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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 22.02.2022

Pronounced on : 10.03.2022

CORAM

THE HONOURABLE MR. JUSTICE C.V.KARTHIKEYAN

CMA No.2649 of 2017

United India Insurance Co., Ltd.,
G.2, Sarojini Building, Nair Nagar,
Virudhachalam – 606 001.

...Appellant

Vs.

1.Saraswathi
2.Narayanasamy
3.T.Ramamoorthy

...Respondents

Prayer:- This petition filed under Section 173 Motor Vehicles Acts, against the award and decree dated 23.03.2017 in MCOP No.462 of 2014 on the file of the Motor Accidents Claims Tribunal (Principal District Judge, Perambalur.

For Appellant : Mr.D.Bhaskaran

For R3 : Mr.N.L.Ramesh

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JUDGMENT

The 2nd Respondent in MCOP No.462 of 2014 on the file of the Motor Accident Claims Tribunal / Principal District Court, Perambalur, is the appellant herein. They are the insurers of the offending vehicle and claimed that liability to pay compensation should not have been mulcted on them.

2.MCOP No.462 of 2014 had been filed by the two claimants for the death of their son Chelladurai in a road accident which took place on 22.03.2013. It was stated that on that particular date at around 8.00 a.m., Chelladurai was travelling as a cleaner in a Tractor bearing registration No.TN-31-P-9927 belonging to the 1st respondent and insured with the 2nd respondent therein. The vehicle was driven by one Rajasekar. They were both working in Shanmugham cashew-nut groove. While driving the tractor, the driver Rajasekar suddenly applied brakes and as a result, Chelladurai was thrown out of the tractor and fell down in between the two wheels on the left side of the tractor and was run over and died on the spot. It was claimed that the accident occurred due to the rash and negligent driving of the driver. A First Information Report in Crime

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No.61 of 2013 had been registered by Andimadam Police under Section 304(A) IPC. The claimants / parents of Chelladurai filed the aforementioned claim petition seeking compensation under Section 166 of the Motor Vehicles Act, 1988.

3.A counter had been filed by the 2nd respondent / insurer stating that the deceased was sitting in a casual manner and fell down from the tractor. It was also stated that the accident occurred only owing to the carelessness of the deceased. It was also stated that the vehicle had no valid documents and was also not insured. It was also stated that it was used for commercial purpose. It was further stated that the deceased as a gratuitous passenger and the vehicle being a goods vehicle and the deceased not being a third party and since premium was not paid to cover such accident, they are not liable to pay any compensation.

4.The parties went to trial and the Tribunal framed as a first point for consideration, whether the accident occurred due to the rash and negligent driving of the driver of the tractor and then as a second point, the compensation which is to be paid for the death to the claimants. During trial, PW-1 and PW-2 were examined and Exs.P1 to P13 were

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marked. On the side of the insurance company / 2nd respondent, RW-1 and RW-4 were examined and Exs.R1 to R4 had been marked. The documents marked on behalf of the claimants were primarily to prove identity and relationship. The document marked on behalf of the respondents included the insurance policy Ex.R8, the terms of which will have to be interpreted to determine whether the 2nd respondent is liable to pay compensation.

5.With respect to the first point framed for consideration, the Tribunal pointed out the evidence of PW-2, who claimed that he was the witness to the accident and noted the manner in which the accident occurred. It was stated that the driver had applied sudden brake and the deceased was thrown out of the tractor and fell down and the back wheel of the tractor run over him. Ex.P1, the First Information Report was also noticed by the Tribunal. The Tribunal also noticed the evidence of RW-1 and the letter of the Road Transport Officer, Chidambaram. The sitting capacity of the vehicle was only one and there can be no co-passenger or even a passenger in the said vehicle. There was a seat only for the driver of the vehicle.

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6.The Tribunal also noticed the evidence of RW-4, Assistant Manager of the Insurance Company, who stated that the deceased was actually travelling in the tipper and that the tipper was not insured and that the tractor was a goods vehicle and nobody can travel as the passenger in the said vehicle. It was stated that the insurance policy was issued only for the purpose of agriculture and therefore, there has been violation of the conditions of the policy.

7.The Tribunal, on consideration of the evidence presented, stated that as a fact the 1st respondent trailer had no valid insurance cover and that the sitting capacity was only one and that the deceased travelled in the trailer, which was a violation of a policy condition. It was held that the 1st respondent / owner had breached the policy condition. Thereafter, it was held that the insurer must pay the compensation and then take a decision to proceed against the owner.

8.Having held so, the Tribunal then proceeded to determine the compensation. It was found that the deceased Chelladurai was aged 16 years and was working as a cleaner. It was claimed that he earned Rs.300/- per day. The Tribunal determined his monthly income as

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Rs.6,000/- per month and thereafter, adopted the multiplier of 18 since the deceased was aged 16 years. One half of the monthly income deducted towards expenses which could have been utilized by the deceased and the annual loss of income calculated to Rs.6,48,000/- (Rs.3,000 x 12 x 18). Towards loss of love and affection a sum of Rs.1,00,000/- and towards funeral expenses a sum of Rs.20,000/- and towards transportation charges a sum of Rs.10,000/- and towards property loss / loss of clothes and belongings a sum of Rs.2,000/- had also been granted. The total compensation granted was Rs.7,80,000/-.

9.Questioning that aforesaid judgment, the 2nd respondent Insurance Company had preferred the present Civil Miscellaneous Appeal before this Court.

10.Heard arguments advanced by Mr.D.Bhaskaran, learned counsel for the appellant and Mr.M.L.Ramesh, learned counsel on behalf of the 3rd respondent.

11.It is the contention of Mr.D.Bhaskaran, learned counsel for the appellant that the Tribunal had erred in directing the compensation to be

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paid by the appellant / Insurance Company. It was pointed out that the deceased was travelling as a gratuitous passenger and that the tractor had only one seat for the driver and insurance cover was also limited to that fact did not cover injuries suffered by any gratuitous passenger. It had been contended that the policy should be viewed in stricto sensu and there cannot be any deviation from the terms as agreed between the insured and insurer.

12.Learned counsel pointed out that the Hon'ble Supreme Court had laid down the law that the insurance company is not liable to pay the compensation for a gratuitous passenger and as a matter of fact did not also uphold the concept of pay and recovery. Learned counsel therefore stated that the appeal should be allowed and the judgment of the Tribunal should be interfered with and set aside.

13.Mr.M.L.Ramesh, learned counsel for the 3rd respondent on the other hand affirmed the reasoning of the Tribunal and pointed out that the deceased was actually travelling on the tractor, not as a gratuitous passenger, because he was a cleaner and therefore, was a necessary passenger. It was also pointed out by the learned counsel that the Hon'ble

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Supreme Court had also affirmed the concept of pay and recovery and therefore, stated that the judgment under appeal, does not require any interference. It was also pointed out that the vehicle was insured for agriculture purposes.

14.I have carefully considered the arguments advanced.

15.The facts are not in dispute. The vehicle insured namely, the Tractor bearing registration No.TN-31-P-9927 has only one seat for the driver. There is no provision in the vehicle for any other person to travel either as a gratuitous passenger owing to the benevolence of the driver or as a paid passenger owing to the avarice of the driver or even as somebody directly involved in the work place and working under the owner of the tractor. The insurance cover was only for the tractor alone.

16.Ex.R8 had been produced by the respondents, which is the policy of the insurance. It can be termed as a Farmer's Package Insurance. It covered risk of fire, allied perils, burglary, house breaking and such other aspects relating to agriculture. The third party premium had also been paid. But it did not cover injuries suffered by a gratuitous passenger. A third party would include any authorized person or a stranger walking across the road or somebody travelling in the another vehicle injured in a collusion with the tractor.

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17.In the instant case, the deceased, was travelling in the tractor, which had no provision for another passenger to even be seated. This is a point which is stressed by the learned counsel Mr.Baskaran appearing on behalf of the appellant, who claimed that the policy of insurance did not cover injuries for any accident occurring to that particular individual who travelled as a gratuitous passenger.

18.This has been a vexed question and had come up often for consideration before the Courts of law.

19.Learned counsel for the 3rd respondent relied on a judgment of the Hon'ble Supreme Court reported in ***(2018) 10 SCC 432, Shivaraj v. Rajendra and Another***. The facts in that particular case are practically the same as in the instant case. The appellant therein had travelled in a tractor as a passenger, even though the tractor could accommodate only one person namely, the driver. The vehicle insured in the instant case is also the same. It was held by the High Court in that case that the insurance company was not liable for loss or injuries suffered by such passenger or even to indemnify the owner of the tractor. This conclusion of the High Court was challenged before the Hon'ble Supreme Court.

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The Hon'ble Supreme Court held that such conclusion by the High Court is unexceptionable. However, the Hon'ble Supreme Court further held that the High Court should have directed the insurance company to pay the compensation amount with liberty to recover from the tractor owner. This, as laying down a principle of law was pointed out by the learned counsel for the 3rd respondent who stated that the appeal by insurance company should therefore been dismissed and there should be a direction, that they should pay the compensation in the first instance and recover it from the owner of the tractor. Paragraphs 10 and 11 of the aforesaid judgment are quite instructive and they are extracted below:

> *"10.The High Court, however, found in favour of Respondent 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 nether 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 2) was not liable for the loss or injuries suffered by the appellant or to indemnify the owner of the tractor. That conclusion*

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reached by the High Court, in our opinion, is unexceptionable in the fact situation of the present case.

11.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 appellant claimant 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. Swaran Singh, (2004) 3 SCC 297, Mangla Ram v. Oriental Insurance Co. Ltd, (2018) 5 SCC 656, Rani v. National Insurance Co. Ltd., (2018) 8 SCC 492 and including Manuara Khatun v. Rajesh Kumar Singh, (2017) 4 SCC 796. In other words, the High Court should have partly allowed the appeal preferred by Respondent 2. The appellant may, therefore, succeed in getting relief of direction to Respondent 2 insurance company to pay the compensation amount to the appellant with liberty to recover the same from the tractor owner, Respondent 1."

20.However, the issue of pay and recovery in case of injuries suffered by a gratuitous passenger or even death of a gratuitous passenger had been referred to a larger bench by the Hon'ble Supreme Court as early as in the year 2004 and the larger bench was constituted and judgment of that Court had been reported in ***2004 (2) TN MAC 387***

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(SC) : 2003 (2) SCC 223, New India Assurance Co. Ltd. v. Asha Rani and others. That judgment was not brought to the notice of the Hon'ble Supreme Court while deciding ***Shivaraj*** (referred supra).

21.The Hon'ble Supreme Court, after an elaborate consideration of provisions of Sections 147 & 149 of the Motor Vehicles Act, 1988 as amended by the amendment Act, 54 of 1994 observed as follows:

> *"It is therefore, manifest that in spite of the amendment of 1994, the effect of the provision contained in Section 147 with respect to persons other than the owner of the goods or his authorized representative remains the same. Although the owner of the goods or his authorized representative would now be covered by the policy of insurance in respect of a goods vehicle, it was not the intention of the legislature to provide for the liability of the insurer with respect to passengers, especially gratuitous passengers, who were neither contemplated at the time the contract of insurance was entered into, nor any premium was paid to the extent of the benefit of insurance to such category of people."*

22.A Division Bench of this Court in a judgment reported in ***2018 (2) TN MAC 731 (DB), Bharati AXA General Insurance Co. Ltd., v.***

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Aandi and others, was confronted with a situation where they had to consider the binding effect of the judgment in ***Asha Rani*** (referred supra) by three judges of the Hon'ble Supreme Court and a much later and more recent judgment in ***Shivaraj*** (referred supra) by two judges of the Hon'ble Supreme Court.

23.The Division Bench was also considering the issue of injury to gratuitous passengers who are also termed as unauthorised persons and whether the insurer can be directed to pay compensation in the first place and later recover it from the owner of the vehicle in manner known law.

24.Even before examining the reasoning of the Division Bench, it would be appropriate to examine the dictum laid by the full bench of this Court in ***United India Insurance Co. Ltd. v. Nagammal and others, 2009 (1) CTC 1***. The full bench referred to ***Asha Rani*** (referred supra) and also to ***New India Assurance Company V. Shri Satpal Singh and others, 2000 (1) CTC 370 (SC)*** and ***National Insurance Co. Ltd. v. Baljit Kaur and others, 2004 (1) CTC 210 (SC) : 2004 (2) SCC 1*** and held as follows:

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"30. From a conspectus of the decisions, thus analysed, it is now apparent that before ***Asha Rani's case*** *was decided, the decision in* ***Satpal Singhs case*** *was holding the field and such latter decision was overruled only in* ***Asha Rani's case****. Under such peculiar circumstances in* ***Baljit Kaurs case*** *it was observed, that even though the Insurance Company was not liable to pay the compensation in respect of a passenger in a goods vehicle, yet since the law was not clear before* ***Asha Rani's case*** *was decided, the doctrine of prospective overruling was applied and a direction was issued in the interest of justice directing the Insurance Company to satisfy the award and recover the same from the owner of the vehicle. In other words, even though the statutory provision under Section 149(4) and Section 149(5) was not applicable, the Supreme Court applied the Doctrine of "pay and recover". The ratio of the said decision has been applied selectively in some of the later decisions and in some of the subsequent decisions, the doctrine of "pay and recover" in respect of matters which are not strictly covered under Sections 149(4) and 149(5) has not been applied by the Supreme Court depending upon the facts and circumstances of a particular case.*

Therefore, it cannot be said as an inexorable principle of law that in each case where the liability is in respect of a passenger in a goods vehicle, which is not required to be

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covered under Section 147 of the Act, the Insurance Company would be directed to first pay the amount and thereafter recover the same from the owner and such discretion is obviously with the Court either to apply such principle or not.

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 pictures 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

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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 Kaurs 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 Kaurs***

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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."* (emphasis supplied)

25.The Division Bench in ***Bharati AXA General Insurance Co. Ltd.,*** (referred supra) considered the effect of the judgment in ***Shivaraj*** (referred supra), which was more proximate in time and held as follows:

*"**49.** Coming to the latest judgment viz., **Shivaraj v. Rajendra** dated 05.09.2018, made in **Civil Appeal Nos. 8278 and 8279 of 2018**, there again the Hon'ble Supreme Court affirmed the conclusion of the High Court to the effect that the Insurance Company was not liable for the loss or injuries suffered by the appellant or to indemnify the owner of the tractor. However, the Hon'ble Supreme Court taking note of the peculiar circumstances of the case directed the Insurance Company to pay the compensation with liberty to recover the same. Unfortunately, the decisions of the larger bench in **New India Assurance Company v. Asha Rani or National Insurance Company Ltd. v. Baljit Kaur** were not brought to the notice of the two Judge Bench which decided **Shivaraj v. Rajendra** referred*

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to supra.

50. *We find that the judgments relied upon by the Hon'ble Supreme Court in* ***Shivaraj v. Rajendra*** *referred to 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.*

51. *In fact, we find that in none of the judgments referred to viz.,* ***National Insurance Co. Ltd. v. Swam Singh reported in (2004) 3 SCC 297, Mangla Ram v. Oriental Insurance Co. Ltd. reported in (2018) 5 SCC 656, Rani v. National Insurance Co. Ltd. reported in 2018 (9) Scale 310*** *and* ***Manuara Khatun v. Rajesh Kumar Singh 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 v. Rajendra*** *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***

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Rani *and* ***National Insurance Company Ltd. v. Baljit Kaur*** *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. (emphasis supplied)*

26.The issue is thus settled in case of compensation to be paid for sufferings of gratuitous passenger and it would be extremely inappropriate, if this issue were to again meander around and be held otherwise than as laid down. The law laid down is that the Tribunal was not right in directing the insurance company to pay the compensation and then recover the same from the owner of the offending vehicle.

27.In view of that particular position of law, the appeal stands allowed. However, the 1st and 2nd respondents, have every right to proceed against the 3rd respondent to recover the compensation granted by the Tribunal.

28.No arguments had been advanced with respect to the quantum of compensation and therefore, the quantum as determined by the Tribunal is upheld by this Court.

29.If at the time of admission, the appellant had deposited any amount, they are permitted to withdraw the same.

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30.The period of limitation for the 1st and 2nd respondents to proceed against the 3rd respondent to recover the award as granted by the Tribunal would commence from the date of receipt of a copy of this order and this could be taken advantage by the 1st and 2nd respondents, if at all the issue of limitation is put up against them by the 3rd respondent in any such recovery proceedings. No costs.

10.03.2022

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Index : Yes / No
Internet : Yes / No
Speaking order : Yes / No

To,

The Motor Accident Claims Tribunal, Perambalur / The Principal District Court, Perambalur.

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C.V.KARTHIKEYAN, J.,

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Pre-Delivery Judgment made in

CMA.N0.2649 of 2017

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