BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : 29.11.2023

PRONOUNCED ON : 29.01.2024

CORAM:

THE HONOURABLE MRS.JUSTICE L.VICTORIA GOWRI

C.M.A.(MD)No.1906 of 2013

Cholamandalam M.S.General Insurance
CO. Ltd., “Dare House”
2nd & 5th Floors, N.S.C.Bose Road,
Chennai 600 001. ... Appellant

Vs.

1.K.Sellammal

2.A.Krishnan

3.K.Kanagavalli

4.A.Chinnappa ... Respondents

PRAYER : Civil Miscellaneous Appeal filed under Section 173 of the Motor Vehicle Act, 1988, to set aside the judgment and decree dated 05.07.2012 made in M.C.O.P.No.453 of 2009 on the file of the Motor Accident Claims Tribunal (Sub Court), Kulithalai.

For Appellant : Mr.S.Srinivasa Raghavan

For R1 to R3 : Mr.J.Anand Kumar

For R4 : No Appearance

JUDGMENT

This Civil Miscellaneous Appeal has been directed as against the award passed by the learned Motor Accident Claims Tribunal (Sub Judge), at Kulithalai in M.C.O.P.No.453 of 2009 dated 05.07.2012 by the appellant/second respondent/insurance company challenging the liability fixed on the insurance company.

2.For the sake of convenience, the parties are addressed herein as per the rank in M.C.O.P.No.453 of 2009.

3.The brief facts leading to the filing of the Civil Miscellaneous Appeal is as follows:-

This is a fatal case. The first petitioner is the mother of the deceased, the second petitioner is the father of the deceased and the third petitioner is the sister of the deceased. On 09.07.2009, at about

12.30 hours, the deceased Adaikan @ Adaikalasamy travelled in a tractor bearing registration No.TN-45-AZ-1486 belonging to the first respondent driven by one Bakkiyaraj while the said tractor was proceeding on Kalarpatti road, near Elanthaikulam, to avoid hitting against the two wheeler, the driver applied sudden break. As the result of which, the deceased was thrown away from the tractor and sustained multiple injuries all over the body including head. However, on the same day, he died and postmorterm was conducted at Government Hospital, Manapparai. Valanadu Police registered a FIR in Crime No.99 of 2009 as against the first respondent's driver. Seeking compensation for a sum of Rs.10,00,000/- for the death, the petitioners have filed this claim petition.

4.The first respondent is the owner of the vehicle and the second respondent is the insurance company with which the vehicle was insured. Refuting all the allegations set forth in the claim petition, the second respondent has filed a counter. The second respondent had pleaded that the deceased was an unauthorized passenger who travelled violating the terms and conditions of the insurance policy and against the provisions of the Motor Vehicles Act and Rules. It was also pleaded that the first respondent's driver had no driving licence on the date of accident and sought for dismissal of the claim petition.

5.The learned Tribunal had framed three issues. Two witnesses P.W.1 and P.W.2 were examined on the side of the petitioners and Ex.P1 to Ex.P2 were marked and on the side of the respondents, two witnesses R.W.1 and R.W.2 were examined and three documents Ex.R1 to Ex.R3 were marked. The learned Tribunal after scrutinizing the evidence adduced and various oral and documentary evidence produced and considering the arguments putforth, proceeded to conclude that the accident had happened only due to rash and negligent driving of the first respondent's driver.

6.Thereafter, on the question of compensation, the learned Tribunal has concluded that the deceased was a bachelor and on the basis of the post morterm report Ex.P2, and FIR Ex.P1 and the evidence of P.W.1, the learned Tribunal fixed the age of the deceased as 21 years. Though it was contended by the petitioners that the deceased was working under the first respondent and was earning Rs.8,000/- per month since they were not able to prove same, a notional income of Rs.4,500/- was fixed by the learned Tribunal and the annual income was derived at Rs.6,000/-. After adopting the dictum of the Hon'ble Apex Court in the case of ***Sarala Varma and others v. Delhi Transport Corporation and others*** reported in ***AIR 2009 (SCC) 3104***, 50% of the income was deducted towards personal income and after such deduction, the contribution to the deceased's family was arrived at Rs.27,000/- per year. Following the ***Sarala Verma*** case, the multiplier of '15' was adopted and compensation under the head loss of dependency was arrived at Rs.4,05,000/- (Rs. 27,000x15). The learned Tribunal passed the award under the following heads:-

Head	**Compensation awarded**
(I)Loss of dependency:	Rs.4,05,000/-
(ii)Loss of love and affection for the petitioners 1 to 3:	Rs.30,000/- (Rs.10,000/- each)
(iii)Funeral Expenses:	Rs.5,000/-
(iv)Transportation Expenses:	Rs.5,000/-
Total compensation awarded:	Rs.4,45,000/- with interest @ 7.5 % from the date of the claim until the realization and costs.

7. For deciding the question of liability, the learned Tribunal examined an official from RTO office, Manapparai as R.W.2. The copy of the driving licence of Bakkiyaraj who drove the vehicle was produced and he further deposed that the said Bakkiyaraj had obtained licence to drive two wheeler and to drive light motor vehicle. He also deposed in his cross examination that a tractor is a light motor vehicle and Ex.R3 licence is sufficient to drive the tractor meant for agricultural purpose. That apart registration certificate of the tractor was marked as Ex.R2 and a perusal of the same would reveal that the tractor is of an unladden weight of 1960 kgs. On the basis of the evidence of R.W.2 and Ex.R2 and Ex.R3, the learned Tribunal has concluded that the tractor driven by the said Bakkiyaraj is a light motor vehicle as per Section 2(21) of the Motor Vehicle Act, 1988 and as such Ex.R3 licence is sufficient for the said Bakkiyaraj to drive the said tractor. The learned Tribunal decided that the driver Bakkiyaraj possessed valid driving licence at the time of the accident. The learned Tribunal observed that it is not disputed at the time of accident that the driver Bakkiayaraj and Adaikan @ Adaikaisamy were travelling in the said tractor. No doubt Ex.R2 registration certificate would reveal that the seating capacity of the

tractor is one. Ex.R1 insurance policy clearly elaborates the carrying capacity and the seating capacity of the tractor are mentioned as follows:-

(i)Licenced passenger carrying capacity	- 1
(ii)Driver and others	- 1
(iii)Cleaner	- nil
(iv)Conductor	- nil
(v)Total seating capacity including driver	- 1

8. Thus, the learned Tribunal concluded that the total seat capacity and carrying capacity of the tractor involved in the accident is for the driver alone. Further it was observed by the learned Tribunal that Ex.R1 insurance policy was paid only for the driver not for any additional person. It was also admitted that the said driver Bakkiyaraj was the son of the first respondent and hence, the learned Tribunal proceeded to conclude that the first respondent had wantedly allowed his son to drive the tractor carrying one more person that is the deceased Adaikan @ Adaikalasamy and thereby violating the terms and conditions of the Ex.R1 policy. Finally the learned Tribunal concluded that the second respondent insurance company is not liable to indemnity the first

respondent and the first respondent being the owner of the tractor alone was held responsible for the claim. However, considering the fact that the second respondent did not specifically dispute the averments of the petitioners that they were depending on the income of the deceased and since it was not disputed that the deceased was the only son of the petitioners 1 and 2, the learned Tribunal applying the principle of pay and recover, directed the second respondent to pay the compensation amount and recover the same from the first respondent.

9.Challenging the said award, the appellant/second respondent has filed this Civil Miscellaneous Appeal.

10.The learned counsel for the appellant vehemently submitted that no passenger is permitted to travel in a tractor except a driver and so any other person except the driver who travelled in the tractor should be considered as an unauthorized passenger and such a person is outside the scope and ambit of the policy of insurance. The learned counsel further contended that the Hon'ble Apex Court has held in umpteen number of cases that the person who had travelled in a tractor except the driver in any part of India is not entitled to be compensated by the insurer as the policy of insurance does not cover such class of persons.

11.He further vehemently contended that giving a direction for pay and recover even after finding that the seating capacity of the tractor is only one except that of the driver is not sustainable and the award of the learned Tribunal is liable to be set aside. He further contended that according to the Section 149 of Motor Vehicles Act, 1988, an unauthorized passenger is not covered either by the insurance policy or by the Act and that the insurance company cannot be called upon to indemnify the owner and the owner alone is liable to compensate the claimants and the insurance company has to be exonerated and the award of pay and recover is bad in an eye of law.

12. The learned Counsel appearing for the respondent vehemently submitted that the 2nd respondent / Insurance Company has been absolved from paying the compensation award to the claimants by invoking the principles of "Pay and Recover". He further contended that to do substantial justice, this Court may invoke the principles of "Pay and

Recover" as has been enunciated in the case of *National Insurance Company Ltd., .Vs. Swaran Singh and others, 2004 (1) TN MAC 104 (SC) : 2004 (3) SCC 297*. He further contended that the Hon'ble Apex Court in the cases of *Mangla Ram .Vs. Oriental Insurance Company Ltd., reported in 2018 (1) TN MAC 681 (SC)*, *National Insurance Company .Vs. Parvathneni and other reported in 2018(9) SCC 657* and *Manuara Khatun and others .Vs. Rajesh Kumar Singh and others reported in 2017 (4) SCC 796,* has held that, there is no wrong in directing the Insurance Company to pay the compensation amount to the claimant and recover the same from the tractor owner. He also relied the Judgment of the Hon'ble Apex Court in the case of *National Insurance Company Ltd., .Vs. Baljit Karu & Others., reported in 2004 (TN MAC) Volume 1 SCC, National Insurance Company .Vs. Roshan Lal and other reported in 2017 (4) SCC 803, Branch Manager, United India Insurance Company Co. Ltd., .Vs. Nagammal and others reported in 2009 (1) CTC 1 full bench* and *the Manager, National Insurance Co. Ltd., .Vs. Saju P. Paul and other reported in 2013 (1) TN MAC 25 (SC).*

13. The learned Counsel for the appellant further submitted that the provisions of the Motor Vehicles Act, 1988 do not insist any statutory liablity on the owner of the vehicle to get his vehicle insured for any passenger travelling in goods carriage and the insurer would have no liability thereto. In the instant case, obviously, it was a gratuitous passenger who travelled in the vehicle which is involved in the accident, that is, tractor. No one other than the driver is permitted to travel in terms of the Insurance Policy. Hence, the insurer would have no liability at all. He further relying upon the following cases:

(i) New India Assurance Co. Ltd., .Vs. Asha Rani and Others reported in 2004 (2) TN MAC 387 (SC);

(ii) Manuara Khatu and other .Vs. Rajesh Kumar Singh and others reported in 2017 (1) TN MAC 289 (SC): 2017 (4) SCC 796;

(iii) National Insurance Co. Ltd., .Vs. Swaran Singh and others, reported in 2004 (1) TN MAC 104 (SC) : 2004 (3) SCC 297;

(iv) Mangla Ram .Vs. Oriental Insurance Co. Ltd., 2018 (1) TN MAC 681 (SC); 2018 (5) SCC 656;

14. In the instant case, considering that it was a gratuitous passenger who travelled in the tractor bearing registration No. TN-45/AZ-1486 belonging to the 1st respondent which was driven by his driver namely Bakkiaraj, the learned Tribunal proceeded to decide that the driver of the tractor alone was responsible for the accident. As a result of which, the gratuitous passenger namely Adaikan @ Adaikalasamy died on 09.07.2009. The said decision was arrived by the learned Tribunal on the basis of the evidence deposed by the eye witness namely A.Nanda Gopal as P.W-2. That apart, the appellant / 2nd respondent did not examine the driver who drove the vehicle and it is evident from Ex.P-1 FIR that Valanadu police registered a case against the said driver. However, the learned Tribunal has concluded by directing the appellant / 2nd respondent to pay the compensation award to the claimants and recover the same from the 1st respondent owner of the tractor. It is an admitted fact that the driver of the tractor who drove the tractor was none other than the son of the 1st respondent and he was in possession of driving license for light motor vehicle and it was marked as Ex.R-3. The learned Tribunal concluded that the tractor is a light motor vehicle as per Section 2(21) of the Motor Vehicles Act, 1988. Hence,

Ex.R-3 is sufficient to drive the same. No doubt the seating capacity of tractor is only one and the Ex.R-1 insurance policy covers only the driver and it is clear from Ex.R-1, Insurance Policy that additional premium was not paid for any additional persons other than the driver. No trailor was attached to the tractor at the time of the accident.

15. The Insurance Policy which was marked as Ex.R-1 covered only the driver and the finding of the learned Trial Court is that the 1st respondent had allowed his son to drive the tractor without following the terms of 1st respondent policy. The learned Tribunal proceeded to decide that the 2nd respondent is not liable and the 1st respondent being the owner of the tractor alone is responsible for claim. However, the learned Tribunal considering the facts and circumstances of the case proceeded to pass an order on the principle of pay and recover, thereby, directing the appellant / 2nd respondent to pay the compensation to the claimants and thereafter recover the same from the 1st respondent. Challenging the same, the appellant / 2nd respondent Insurance Company is before this Court. Both the appellant and the 2nd respondent Insurance Company and the claimants submitted their arguments relying upon various judgments

mentioned supra.

16. Relying upon the Judgment of the Hon'ble Apex Court in *National Insurance Company Limited .Vs. Parvathneni and another reported in (2009) 8 SCC 785,* the pertinent question to be decided is that, if the Insurance Company proves that it has no liability to pay compensation to the claimants, can the Insurance Company be compelled to make payment and later on recover it from the owner of the vehicle? When a person has no liability to pay at all how can it be compelled to pay? It may take years for the Insurance Company to recover the amount from the owner of the vehicle, and it is also possible that for some reason the recovery may not be possible at all.

17. The instant case is that one of the unauthorized person / gratuitous passenger in a tractor who travelled along with the driver who died in the course of his travel in an accident. However, the learned Tribunal directed the Insurance Company to pay and recover, despite the fact that there is no requirement for insured to cover a person who is an unauthorized person travelling in the goods vehicle. In the absence of

any statutory requirement to cover the liability in respect of a gratuitous passenger in a goods vehicle, the principle of "Pay and Recover" as statutorily recognized in Section 149 (4) and 149 (5), is not applicable *ipso facto* to such cases. The said question has been already decided in the cases of *Bharati AXA General Insurance Co. Ltd., .Vs. Aandi reported in 2018 (2) TN MAC 731 (DB*. The relevant portion of this Judgment is extracted as follows:

> "*24. We have considered the rival submissions. Section 147 of the Motor Vehicles Act, spells out the requirements of the motor insurance policy as well as the limits of liability. While Section 147(1), deals with the matters which will have to be covered by the Policy, proviso to Section 147(1), sets out exemptions. Section 147(1)(b), which requires the policy to insure the person or classes of persons specified in the Policy to the extent specified in sub-Section (2) against any liability, which may be incurred by him in respect of the death or bodily injury to any person, including Owner of the goods or his Authorized Representative carried in the vehicle or damage to any property of a Third party caused by or arising out of the use of the vehicle*

in a Public place.

25. A reading of the above provision makes it clear that an Insurance Policy which is a mandatory Statutory requirement is required to cover only certain classes of persons and not every person who chooses to travel in any type of vehicle. Therefore, there is no mandatory requirement for the Insurance company to cover persons who are travelling as passengers in a nonpassenger vehicle/ goods vehicle.

26. Section 149, imposes an obligation on the part of the insurers to satisfy the judgments and awards made against the persons insured in respect of Third party risks. Section 149(2), requires the Court or the Tribunal to notify the Insurance Company regarding the claim and also hear the Insurance Company and prescribes the defences that are available to the insurer in such Third Party claims. One of the defences that is available to the insurer in such Third Party claims as set out under Section 149(2)(a)(i)(c), is that the insured vehicle being used for a purpose not allowed by the permit under which the *vehicle is used where the vehicle is a transport vehicle. Therefore, it is clear that a Insurance Company which faces the claim petition can raise a statutory defence to the effect that the vehicle in question was used for a purpose other than the purpose for which the permit had been issued, in order to avoid the liability. Both these provisions have to be necessarily read together.*

27. The Hon'ble Supreme Court has repeatedly considered the effect of these provisions in various judgments. It should be pointed out at this juncture, Section 147(1)(b)(i), which read as follows:-

"(i) Against any liability which may be incurred by him in respect of the death of or bodily injury to any person or damage to any property of a third party caused by or arising out of the use of the vehicle in a public place."

was amended by Act 54 of 1994 with effect from 14.11.1994 to read as follows:-

" (i) Against any liability which may be incurred by him in respect of the death of or bodily injury to any person, including

the owner of the goods or his authorized representative carried in the vehicle or damage to any property of a third party caused by or arising out of the use of the vehicle in a public place."

28. The addition of the words "including the owner of the goods or his authorized representative carried in the vehicle" introduced a class of persons who were otherwise not required to be covered statutorily. Therefore, it is only after 14.11.1994, the owner of the goods or the authorized representative of such owner were required to be covered by the Insurance Companies and not before that.

29. Therefore, a passenger in a goods vehicle even if he was the owner of the goods or the authorized representative of the owner of the goods was not covered prior to 14.11.1994 or there was no statutory requirement to cover such person. A close reading of Section 147(1) would show that a policy of insurance covering risks relating to motor accidents are required to cover the persons or classes of persons specified in the policy, against any liability incurred by him in respect of death or bodily injury *or damage to any property of a*

1) Third party.

2) the owner of the goods or his authorized representative carried in a goods vehicle.

3) against the death or bodily injury to the passenger of a public service vehicle.

30. Sub-Section (2) of Section 147, lays down the limits of liability. Sub section 5 of Section 147, is a non-abstanti clause, which makes the Insurers liable to indemnify the person or class of persons specified in the Policy, in respect of the liability covered by the Policy.

31. Section 149 of the Motor Vehicles Act imposes an obligation on the Insurance Company to satisfy the Judgments and awards passed against the insured. Sub-section (2) of section 149, provides that the Insurer must be heard in a proceeding before the Claims Tribunal seeking compensation, it also sets out the defences that are available to the Insurance Company in such claims. One of the defences that is set out in Section 149(2)(a)(i)(c), is the purpose for which the vehicle was *used at the time of the accident. Under the said provision it is open to the Insurance Company to plead and prove that the vehicle was used for the purpose other than which it was permitted and extricate itself from the liability to pay compensation.*

50. In fact, we find that in none of the judgments referred to viz., National Insurance Co. Ltd. Vs. Swarn Singh & Ors. reported in (2004) 3 SCC 297, Mangla Ram Vs. Oriental Insurance Co. Ltd. reported in (2018) 5 SCC 656, Rani & Ors. Vs. National Insurance Co. Ltd. & Ors. reported in 2018 (9) Scale 310 and Manuara Khatun and Others Vs. Rajesh Kumar Singh And Others reported in (2017) 4 SCC 796, the question regarding the liability of the Insurance Company to pay the compensation in respect of an unauthorized 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 Vs. 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 *unauthorized 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 Vs. Asha Rani and others and National Insurance Company Ltd., Vs. 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."*

18. Fully fortified by the said Judgment passed by the Hon'ble Division Bench of this Court, I have no hesitation to hold that the learned Tribunal erred by applying the principles of pay and recover, thereby directing the appellant / 2nd respondent to pay the compensation amount and thereafter, recover the same, from the 1st respondent, that is, the owner of the vehicle. I hereby modify the award passed by Tribunal partly, as far as the direction of pay and recover alone. Hence, the 1st respondent is liable to pay the compensation. As far as the other portion of the award is concerned, including the quantum of the compensation, the same is hereby confirmed. Accordingly, the 2nd respondent / Appellant

is permitted to withdraw the amount, if any, already deposited before the Tribunal.

19. Accordingly, the Civil Miscellaneous Appeal stands allowed. There shall be no order as to costs.

20. The 1st respondent / Owner of the vehicle is directed to deposit the entire compensation amount as awarded by the Tribunal with accrued interest and costs to the credit of M.C.O.P.No.453 of 2009 on the file of the Motor Accident Claims Tribunal (Sub Court), Kulithalai, within a period of eight weeks (8) from the date of receipt of copy of this judgment. On such deposit, the claimants are permitted to withdraw the said amount, less the amount, if any already withdrawn, by making necessary application before the Tribunal. No costs.

29.01.2024

NCC : Yes / No
Index : Yes / No
Internet : Yes
Sml/Mrn

To

1.The Motor Accident Claims Tribunal, Sub Judge,
Kulithalai.

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

L.VICTORIA GOWRI, J.

Sml/Mrn

C.M.A.(MD)No.1906 of 2013

29.01.2024