



REV. APLC(MD)No.42 of 2024

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATE : 26.06.2024

CORAM :

THE HONOURABLE MR.JUSTICE K.MURALI SHANKAR

Rev.Appl.(MD)No.42 of 2024
in
C.M.A(MD)No.715 of 2019

1.S.Gomathi

2.S.Alagumuthu : Petitioners/ Respondents 1 & 2

Vs.

1.The Oriental Insurance Company
through it's Branch Manager,
Sree Vijay Complex, 1024 B, Cumbam Road,
Opp.to Old Bus Stand, Theni 625 531.

: 1st Respondent /Appellant

2.A.Selvaraj : 2nd Respondent/3rd Respondent

PRAYER : Review Application filed under Section 114 and Order XLVII
Rule 1 and 2 of the Civil Procedure Code, to review the order, dated
10.11.2023 made in C.M.A(MD)No.715 of 2019 on the file of this Court.

For Petitioner : Mr.P.Subbiah



ORDER

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The Review Application is directed against the judgment made in C.M.A(MD)No.715 of 2019, dated 10.11.2023, setting aside the award passed in M.C.O.P.No.321 of 2015, dated 01.03.2019 on the file of the Motor Accident Claims Tribunal/Principal District Court, Thoothukudi.

2. The Tribunal by holding that the accident was occurred only due to the rash and negligent driving of the tractor driver, mulcted liability on the insurer and directed them to pay compensation of Rs.6,45,964/- with interest and costs.

3. The first respondent/insurer has taken a defence that the deceased was a gratuitous passenger in the tractor and that since the owner and driver of the tractor have violated the terms and conditions of the insurance policy, the insurer is not liable for the claim.

4. This Court, upon considering the evidence available on record, has come to a decision that the deceased was travelling in the tractor and at the time of accident, he has fallen down from the tractor and sustained injuries and that therefore, the deceased has to be considered as gratuitous



passenger in the tractor and as such, the insurer is not liable for the claim.

This Court has further held that since the insurer is not liable for the claim, the doctrine of pay and recovery cannot be applied and on that basis allowed the appeal and thereby set aside the award passed by the Tribunal.

5. The main contention of the review petitioner is that this Court has proceeded on the misconception of legal position of paying compensation by the Insurance Company and recover the same from the owner of the vehicle as ruled by the Hon'ble Apex Court in the cases reported in (2018) 8 SCC 492, (2018) 10 SCC 432 and (2023) ACJ 623, with respect to the person travelled in a tractor by sitting on the mud guard; that this Court ought to have followed the judgments of the Hon'ble Apex Court above referred; that this Court ought to have applied the doctrine of pay and recovery and thereby should have directed the insurer to pay the compensation and then to recover the same from the owner of the vehicle.

6. The learned counsel for the petitioner has relied on the following decisions in support of his contentions.

(i) *Shivaraj vs. Rajendra and another* reported in **2018 (10) SCC 432**, wherein the Hon'ble Apex Court has held as follows :



9. The High Court, however, found in favour of respondent No.2 (insurer) that the appellant travelled in the tractor as a passenger which was in breach of the policy condition, for the tractor was insured for agriculture purposes and not for carrying goods. The evidence on record unambiguously pointed out that neither was any trailer insured nor was any trailer attached to the tractor. Thus, it would follow that the appellant travelled in the tractor as a passenger, even though the tractor could accommodate only one person namely the driver. As a result, the Insurance Company (respondent No.2) was not liable for the loss or injuries suffered by the appellant or to indemnify the owner of the tractor. That conclusion reached by the High Court, in our opinion, is unexceptionable in the fact situation of the present case.

10. At the same time, however, in the facts of the present case the High Court ought to have directed the Insurance Company to pay the compensation amount to the claimant (appellant) with liberty to recover the same from the tractor owner, in view of the consistent view taken in that regard by this Court in *National Insurance Co. Ltd. Vs. Swarna Singh & Ors.*¹, *Mangla Ram Vs. Oriental Insurance Co. Ltd.*², *Rani & Ors. Vs. National Insurance Co. Ltd. & Ors.*³ and including *Manuara Khatun and Others Vs. Rajesh Kumar Singh And Others.*⁴ In other words, the High Court should have partly allowed the appeal preferred by the respondent No.2. The appellant may, therefore, succeed in getting relief of direction to respondent No.2 Insurance Company to pay the compensation amount to the 1 (2004) 3 SCC 297 2 (2018) 5 SCC 656 3 2018 (9) SCALE 310 4 (2017) 4 SCC 796 appellant with



liberty to recover the same from the tractor owner (respondent No.1).”

(ii) *Shivawwa Vs. Branch Manager, National India Insurance*

Company Limited reported in (2018) 5 SCC 762 :

11. Assuming for the sake of argument that the insurance company was not liable to pay compensation amount awarded to the claimants as the offending tractor was duly insured, the insurer would be still liable to pay the compensation amount in the first instance with liberty to recover the same from the owner of the vehicle owner (respondent No.2), in light of the exposition in the case of National Insurance Co. Vs. Swarn Singh and Ors reported in (2004) 3 SCC 297.

(iii) *Rani and others Vs. National Insurance Company Limited*

and others reported in **2018 (9) Scale 310.**

“11. In M.F.A. No.5876/2011 the contention is liability cannot be fastened on the insurer as there is violation of permit by admittedly plying the vehicle in Karnataka. Therefore, liability is to be fastened on the owner.

12. M.F.A. No.5876/2011 is disposed of. The owner is directed to satisfy the award. The amount in deposit is directed to be refunded to the insurer-appellant.”

(iv) *V.Renganathan and another Vs. The Branch Manager,*

United India Insurance Company Limited and another reported in (2023)

ACJ 623 :



5. *We find no fault with the finding of the High Court that the Insurance Company could not be held liable for the payment of compensation in view of the judgment of 3-Judges' Bench of this Court in the case of New India Assurance Co. Ltd. vs. Asha Rani & Ors. reported in 2003 (2) SCC 223. However, at the same time, we find that in view of the settled position, the High Court ought to have partly allowed the appeal. We may gainfully refer to the observations of this Court in similar facts at paragraph Nos.10 and 11 of the Judgment of this Court in Shivaraj vs. Rajendra and Another reported in 2018(10) SCC 432.*

6. *As already observed, the facts in the present case are similar to the facts in the case of Shivaraj vs. Rajendra and Anr. (supra).*

7. *In the present case also, the High Court ought to have partly allowed the appeal preferred by the Insurance Company and ought to have directed it to pay the amount of compensation to the appellants and granted liberty to recover the same from the tractor owner."*

7. No doubt, as rightly contended by the learned counsel for the petitioner, in the above decisions, the Hon'ble Supreme Court has directed the insurer to pay the compensation and then to recover the same from the owner of the vehicle. The Hon'ble Apex Court in the case of **Balu Krishna Chavan vs. The Reliance General Insurance Company Limited and others** in **SLP(C) No.33638 of 2017, dated 03.11.2022**, has specifically observed



that the law is well settled that if the liability of the insurance company is decided and they are held not to be liable, ordinarily, there shall be no direction to 'pay and recover'. No doubt, it was also observed that in the facts and circumstances arising in each case, Court can pass appropriate orders to meet the ends of justice and the following passage is extracted hereunder :

“ 9.In the instant case, the appellant has relied on the judgment, dated 21.02.2017 passed by this Court in Civil Appeal No (s).3047 of 2017 titled as “Manuara Khatun & Ors Vs. Rajesh Kr.Singh & Ors”. In the said case also, a Bench of this Court, having referred to the earlier decisions in Para-15 and 16 of that judgment, has concluded that normally, there would be no order to “pay and recover”.

8. A Division Bench of this Court in the case of ***Bharathi AXA General Insurance Co.Ltd. Vs. Aandi*** reported in ***2018 (2) TNMAC 731***, has observed that the application of principle of pay and recovery exercised by the Hon'ble Supreme Court invoking its power under Article 142 of the Indian Constitution cannot be uniformly and universally apply to in all cases where there is a grave policy violation and the relevant passages are extracted hereunder :

“49. We find that the judgments relied upon by the Hon'ble Supreme Court in Shivaraj v. Rajendra and another, referred to



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supra in support of its conclusion that the Insurance Company can be directed to pay the compensation with liberty to recover the same even in respect of a Gratuitous Passenger or an unauthorized 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 and others*, 2004 (1) TNMAC 104(SC); 2004(3) SCC 297; *Mangla Ram v. Oriental Insurance Co. Ltd.*, 2018(1) TNMAC 681 (SC); 2018(5) SCC 656; *Rani & ors. v. National Insurance Co. Ltd. & ors.*, 2018(2) TNMAC 278 (SC); 2018 (9) Scale 310; and *Mannuara Khatun and others v. Rajesh Kumar Singh and others*, 2017(1) TNMAC 289 (SC); 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 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 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 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.”



9. In the full Bench judgment in ***Rani and others'*** case cited by the learned counsel for the petitioner, there was violation of permit by admittedly plying the vehicle in Karnataka, but the said case is not a case of gratuitous passenger. Since the Hon'ble Supreme Court has settled the legal position that in all cases order of pay and recover would not arise when the insurance company is not liable and in fit cases, the said doctrine can be applied.

10. In view of the judgment of larger Bench of the Hon'ble Supreme Court, which was reiterated in the subsequent decisions, this Court has rightly refused to apply the doctrine of pay and recover and consequently, dismissed the claim. It is settled law that the review proceedings are not by way of an appeal and have to be strictly confined to the ambit and scope of Order 47 Rule 1 C.P.C., and that a review petition, it must be remembered has a limited purpose and cannot be allowed to be 'an appeal in disguise.'

11. The Hon'ble Supreme Court in the case of ***Lilly Thomas and Others vs. Union of India and Others*** reported in ***2006 SCC 224***, has held that the power of review can be exercised for correction of a mistake but not to substitute a view and as such powers can be exercised within the limits of the statute dealing with the exercise of power.



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12. Even assuming for argument sake, if two decisions with different legal position are available for a particular aspect, Court passing a judgment on the basis of one legal position, that by itself cannot be a ground to seek review and the same by no stretch of imagination can be considered as an error apparent on the face of the record.

13. Considering the above, this Court is of the view that the review petitioner has not shown any error apparent on the face of the record or any other ground to invoke the review jurisdiction. Hence, this Court concludes that the review application is absolutely devoid of merits and the same is liable to be dismissed.

14. In the result, the review petition is dismissed.

26.06.2023

NCC : Yes/No
Index : Yes / No
Internet: Yes / No
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K.MURALI SHANKAR,J.

DAS

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