BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 31.01.2024

Pronounced on : 12.04.2024

CORAM:

THE HON'BLE MR.JUSTICE K.MURALI SHANKAR

C.M.A.(MD)No.677 of 2017

The Regional Manager,
HDFC ERGO General Insurance Co. Ltd.,
New No.528 Old No.559, 2nd Floor,
Anna Salai, Teynamet,
Chennai-600 018. ...Appellant

Vs.

1. Vijaya

2. Murugesan ...Respondents

Prayer : This Civil Miscellaneous Appeal filed under Section 173 of the Motor Vehicles Act, to set aside the fair and decreetal order dated 24.02.2017 made in MCOP.No.28 of 2016 on the file of Motor Accident Claims Tribunal (Special Sub Court for Motor Accident Cases), Thanjavur and allow this appeal.

For Appellant : Mr.S.Srinivasa Raghavan

For R1 : Mr.Dr.Ramesh Mahadev

For R2 : No appearance

JUDGMENT

The Civil Miscellaneous Appeal is directed against the award passed in M.C.O.P.No.28 of 2016 dated 24.02.2017 on the file of the Motor Accident Claims Tribunal/Special Subordinate Court, Thanjavur.

2. The appellant/insurer, who was made liable to pay compensation of Rs.2,19,274/- (Rupees Two Lakhs Nineteen Thousand Two Hundred and Seventy Four only) with interest and costs to the first respondent/ claimant for the disability suffered by her, consequent to an accident occurred on 10.09.2015, challenged the liability mulcted on it and invoking the doctrine of pay and recovery.

3. The case of the first respondent/claimant is that on 10.09.2015, when the first respondent/claimant was travelling in a two wheeler Hero Honda Passion Pro Cast bearing Registration No.TN-49-AU-1058 as a pillion rider, which was driven by her husband, at about 11.30 a.m., Ananthagopalapuram to Kattathi thar road opposite to Pathirakottai Government Higher Secondary School, her husband, without noticing the speed breaker, had driven the motor cycle in a rash and negligent manner

and as a result of which, the first respondent/claimant fell down and sustained injuries and that the accident was occurred only due to the rash and negligent driving of the two wheeler rider.

4. It is the further case of the first respondent/claimant that she was immediately taken to Thanjavur Medical College Hospital and was taking inpatient treatment from 10.09.2015 to 19.09.2015 and thereafter she had taken outpatient treatment.

5. The defence of the appellant/insurer is that the rider of the second respondent's vehicle did not possess a valid driving license to ride the two wheeler on the date of accident and that the second respondent/owner of the vehicle has committed a policy condition violation and as such, the appellant/insurer is not liable for the claim. The appellant/insurer has also taken a stand that the accident was not due to any rash and negligent driving of the driver of the second respondent, but the accident was due to the negligence on the part of the first respondent/claimant and that the first respondent/claimant has suppressed the real manner of the accident.

6. During trial, the first respondent/claimant has examined herself as P.W.1 and medical officer Dr.Rethina Sabapathy as P.W.2 and exhibited 11 documents as Ex.P.1 to Ex.P.11. The second respondent/owner of the vehicle had remained *ex parte*. The appellant/insurer has examined one witness Thiru.Arun Prasath as R.W.1 and exhibited 2 documents as Ex.R.1 and Ex.R.2.

7. The learned trial Judge, upon considering the evidence both oral and documentary and on hearing the arguments of both the sides, has passed the impugned award dated 24.02.2017 holding that the accident was occurred only due to the rash and negligent driving of the second respondent vehicle's rider and that the second respondent/owner of the vehicle has allowed a person to drive his vehicle without driving license and thereby has violated the policy condition, directed the appellant/ insurer to pay the compensation of Rs.2,19,274/- and then to recover the same from the second respondent/owner of the vehicle. Aggrieved by the impugned award, the insurer has preferred the present appeal.

8. The learned counsel appearing for the appellant/insurer would submit that the the policy of insurance issued by the appellant/insurer to

the vehicle involved in the accident and owned by the second respondent was a statutory or Act only policy and in the said policy of insurance, occupant of a private vehicle including the pillion rider in a two wheeler are outside the ambit of coverage and are not covered as per the provision of Section 147 of the Motor Vehicles Act, that the Tribunal ought not to have granted a direction for payment and recovery in the case on hand as the defence of absence of coverage goes to the root of the liability and as such, such a direction is impermissible and that therefore, the award is liable to be set aside.

9. The learned counsel appearing for the first respondent/claimant has not raised any specific arguments with regard to the liability issue and the applicability of doctrine of pay and recovery, but on the other hand, he has raised some sympathetic grounds that the first respondent/claimant is a senior citizen, that she had suffered grievous and bone injuries all over her body, that she is not able to perform her own work without support of others, that the medical board has assessed the disability at 36% and that therefore, sought to confirm the award.

10. Admittedly, the two wheeler bearing Registration No.TN-49-AU-1058 was owned by the second respondent, that the husband of the first respondent/claimant borrowed the vehicle from the second respondent and drove the same with the first respondent/claimant as pillion rider. It is not in dispute that the said vehicle was insured with the appellant/insurer and the policy was in force on the date of accident.

11. Admittedly, FIR came to be registered against the husband of the first respondent/claimant. Moreover, the Tribunal, considering the evidence available on record, has given a specific finding that the husband of the first respondent/claimant, who had driven the two wheeler at the time of accident, was not possessing valid driving licence at the time of accident. As already pointed out, the second respondent/owner of the vehicle had remained *ex parte*. Since no appeal was filed challenging the finding of the Tribunal, the said finding of the Tribunal that since the second respondent/owner of the vehicle has allowed the first respondent/claimant's husband to drive the vehicle without valid driving license, he has violated the policy condition, has attained finality.

12. At this juncture, it is necessary to refer the judgment of the Hon'ble Supreme Court in ***United India Insurance Co. Ltd., Shimla Vs. Tilak Singh and others*** reported in ***(2006) 4 SCC 404;***

> *"21. In our view, although the observation made in Asha Rani's case (supra) were in connection with carrying passengers in a goods vehicle, the same would apply with equal force to gratuitous passengers in any other vehicle also. Thus, we must uphold the contention of the appellant-insurance company that it owed no liability toward the injuries suffered by the deceased Rajinder Singh who was a pillion rider, as the insurance policy was a statutory policy, and hence it did not cover the risk of death of or bodily injury to gratuitous passenger."*

13. It is also necessary to refer the judgment of the Hon'ble Supreme Court in the case of ***The General Manager, United Insurance Co. Ltd., Vs. M.Laxmi and others*** passed in ***Civil Appeal No.6659 of 2008 dated 14.11.2008***, wherein, one Mohd. Mohsin and the deceased were travelling on a scooter belonging to the fourth respondent with the deceased as a pillion rider, that the said two wheeler hit a bullock cart because of rash and negligent driving of the two wheeler, the deceased fell down and sustained fatal injuries and that the policy of insurance taken for the two

wheeler was an Act policy and the Tribunal, taking note of the fact that the deceased was a pillion rider and also a gratuitous passenger and is not a third party, has held that the insurer was not liable for the claim and directed the insured to pay the compensation and that when an appeal was taken before the High Court, the High Court, relying on a circular of the Tariff Advisory Committee, by holding that the liability of the insurer was there, allowed the appeal and when the same was challenged before the Hon'ble Apex Court, by referring to the decision of the Supreme Court in ***New India Assurance Co. Ltd., Vs. Asha Rani and others*** reported in ***2003 (2) SCC 223*** and also ***Tilak Singh's*** case above referred, by holding that the order of the High Court is legally unsustainable, set aside the order and restored the order of the Tribunal and the relevant passages are extracted hereunder:-

> *7. In New India Assurance Co. Ltd. v. Asha Rani and Ors. (2003 (2) SCC 223), it has been noted as follows:*
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> > *"Section 147 of the 1988 Act, inter alia, prescribes compulsory coverage against the death of or bodily injury to any passenger of "public service vehicle". Proviso ap- pended thereto categorically states that compulsory cover- age in respect of drivers and conductors*

of public service vehicle and employees carried in a goods vehicle would be limited to the liability under the Workmen's Compensation Act. It does not speak of any passenger in a "goods carriage".

In view of the changes in the relevant provisions in the 1988 Act vis-`-vis the 1939 Act, we are of the opinion that the meaning of the words "any person" must also be attributed having regard to the context in which they have been used i.e. "a third party". Keeping in view the provi- sions of the 1988 Act, we are of the opinion that as the provisions thereof do not enjoin any statutory liability on the owner of a vehicle to get his vehicle insured for any passenger travelling in a goods vehicle, the insurers would not be liable therefor.

Furthermore, sub-clause (i) of clause (b) of sub-section (1) of Section 147 speaks of liability which may be incurred by the owner of a vehicle in respect of 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, whereas sub-clause (ii) thereof deals with liability which may be incurred by the owner of a vehicle against the death of or bodily injury to any passenger of a public service vehicle caused by or arising out of the use of the vehicle in a public place.

8. In United India Assurance Co. Ltd., Shimla v. Tilak Singh and Ors. (2006 (4) SCC 404), it has been noted as follows:

> *"In our view, although the observations made in Asha Rani case (supra) were in connection with carrying passengers in a goods vehicle, the same would apply with equal force to gratuitous passengers in any other vehicle also. Thus, we must uphold the contention of the appellant Insurance Company that it owed no liability towards the injuries suffered by the deceased Rajinder Singh who was a pillion rider, as the insurance policy was a statutory policy, and hence it did not cover the risk of death of or bodily injury to a gratuitous passenger."*

9. In view of what has been stated by this Court in Asha Rani and Tilak Singh cases (supra), the order of the High Court is clearly unsustainable and is set aside and that of the MACT is restored.

14. The above decisions are squarely applicable to the case on hand. Hence, this Court has no hesitation to hold that the appellant/insurer cannot be made liable.

15. The Hon'ble Apex Court in the case of ***Balu Krishna Chavan Vs. The Reliance General Insurance Company Ltd. and others*** in ***SLP(C) No.33638 of 2017,*** has reiterated the legal position 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". In the case on hand, the first respondent/claimant has not shown any legal reason or ground for invoking the doctrine of pay and recovery. Hence, the impugned order of the Tribunal applying the doctrine of pay and recovery cannot legally be sustained. Consequently, this Court concludes that the impugned award is liable to be set aside.

16. Considering the other facts and circumstances, this Court, further decides that the parties are to be directed to bear their own costs.

17. In the result, the Civil Miscellaneous Appeal is allowed and the impugned award dated 24.02.2017 is set aside. Parties are directed to bear their own costs.

12.04.2024

NCC :yes/No
Index :yes/No
Internet:yes/No
csm

K.MURALI SHANKAR,J.

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To

1. The Motor Accident Claims Tribunal/
   Special Subordinate Court, Thanjavur.

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

Pre-Delivery Judgment made in
C.M.A.(MD)No.677 of 2017

Dated : 12.04.2024