance with law and as such, the same is liable to be set aside.

19. 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.



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20. In the result, this Civil Miscellaneous Appeal is allowed and the impugned award dated 12.04.2018 passed in M.C.O.P.No.43 of 2014 directing the appellant/second respondent to pay the compensation and then to recover the same from the second respondent/first respondent is set aside. The second respondent/first respondent is directed to satisfy the award. If the amount was already deposited by the appellant/second respondent, the amount shall be withdrawn by them. In case, if the amount deposited on or any portion thereof, that was already withdrawn by the first respondent/ claimant, then the appellant/second respondent is permitted to recover the same from the second respondent/first respondent. Parties are directed to bear their own costs.

30.11.2023

NCC : Yes/No
Index : Yes/No
Internet: Yes/No
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To:

1. The Motor Accident Claims Tribunal/
Chief Judicial Magistrate Court, Pudukottai.
2. The Record Keeper,
Vernacular Section,
Madurai Bench of Madras High Court,
Madurai.



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K.MURALI SHANKAR,J.

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Pre-Delivery Order made in
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Dated : 30.11.2023