BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 21.12.2023

Pronounced on : 19.03.2024

CORAM:

THE HONOURABLE MR.JUSTICE P.VADAMALAI

C.M.A(MD)Nos.559 and 560 of 2021
in
C.M.P(MD)Nos.5330 and 5335 of 2021

M/s.National Insurance Co., Ltd.,
represented by its Divisional Manager,
Servista Convent Building,
12A, Opp. District Court,
Y.M.R.Patty, Dindigul. ... Appellant in both CMAs

Vs.

1.Vineka Sri
2.Minor Kishor
3.Minor Sarvesh
4.Nagarajan
5.Rajendran ...Respondents in C.M.A(MD)No.559 of 2021

(Minor 2 & 3 respondents represented by their mother and guardian 1st Respondent herein)

1.Prabhu
2.Rajendran ...Respondents in C.M.A(MD)No.560 of 2021

COMMON PRAYER : Civil Miscellaneous Appeals filed under Section 173 of the Motor Vehicles Act, 1988, to set aside the judgment and decree dated 10.12.2020 passed in M.C.O.P.Nos.568 and 569 of 2018 respectively, on the file of the Motor Accidents Claims Tribunal/District Court, Karur.

In C.M.A(MD)No.559 of 2021

For Appellant	: M/s.P.Malini
For R1 – R4	: Mr.K.Sudalaiyandi
For R5	: No Appearance

In C.M.A(MD)No.560 of 2021

For Appellant	: M/s.P.Malini
For R1	: Mr.K.Sudalaiyandi
For R2	: No Appearance

COMMON JUDGMENT

These Civil Miscellaneous Appeals are preferred against the Common award dated 10.12.2020 passed in M.C.O.P.Nos.568 of 2018 and 569 of 2018 by the Motor Accident Claims Tribunal/District Judge, Karur.

2. The second respondent in M.C.O.P.Nos.568 of 2018 and 569 of 2018 is the appellant herein. The petitioners/claimants are the respondents herein.

3. The petitioners/claimants filed the claim petition in M.C.O.P.Nos.568 of 2018 and 569 of 2018.

4. For the sake of convenience, the parties arrayed in M.C.O.P.Nos.568 of 2018 and 569 of 2018 is adopted hereunder.

5. **The brief facts of the case:**

On 25.08.2013, the deceased Senthilkumar, Prabhu, Chandran and Sathish were travelling in a car bearing registration No.TN 07 R 2506 driven by one Ramesh from Kollam to Madurai. When the car was nearing Thottichimalai bridge, the driver of the car drove in a rash and negligent manner and dashed on a road side Marudha tree. Due to impact, the aforesaid Senthilkumar and Ramesh died on the spot. Chandran died on the way to the hospital. Prabhu sustained injuries. The deceased Senthilkumar was running a medical shop and earning Rs.50,000/- p.m. Hence, the dependants of the deceased Senthilkumar filed M.C.O.P.No.568 of 2018 seeking compensation of Rs.50,00,000/- and the injured Prabhu filed M.C.O.P.No.569 of 2018 seeking compensation of Rs.15,00,000/-.

6. The second respondent/Insurance Company objected the claim petition by contending that the policy issued to the car is only under liability policy and there is no insurance coverage for the occupants of the car. The owner of the car, who is 1st respondent, violated the policy

condition. Moreover, the driver of the car had not possessed valid driving license. Therefore, the petitioners are not entitled any claim from the 2nd respondent/Insurance Company.

7. Before the Tribunal both side adduced oral and documentary evidence. On the side of petitioners, P.W.1 and P.W.2 were examined and Ex.P.1 to Ex.P.12 were marked. On the side of 2nd respondent, R.W.1 was examined and Ex.R.1 was marked.

8. After hearing both and after considering the evidence, the Tribunal has held that the accident was taken place due to the rash and negligent driving of the driver of the first respondent's car and awarded compensation directing the second respondent to pay the compensation and recover the same from the first respondent. Aggrieved by the said award, the 2nd respondent/Insurance Company has preferred these Civil Miscellaneous Appeals.

9. Heard both side and perusal the records in these Civil Miscellaneous Appeals.

10. The learned counsel appearing for the 2nd respondent/Insurance Company has mainly argued that the accident occurred due to rash and negligent driving of the driver of the first respondent, who dashed the car against the tree. The policy issued is only Act policy and there was no premium paid to cover liability towards passengers travelling in the car. To prove the same, Ex.R.1/Insurance Policy was marked. Hence, the Tribunal erred in awarding compensation directing the 2nd respondent/Insurance Company to pay and recover compensation from the first respondent. In support of his argument the learned counsel relied on the following citation:

2021 (1) TN MAC 620 (DB) of Madras High Court (The Branch Manager vs. G. Sumathi and Ors.), wherein it is held in paragraph No.13 as follows:

> "13. ......the insurance policy in question is only an "Act Policy", which will cover only the risk that may be confronted by a third party to the vehicle and not to the occupant of the vehicle. The coverage for an occupant of the vehicle can be extended upon payment of additional premium by the owner of the car. In the present case, even as admitted by claimants the owner of the car has not remitted any additional premium to

cover the risk that may be confronted by the occupants of the car. In such circumstances, we are of the view that the Tribunal erred in mulcting the appellant/insurance company with the liability to pay the compensation to the claimants."

11. Per contra, the learned counsel for the petitioners submitted that the Tribunal has elaborately discussed the matter and considering the decision taken by the Hon'ble Supreme Court reported in **2017 (1) TN MAC 289 (SC)** [Manuara Khatun and Ors. Vs. Rajesh Kr. Singh and Ors.] directed the 2^{nd} respondent/Insurance Company to pay the compensation to the claimants and recover the same from the first respondent on the same decree.

12. On hearing both and perusal of records, it is clear that the accident took place due to rash and negligent driving of the car TN 07 R 2506, which belonged to the 1^{st} respondent. The 2^{nd} respondent's main contention is that the appellant insurance policy is not liable to pay the compensation to the occupants of the car in this case on the ground that the insurance policy is Act policy and hence, order of the pay and recovery is illegal.

13.The said submission of the learned counsel for the insurance company has been repudiated by the learned counsel for the claimant that the pay and recover is already incorporated in the act and apart from that in the policy itself there is an endorsement to that effect. Further, the Hon'ble Supreme Court reported in ***2017 1 TNMAC 289 (SC)*** clearly stated that the Motor Vehicle Accident Claims Tribunal and High Court has jurisdiction to pass order "pay and recover".

14. To consider the submission of the learned counsel for the insurance company, this Court is duty bound to extract the principle laid down by the Hon'ble Full Bench of this Court and the Hon'ble Supreme Court and the relevant clause of the marked policy:

(i) relevant provision of the marked policy

The insured is not indemnified, if, the vehicle is used or driven otherwise then in accordance with law of this schedule. Any payment made by the company of wider terms appearing in the certificate in order to cope with the Motor Vehicles Act, 1988 is recoverable from the insured. See the clause headed "***Avoidance of certain terms and rights of recovery***".

15. The entire policy with the condition has not been marked by the insurance company before the Court below and also before this Court. The Hon'ble Supreme Court in the case of ***Insurance Co. Ltd. v. Jugal Kishore*****, reported in (1988) 1 SCC 626 at page 632** directed to mark the terms and conditions of the policy in order to consider the defence of the insurance company and also to render a fair justice in the following words:

> ***10.*** *Before parting with the case, we consider it necessary to refer to the attitude often adopted by the Insurance Companies, as was adopted even in this case, of not filing a copy of the policy before the Tribunal and even before the High Court in appeal. In this connection what is of significance is that the claimants for compensation under the Act are invariably not possessed of either the policy or a copy thereof. This Court has consistently emphasised that it is the duty of the party which is in possession of a document which would be helpful in doing justice in the cause to produce the said document and such party should not be permitted to take shelter behind the abstract doctrine of burden of proof. This duty is greater in the case of instrumentalities of the State such as the appellant who are under an obligation to act fairly. In many cases even the owner of the vehicle for reasons known to him does not*

choose to produce the policy or a copy thereof. We accordingly wish to emphasise that in all such cases where the Insurance Company concerned wishes to take a defence in a claim petition that its liability is not in excess of the statutory liability it should file a copy of the insurance policy along with its defence. Even in the instant case had it been done so at the appropriate stage necessity of approaching this Court in civil appeal would in all probability have been avoided. Filing a copy of the policy, therefore, not only cuts short avoidable litigation but also helps the court in doing justice between the parties. The obligation on the part of the State or its instrumentalities to act fairly can never be over-emphasised.

16. In this case the policy marked before this Court in the typed set of papers, the clause "***Avoidance of certain terms and rights of recovery***" is not available. Hence, this Court is unable to accept the contention of the learned counsel for the insurance company. Apart from that factual aspect, the pay and recovery clause is expressly incorporated under Section149 (5) of the Motor Vehicles Act 1988. The same was considered by the Hon'ble Full Bench of this Court reported in ***2009 1 CTC 1*** in the case of ***Branch Manager, United India Insurance Co.Ltd Vs. Nagammal and Others***.

Under Section 149 (5), if the amount exceeds the amount for which the insurer is otherwise liable under the policy, the insurer is entitled to recover the excess from the person insured.

> "*4. It is thus seen that Section 149 itself contemplates that under certain contingencies, even though ultimately the insurer may not be liable, it is required to satisfy the award and recover the same subsequently from the owner.*
>
> *31.(ii). Section 149 envisages the defenses which are open to the Insurance Company. Where the Insurance Company is not successful in its defense, obviously it is required to satisfy the decree and the award. Where it is successful in its defense, 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)*
>
> *31.(vii) where, however, the mater 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 ie., the driver or the owner, as the case may be*".

17. Even in the recent judgment of the Hon'ble Supreme Court in 2017 4 SCC 796, the Hon'ble Supreme Court entertained the claimant's plea of pay and recovery after considering all the earlier judgments including the Hon'ble Three Judges Bench judgment rendered in ***Baljit Kaur (2004 2 SCC 1)***. The relevant paragraph of the judgment is as follows:

National Insurance Co. Ltd. v. Baljit Kaur, (2004) 2 SCC 1 at page 8

"21. The upshot of the aforementioned discussions is that instead and in place of the insurer the owner of the vehicle shall be liable to satisfy the decree. The question, however, would be as to whether keeping in view the fact that the law was not clear so long such a direction would be fair and equitable. We do not think so. We, therefore, clarify the legal position which shall have prospective effect. The Tribunal as also the High Court had proceeded in terms of the decision of this Court in Satpal Singh [(2000) 1 SCC 237 : 2000 SCC (Cri) 130] . The said decision has been overruled only in Asha Rani [(2003) 2 SCC 223 : 2003 SCC (Cri) 493] . We, therefore, are of the opinion that the interest of justice will be subserved if the appellant herein is directed to satisfy the awarded amount in favour of the claimant, if not already satisfied, and recover the same from the owner of the vehicle. For the purpose of such recovery, it would not be necessary for the insurer to file a separate suit but

it may initiate a proceeding before the executing court as if the dispute between the insurer and the owner was the subject-matter of determination before the Tribunal and the issue is decided against the owner and in favour of the insurer. We have issued the aforementioned directions having regard to the scope and purport of Section 168 of the Motor Vehicles Act, 1988, in terms whereof, it is not only entitled to determine the amount of claim as put forth by the claimant for recovery thereof from the insurer, owner or driver of the vehicle jointly or severally but also the dispute between the insurer on the one hand and the owner or driver of the vehicle involved in the accident inasmuch as can be resolved by the Tribunal in such a proceeding".

18. In the Hon'ble Division Bench judgment reported in 2021 (1) TNMAC 620 relied by the learned counsel for the insurance company, the above said Hon'ble Full Bench Judgment and 2017 4 SCC 796 is not referred. The learned counsel for the appellant has not raised objection regarding the quantum of compensation awarded by the Tribunal. Therefore, in view of the above discussion, this Court finds no ground to interfere with the direction of the learned tribunal Judge to pay and recover.

19. In the result, these Civil Miscellaneous Appeals are dismissed and the common award dated 10.12.2020 passed by the Motor Accident Claims Tribunal/District Judge, Karur in M.C.O.P.Nos.568 of 2018 and 569 of 2018 are confirmed. No costs. Consequently, connected Miscellaneous Petitions are closed.

19.03.2024

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

To

1.The Motor Accidents Claims Tribunal/District Court,
Karur.

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

P.VADAMALAI, J.

VSD

Pre - Delivery Judgment made in
C.M.A(MD)Nos.559 and 560 of 2021
in
C.M.P(MD)Nos.5330 and 5335 of 2021

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