IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 22.12.2023

PRONOUNCED ON: 17.04.2024

THE HONOURABLE MR. JUSTICE K. RAJASEKAR

C.M.A. No. 3688 of 2021

and C.M.P. No.21675 of 2021

M/s. HDFC ERGO General Insurance Co. Ltd.,
Old No.559, New No.528, 2nd Floor,
Anna Salai, Thenampet,
Chennai – 600 018. ... Appellant / 2nd Respondent

Vs.

1. P. Anand ... 1st Respondent / Petitioner

2. Sri Krishna Lorry Service ... 2nd Respondent / 1st Respondent

Civil Miscellaneous Appeal filed under Section 173 of the Motor Vehicles Act, 1988 to set aside the award and decree dated 19.04.2021 made in M.C.O.P. No. 528 of 2011 on the file of the Additional Subordinate Judge, Motor Accident Claims Tribunal, Ponneri.

For Appellant : Mr. S. Arunkumar

For R1 : Mr. R. Venkatesulu

For R2 : Notice Dispensed With

JUDGMENT

This Civil Miscellaneous Appeal has been filed by the Insurance Company challenging the liability fixed on them to indemnify the owner of the lorry to pay compensation awarded in M.C.O.P. No. 528 of 2011, dated 19.04.2021 on the file of the Additional Subordinate Judge, Motor Accident Claims Tribunal, Ponneri.

2. For the sake of convenience, the parties are referred herein according to their litigative status before the Tribunal.

3. The point raised by the Insurance Company is that the injured in this case was an unauthorized passenger in the goods vehicle, hence the insurance company is not liable to pay compensation. The claimant filed the claim petition stating that on 10.07.2011, at about 1:30 AM, he was waiting for the bus at Super Bazar Bus stop, since no bus came for a long time, the claimant stopped a lorry bearing Registration No.AP-26-TA-0344, which belongs to the first respondent and was boarding the lorry. Due to the rash and negligent driving by the driver of the lorry, the claimant fell down on the

rear side of the lorry tyre and sustained grievous injuries. For the injuries sustained by him, he has come forward with claim petition seeking for a sum of Rs.10,00,000/- from the owner and the insurer of the lorry by invoking sections 166 and 140 of the Motor Vehicles Act, 1988.

4. The first respondent has not contested the claim and remained ex-parte. The second respondent – insurance company filed counter and disputed the age, occupation and income of the claimant and also contended that the claimant is a gratuitous passenger since, the lorry is a goods carriage vehicle. The insurance company also contended that the compensation claimed under various heads is on the higher side.

5. The Tribunal after accepting the case of the claimant has held that the claimant was waiting for a passenger bus to return back to Nellore from Kalahasti, he stopped the lorry and while boarding into the lorry, he sustained injuries, hence fixed contributory negligence of 20% on the part of the claimant and awarded compensation for a sum of Rs.4,54,400/- along with interest @ 7.5% per annum from the date of filing of petition till the date of realization. The Tribunal also fixed the liability on the part of the

second respondent – insurance company to pay compensation to the claimant and recover the same from the first respondent.

6. Aggrieved over the Order of Pay and Recover, the insurance company has filed this appeal.

7. The learned counsel appearing for the insurance company submitted that the Tribunal has not properly appreciated the evidence placed on record and Ordered Pay and Recover. The liability of the insurance company to pay compensation to the unauthorized passenger in the goods vehicle is well settled, since it is the admitted case of the claimant that he travelled in the lorry as unauthorized passenger, hence the insurance company is not liable to pay compensation. The learned counsel also relied on the judgments of the Hon'ble Apex Court in ***New India Assurance Co. Ltd. Vs. Asha Rani and Ors. [2001 ACJ 1847]*** and this Court in ***Bharti AXA General Insurance Co. Ltd. Vs. Aandi and Ors. [IV (2019) ACC 626(Mad.)].***

8. The learned counsel for the claimant submitted that the

insurance company has not raised any ground before the Tribunal stating that the claimant is an unauthorized passenger. The Tribunal based on the evidence placed on record has rightly directed the insurance company to pay compensation to the claimant and then recover the same from the first respondent. He also relied on the judgment of the Hon'ble Apex Court in ***Manuara Khatun and others vs. Rajesh Kumar Singh and others [(2017) 4 SCC 796]*** to support his contention, hence prays to confirm the award of the Tribunal.

9. I have considered the submissions made on both sides and perused the materials available on record. It is admitted case that, claimant has boarded the lorry, since no bus was available to reach his place. He shall be termed as unauthorized passenger in the goods vehicle.

10. The Hon'ble Apex Court in ***Manuara Khatun and others vs. Rajesh Kumar Singh and others*** cited supra, by relying on the judgment of the Hon'ble Apex Court in ***Manager, National Insurance Company Ltd. Vs. Saju P. Paul and Ors. [2013 ACJ 554]*** has agreed to issue direction to the insurance company to follow the principle of 'Pay and Recover' for the payment of compensation to the claimant therein, the Order of the Apex

Court reads as follows:

"15. This question also fell for consideration recently in ***Manager, National Insurance Co. Limited v. Saju P. Paul and Anr.****, (supra) wherein this Court took note of entire previous case law on the subject mentioned above and examined the question in the context of Section 147 of the Act. While allowing the appeal filed by the Insurance Company by reversing the judgment of the High Court, it was held on facts that since the victim was travelling in offending vehicle as "gratuitous passenger" and hence, the Insurance Company cannot be held liable to suffer the liability arising out of accident on the strength of the insurance policy. However, this Court keeping in view the benevolent object of the Act and other relevant factors arising in the case, issued the directions against the Insurance Company to pay the awarded sum to the claimants and then to recover the said sum from the insured in the same proceedings by applying the principle of "pay and recover".*

16. Justice R.M. Lodha (as His Lordship then was and later became CJI) speaking for the Bench held in paras 20 and 26 as under:

> *20. The next question that arises for consideration is whether in the peculiar facts of this case a direction could be issued to the Insurance Company to first satisfy the awarded amount in favour of the claimant and recover the same from the owner of the vehicle (Respondent 2 herein).*
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> *26. The pendency of consideration of the above questions by a larger Bench does not mean that the course that was followed in Baljit Kaur, MANU/SC/0009/2004 : (2004) 2 SCC 1 andC halla*

> *Upendra Rao, MANU/SC/0779/2004 : (2004) 8 SCC 517 should not be followed, more so in a peculiar fact situation of this case. In the present case, the accident occurred in 1993. At that time, the claimant was 28 years old. He is now about 48 years. The claimant was a driver on heavy vehicle and due to the accident he has been rendered permanently disabled. He has not been able to get compensation so far due to the stay order passed by this Court. He cannot be compelled to struggle further for recovery of the amount. The Insurance Company has already deposited the entire awarded amount pursuant to the order of this Court passed on 1-8-2011 (National Insurance Co. Ltd. v. Saju P. Paul SLP (C) No. 20127 of 2011 and the said amount has been invested in a fixed deposit account. Having regard to these peculiar facts of the case in hand, we are satisfied that the claimant (Respondent 1) may be allowed to withdraw the amount deposited by the Insurance Company before this Court along with accrued interest. The Insurance Company (the Appellant) thereafter may recover the amount so paid from the owner (Respondent 2 herein). The recovery of the amount by the Insurance Company from the owner shall be made by following the procedure as laid down by this Court in Challa Upendra Rao (supra).*

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19. We find no merit in any of the submissions. Firstly, as mentioned above, we find marked similarity in the facts of this case and the one involved in ***Saju P. Paul's Case*** *(supra). Secondly, merely because the compensation has not yet been paid to the claimants though the case is quite old (16 years) like the one in* ***Saju P. Paul's Case*** *(supra), it cannot be a ground to deny the claimants the relief claimed in these appeals. Thirdly, this Court has already considered and rejected the argument regarding not granting of the relief of the nature claimed herein* *due to pendency of the reference to a larger Bench as would be clear from Para 26 of the judgment in **Saju P. Paul's case** (supra). That apart, learned Counsel for the Appellants stated at the bar that the reference made to the larger Bench has since been disposed of by keeping the issue undecided. It is for this reason also, the argument does not survive any more."*

11. The above discussion of the Apex Court squarely shows that the Order has been passed based on the observations made by the Apex Court in ***Manager, National Insurance Company Ltd. Vs. Saju P. Paul and Ors.*** Cited supra, which has been rendered based on the peculiar facts and circumstances of the case, the same could not be applied as precedent to decide the question of law that, whether the insurance company is liable to pay compensation and thereafter to recover the same from the owner of the vehicle.

12. The Hon'ble Apex Court in ***National Insurance Co. Ltd. Vs. Baljit Kaur and Ors. [2004 ACJ 428]*** and ***New India Assurance Co. Ltd. Vs. Asha Rani and Ors. [2001 ACJ 1847]***, which still holds the field with regard to the above issue. The Division Bench of this Court in ***Bharti AXA General Insurance Co. Ltd. Vs. Aandi and Ors. [IV (2019) ACC 626(Mad.)]***, after considering the judgments of the Apex Court cited above

and also including ***Manager, National Insurance Company Ltd. Vs. Saju P. Paul and Ors.*** and ***Manuara Khatun and others vs. Rajesh Kumar Singh and others*** cited supra, has held as follows in paragraph nos. 47 to 50 as follows:

> *"**47.** However, the Hon'ble Supreme Court invoked the power under Article 142 taking note of the peculiar facts of the case and directed the Insurance Company to pay the compensation with liberty to recover. Therefore, in our considered opinion the judgment in Manager, National Insurance Co. Ltd. v. Saju P. Paul (supra), cannot also be taken as a precedent, as contended by Mr. N. Vijayaraghavan, to impose the obligation to indemnify the insured in respect of death or bodily injury caused to the persons who are unauthorised passengers in a goods vehicle.*
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> ***48.** Coming to the latest judgment, viz., Shivaraj v. Rajendra MANU/SC/0945/2018 : 2018 ACJ 2755 (SC), there again the Hon'ble Supreme Court affirmed the conclusion of the High Court to the effect that the Insurance Company was not liable for the loss or injuries suffered by the appellant or to indemnify the owner of the tractor. However, the Hon'ble Supreme Court taking note of the peculiar circumstances of the case directed the Insurance Company to pay the compensation with liberty to recover the same. Unfortunately, the decisions of the larger Bench in New India Assurance Co. Ltd. v. Asha Rani, (supra) or National Insurance Co. Ltd. v. Baljit Kaur (supra), were not brought to the notice of the two-Judge Bench which decided Shivaraj v. Rajendra (supra).*
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> ***49.** We find that the judgments relied upon by the Hon'ble*

Supreme Court in Shivaraj v. Rajendra (supra), in support of its conclusion that Insurance Company can be directed to pay compensation with liberty to recover the same even in respect of a gratuitous passenger or an unauthorised passenger in a goods vehicle, do not support the said conclusion.

50. *In fact, we find that in none of the judgments referred to, viz., National Insurance Co. Ltd. v. Swaran Singh (supra); Mangla Rant v. Oriental Insurance Co. Ltd., MANU/SC/0332/2018 : III (2018) SLT 431 : II (2018) ACC 118 (SC) : 2018 ACJ 1300 (SC); Rani v. National Insurance Co. Ltd., MANU/SC/0794/2018 : 2018 ACJ 2430 (SC); and Manuara Khatun v. Rajesh Kumar Singh, MANU/SC/0194/2017 : III (2017) SLT 203 : II (2017) ACC 476 (SC) : 2017 ACJ 1031 (SC); 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 (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 Co. Ltd. v. Asha Rani (supra) and National Insurance Co. Ltd. v. Baljit Kaur (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."*

13. Based on the above observations, the Order passed by the Tribunal that the insurance company is liable to pay compensation as first

instance and thereafter to recover the same from the owner of the vehicle, is hereby set aside. Accordingly, the award of the Tribunal is modified to the effect that the first respondent alone shall pay the compensation to the claimant as determined by the Tribunal. The insurance company is also given liberty to withdraw the amount deposited, if any.

14. In the result, this Civil Miscellaneous Appeal is allowed. Consequently, connected civil miscellaneous petition stands closed. No cost.

17.04.2024

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Index:Yes/No
Speaking Order:Yes/No
Neutral Citation Case: Yes/No

To:

1. The Additional Subordinate Judge,
   Motor Accident Claims Tribunal,
   Ponneri.

2. The Section Officer,
   V.R.Section,
   High Court, Chennai.

K. RAJASEKAR, J.

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