BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: **29.04.2024**

CORAM

THE HON'BLE MRS.JUSTICE S.SRIMATHY

C.M.A(MD)No.1973 of 2013
and
M.P.(MD)No.2 of 2013

The Branch Manager
National Insurance Company Limited,
No.2-A, Thirumakkulam North Street,
Tallakulam, Madurai – 625 002. ... Appellant

Vs.

1.Poosari
2.P.Rajangam ... Respondents

PRAYER: Civil Miscellaneous Appeal is filed under Section 173 of the Motor Vehicles Act 1988, against the judgment and award, dated 19.08.2009, made in M.C.O.P.No.1115 of 1999, on the file of the Motor Accident Claims Tribunal, Chief Judicial Magistrate, Madurai.

For Appellant : Mr.D.Sivaraman
For R1 : Mr.K.C.Ramaligam

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JUDGMENT

The Insurance Company has preferred this appeal. The Tribunal has ordered pay and recovery. Aggrieved over the same, the present appeal is preferred.

2.The brief facts of the case are that more than 40 persons travelled in a lorry and they were all agriculture coolies. The vehicle was hired to transport them to the field. Unfortunately, an accident occurred resulting in one fatal and four injuries. All the persons were sitting near the rear door of the lorry. Unfortunately, the door opened and all the persons fell down and one person died on the spot and others sustained injuries.

3. The contention of the Insurance Company is that since more than 40 persons have travelled in the lorry, all the persons ought to be considered as gratuitous passengers. The issue of pay and recovery was already considered and settled by Hon'ble Full Bench of this Court in the case of ***United India Insurance Corporation Limited Vs. Nagammal and others*** reported in ***2009 (1) TN MAC 1 (FB)***. After considering the issues elaborately, in paragraph No.31 the Hon'ble Full Bench of this Court has held as under:

> *"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 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) 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 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.”

It has been categorically stated under sub clause 7 that after Baljith Kaur's case which was rendered in 06.01.2004, the Trial Court has no power to grant pay and recovery. By following the Hon'ble Full Bench of this Court, the Hon'ble Division Bench of this Court in the case of ***Bharati AXA General Insurance Company Limited Vs. Aandi and others*** reported in ***2018 (2) TN MAC 731 (DB)*** has confirmed that pay and recovery can never be allowed after Baljith Kaur's case. In the present case, even though the accident occurred on 06.10.1995, the award was passed on 19.08.2009 which is after ***Nagammal's case***. Therefore, in such circumstances, pay and recovery cannot be ordered by the Tribunal.

4. Following the order of the Hon'ble Full Bench, this Court is inclined to set aside the impugned order and accordingly, the impugned order is set aside. However, at the time of admission, this Court directed the Insurance Company to deposit the entire award amount and the claimant was directed to withdraw 50% of the award amount. The claimant has already withdrawn 50% of the award amount. therefore, it may not be possible to recover the same from the claimant.

5.Therefore, this Court is passing the following orders:

i) The entire liability is fixed on the owner of the vehicle.

ii) The Insurance Company shall recover the 50% which was already deposited at the admission stage and from the owner of the vehicle.

iii) The balance 50% of the award amount which was deposited by the Insurance Company shall be withdrawn by the Insurance Company.

6. Therefore, the 2nd respondent herein / owner of the vehicle is directed to deposit Rs.10,000/- with interest at the rate of 7.5% per annum and costs to the credit of M.C.O.P., on the file of claims Tribunal, within a period of eight weeks from the date of receipt of a copy of this judgment. On such deposit, the claimant is permitted to withdraw the same with accrued interests and costs, less the amount already withdrawn by him, if any, by filing appropriate application before the Tribunal. The Insurance Company shall recover the amount which was already deposited at the admission stage and was withdrawn by the claimant from the M.C.O.P., when the owner deposits the amount. The Insurance Company shall withdraw the excess amount, if any.

7. With the above said directions, the Civil Miscellaneous Appeal is allowed. No costs. Consequently, connected miscellaneous petition is closed.

29.04.2024
(2/5)

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

Tmg

To

1.Motor Accident Claims Tribunal,
Chief Judicial Magistrate, Madurai.

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

S.SRIMATHY, J.

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