
(2011) 06 MAD CK 0489
In the Madras High Court
Case No : C.M.A. (MD) No. 612 of 2009

Manager, Iffco Tokio General Insurance Co. Ltd.	APPELLANT
Vs	
G. Ramesh and Others	RESPONDENT

Date of Decision : 27-06-2011

Acts Referred:

Constitution of India, 1950 — Article 136, 142
Motor Vehicles Act, 1988 — Section 147, 147(1), 147(1)(b)(i), 149, 149(2)

Citation : (2013) ACJ 1187

Hon'ble Judges : K.B.K. Vasuki, J

Bench : Single Bench

Advocate : S. Srinivasa Raghavan, for the Appellant; M.S.P. Veeramani, for the Respondent

Judgement

K.B.K. Vasuki, J.—This appeal is filed by the respondent No. 2, insurer, against the direction issued to the insurer to pay award of compensation made in favour of the claimant Nos. 1 and 2, respondent Nos. 1 and 2 herein, to the claimants at the first instance and to recover the same from the insured. The date, time, place and manner of the accident as due to rash and negligent driving of Minidor goods carrier bearing registration No. TN 28-F 5610 owned by the respondent No. 1 and insured with the respondent No. 2 at the time of the accident resulting in the death of one Mariyae, who is none else than the wife and mother of the claimant Nos. 1 and 2, capacity in which the deceased travelled in the vehicle as gratuitous passenger, age of the deceased and the claimants and their relationship and extent of physical and financial contribution of the deceased to the family are not so seriously disputed.

2. The insurer has in this appeal questioned the correctness of that portion of the award in and under which the insurer is, at the first instance, directed to answer the award and to recover the same from the insured. The learned counsel for the appellant insurer has in" this appeal contended that the insurance company is statutorily required to cover the liability on the insured only in respect of risk of

the passenger travelling in the vehicle either as owner or the representative of the owner accompanying the goods in such capacity in the concerned goods vehicle and not any other passenger travelling in a goods vehicle whether for hire or reward or otherwise and the question of applying pay and recover does not arise in such cases.

3. On the contrary, the learned counsel for the claimants has sought to defend the direction for payment challenged herein on the basis of pay and recover theory.

4. Both the learned counsel on record have, in support of their respective contentions raised herein, cited the following authorities of the Supreme Court and our High Court.

5. The authorities cited on the side of the appellant insurer are:

- (a) New India Assurance Company Vs. Shri Satpal Singh and Others,
- (b) New India Assurance Co. Ltd. Vs. Asha Rani and Others,
- (c) Oriental Insurance Company Ltd. Vs. Devireddy Konda Reddy and Others etc. etc. and Jogi Subbamma and Others etc. etc.,
- (d) New India Assurance Co. Ltd. Vs. Vedwati and Others,
- (e) National Insurance Co. Ltd. Vs. Kaushalaya Devi and Others, and
- (f) Branch Manager, United India Insurance Co. Ltd. Vs. Nagammal, Unnamalai and V.B. Krishnan,

6. The authorities cited on the side of the claimants are:

- (a) National Insurance Co. Ltd. Vs. Baljit Kaur and Others, and
- (b) Oriental Insurance Co. Ltd. Vs. Shri Nanjappan and Others,

7. Heard both sides.

8. As already referred to, the vehicle involved in the accident in the instant case is a goods vehicle and the accident victim who died in the accident was travelling in the vehicle not as owner of the goods or his representative, but only as a gratuitous passenger and the date of the accident is 27.8.2007, i.e., much after the amendment of Motor Vehicles Act, 1988 by Amendment Act of 1994.

9. The main points that arise for consideration in this appeal are:

- (i) Whether the owner is statutorily liable to get his vehicle insured for any passenger travelling in the goods vehicle?
- (ii) Whether the insurer has any liability to indemnify the insured in respect of risk of all the passengers travelling in the goods vehicle?
- (iii) Whether the doctrine of pay and recover can be applied in respect of liability

of gratuitous passengers in the goods vehicle?

10. The reading of the authorities cited on the side of the appellant insurer would reveal that the law in this regard is well settled by the Supreme Court.

11. The first case, which dealt with the liability of the insurance company in respect of death of gratuitous passenger carried in truck, is *New India Assurance Company Vs. Shri Satpal Singh and Others*, wherein a 10-year-old girl met with her death in a truck accident and the Tribunal found the owner of the truck liable to pay compensation and directed the insurer to answer the award in terms of the insurance policy covering the vehicle. The direction so issued was challenged by the insurance company mainly on the ground that the deceased was gratuitous passenger in the truck. The said contention was negated by the Division Bench of our High Court and the insurer filed SLP before the Supreme Court. The appellant insurer has disclaimed their liability on the same ground by relying upon the decision in *Pushpabai Purshottam Udeshi and Others Vs. Ranjit Ginning and Pressing Co. (P) Ltd. and Another*, and three-Judge Bench in *Smt. Mallawwa Etc. Vs. The Oriental Insurance Co. Ltd. and Others*, . The contention so raised on the side of the appellant was negated by the Apex Court in *Satpal Singh's case (supra)* on the premises that the decisions referred to above were rendered u/s 95 of the old Motor Vehicles Act and the old Act is now repealed by new Act and section 147 of the new Act corresponding to section 95 of the old Act has been substantially altered and the decisions rendered in respect of the cases governed u/s 95 of the old Act are hence not applicable to the case in hand. It is further observed by the Supreme Court that the policy under the new Act should insure the liability incurred and cover injury to any person including the owner of the goods or his authorised representative carried in the vehicle and the same is not required to exclude gratuitous passenger in any vehicle irrespective of type or class of the vehicle. The Supreme Court is hence pleased to uphold the finding of Division Bench of our High Court by repelling the contention of the appellant insurance company on the aforesaid score and dismissed the insurer's appeals.

12. The law so laid down in *New India Assurance Company Vs. Shri Satpal Singh and Others*, came up for reconsideration before a larger three-Judge Bench of the Hon'ble Apex Court on reference from two-Judge Bench in batch of cases in *New India Assurance Co. Ltd. Vs. Asha Rani and Others*, The larger Bench has decided the bunch of appeals by dividing the same into three categories, viz., (i) cases which are covered by the provisions of the Motor Vehicles Act, 1939 (old Act); (ii) cases which are covered by the Motor Vehicles Act, 1988 prior to Amendment Act of 1994; and (iii) cases which arise after Amendment Act of 1994. The Supreme Court proceeded to consider the rival submissions made by the parties in the light of the legal position under the old Act and under the new Act before and after the amendment. The Apex Court held detailed analysis of the difference and development of law under the old Act and new Act before and after 1994 amendment and also the extent of applicability of legal principles laid

down in *Smt. Mallawwa Etc. Vs. The Oriental Insurance Co. Ltd. and Others*, in the subsequent judgments to three categories of the cases referred to above. It is observed by the Supreme Court that under old Act (Motor Vehicles Act, 1939), the proviso to section 95 (i) does not envisage any insurance policy for passengers being carried in goods vehicles. The expression "any person" and the expression "every motor vehicle", though are in wide terms, but by proviso (ii) of section 95, it restricts the generality of the main provision by confining the requirement to cases where the vehicle is a vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment and the vehicle shall be a vehicle in which the passengers are carried and the goods vehicle cannot be held to be a passenger vehicle. While construing the legal position u/s 147 (1) of Motor Vehicles Act, 1988 prior to Amendment Act of 1994, it is observed by the Supreme Court that prior to 1994 amendment, it was not necessary for the insurer to insure against the owner of the goods or its authorised representative being carried in a goods vehicle, but Motor Vehicles (Amendment) Act, 1994, particularly section 46, seeks to include the owner of the goods or his authorised representative carried in the vehicle for the purposes of liability under the insurance policy and the same does not include the passengers carried in the goods vehicle. It is further observed by the Supreme Court in para 28 that if a liability other than the limited liability provided for under the Act is to be enhanced under an insurance policy, additional premium is required to be paid and the owner of the passenger carrying vehicle must pay additional premium for covering the risks of the passengers. The three-Judge Bench of the Supreme Court in *Asha Rani's* case has held that the judgment of the Apex Court in *Satpal Singh's* case is not correctly decided. The additional ground on which the Supreme Court arrived at a conclusion that *Satpal Singh's* case is no longer good in law is by virtue of nature of the defence available to the insurer u/s 149(2) of the Motor Vehicles Act, 1988. The Supreme Court in para 29 of its judgment considered the issue from another angle and observed that section 149(2)(a)(i)(c) of Motor Vehicles Act, 1988, enables the insurers to raise defences against the claim of the claimants and one of the defences which is available to the insurer is that the vehicle in question has been used for a purpose not allowed by the permit under which the vehicle was used and the decision of *Satpal Singh's* case, which has not laid down the correct law, had the effect of obliterating the statutory defence available to the insurer. The Supreme Court, on the basis of the principles so laid down, overruled the law laid down in *Satpal Singh's* case.

13. The same legal principle as laid down by the larger Bench was followed by the Supreme Court in the subsequent judgments, viz., (i) *Oriental Insurance Co. Ltd. Vs. Shri Nanjappan and Others*, (ii) *Oriental Insurance Company Ltd. Vs. Devireddy Konda Reddy and Others etc. etc.* and *Jogi Subbamma and Others etc. etc.*, (iii) *New India Assurance Co. Ltd. Vs. Vedwati and Others*, (iv) *Oriental Insurance Co. Ltd. v. Brij Mohan*, 2007 ACJ 1909 (SC); (v) *National Insurance Co. Ltd. Vs. Prema Devi and Others*, ; and (vi) *National Insurance Co. Ltd. Vs.*

Kaushalaya Devi and Others, The Supreme Court has in the authorities cited above following the law laid down in *New India Assurance Co. Ltd. Vs. Asha Rani and Others*, held that "the provisions of 1988 Act do not enjoin any statutory liability on the owner of a vehicle to get his vehicle insured for any passenger travelling in goods vehicle and the insurers would not be liable therefor". However, the Supreme Court has, in some of the cases referred to above, directed the insurer, at the first instance, to answer the award and to recover the amount from the insured by initiating executing proceedings against the insured. The Apex Court was pleased to do so by applying the doctrine of pay and recover theory by following the decision of another larger three-Judge Bench of the Supreme Court in *National Insurance Co. Ltd. Vs. Baljit Kaur and Others*, The Supreme Court in that case, referred to above, dealt with identical question as to whether u/s 147, Motor Vehicles Act, 1988, insurance policy in respect of goods vehicle would also cover gratuitous passengers. The three-Judge Bench of the Supreme Court has reiterated the same view as laid down in the earlier three-Judge Bench of the Apex Court to the effect that the expression "any person" in section 147(1)(b)(i) would only cover a third party as also owner of goods or his authorised representative, but not the passengers carried in goods vehicle whether for hire or reward or otherwise and the legislative intention was not to provide for liability of insurer with respect to gratuitous passengers for whom no insurance policy is envisaged nor any premium was paid to the extent of the benefit of insurance to such category of persons and that instead and in the place of the insurer, the owner of the vehicle shall be liable to satisfy the decree. However, the Supreme Court has, in para 21 of its judgment, proceeded to say that the law was not clear till date, as such, the direction of payment made against the insurer has to be held to be fair and equitable and the clarification of the legal position laid down in the Supreme Court shall have prospective effect to subserve interest of justice. By holding so, the Supreme Court, in the case in hand, was pleased to direct the insurer to satisfy the award amount and recover the amount from the owner of the vehicle by initiating proceedings before the executing court.

14. The direction so issued by the Apex Court was henceforth followed in *Oriental Insurance Co. Ltd. Vs. Shri Nanjappan and Others*, ; (ii) *Oriental Insurance Co. Ltd. v. Brij Mohan*, 2007 ACJ 1909 (SC); and (iii) *National Insurance Co. Ltd. Vs. Kaushalaya Devi and Others*, In all the cases referred to above, the Supreme Court has applied the doctrine of pay and recover theory, having regard to the peculiar circumstances involved in the case in -hand and in exercise of the jurisdiction under Article 142 read with Article 136 of Constitution. The Supreme Court in *Brij Mohan*'s case having found that the victim was a poor labourer and she suffered grievous injuries and became disabled to a great extent and the amount of compensation awarded was also on the lower side, is pleased to direct the insurer to satisfy the award and then recover the same from the insured in exercise of extraordinary jurisdiction under Article 142 read with Article 136 for doing complete justice to the parties.

15. The Division Bench of our High Court has also in the judgment of United India Insurance Company Ltd. Vs. Selvam and A. Govindarajan, by applying the principles laid down in New India Assurance Co. Ltd. Vs. Asha Rani and Others, and National Insurance Co. Ltd. Vs. Baljit Kaur and Others, held that gratuitous passengers who do not come under the expression "any person" and for whom no insurance premium is paid, are not entitled to get compensation at the hands of the insurance company, but as the accident took place on 12/13.4.1999 much prior to the date of judgment of Apex Court in Baljit Kaur's case (6.1.2004), the insurance company is held liable to satisfy the award amount and to recover the same from the owner of the vehicle by filing execution petition without filing a separate suit. The applicability of the ratio of the Division Bench, as referred to above, is thereafter referred to larger Bench of our High Court and the larger Bench considered the question regarding the applicability of doctrine of pay and recover theory in respect of such cases, where any claim for compensation is made for death of or bodily injury caused to gratuitous passenger carried in goods vehicle. The Full Bench of our High Court after having analysed the legal position laid down in the judgments of the Supreme Court from Pushpabai Purshottam Udeshi and Others Vs. Ranjit Ginning and Pressing Co. (P) Ltd. and Another, , till Sardari and Others Vs. Sushil Kumar and Others, has held at para 30 as follows:

(30) From a conspectus of the decisions, thus analysed, it is now apparent that before New India Assurance Co. Ltd. Vs. Asha Rani and Others, was decided, the decision in New India Assurance Company Vs. Shri Satpal Singh and Others, was holding the field and such latter decision was overruled only in Asha Rani's case. Under such peculiar circumstances in National Insurance Co. Ltd. Vs. Baljit Kaur and Others, , 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 u/s 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 Apex 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 covered u/s 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.

16. The Full Bench of our High Court, thereafter at para 31, explained the legal position emerging from various decisions rendered by the Supreme Court from time to time. For better appreciation, the same is extracted in full as follows:

(i) The insurance policy is required to cover the liability envisaged u/s 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) u/s 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 recognized 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, 2000 ACJ 1 (SC), 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 National Insurance Co. Ltd. Vs. Baljit Kaur and Others, 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 National Insurance Co. Ltd. Vs. Baljit Kaur and Others, 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.

The Full Bench of our High Court has, in terms of the clarifications as laid down above, answered the reference and directed the learned single Judge at whose instance the issue is referred to larger Bench, to consider as to whether the doctrine of "pay and recover" can be applied to the facts and circumstances of the case in hand.

17. As rightly argued by the learned counsel for the appellant insurer, the question as to whether the insurance company is statutorily liable to recover the liability in respect of risk of gratuitous passenger, is clearly laid down by Hon"ble Supreme Court in *New India Assurance Co. Ltd. Vs. Asha Rani and Others*, , by reversing the earlier decision in *New India Assurance Company Vs. Shri Satpal Singh and Others*, and further question as to whether the doctrine of "pay and recover" theory, which is applied till then, by directing the insurer to satisfy the award and to recover the amount from the insured even though the insurer was not statutorily required to cover the liability in respect of such passengers carried in goods vehicle, is clarified in Full Bench judgment of our High Court. As per which, after the decision of *National Insurance Co. Ltd. Vs. Baljit Kaur and Others*, rendered on 6.1.2004 no such direction can be issued by the trial court to the insurance company on the principle of "pay and recover" relating to the liability in respect of risk of gratuitous passengers travelling in a goods vehicle and no trial court is expected to decide contrary to the decision made thereon.

18. In the present case, the accident and the claim is of the year 2007 and the award is made on 12.1.2009 much after the decision of *National Insurance Co. Ltd. Vs. Baljit Kaur and Others*, as such, doctrine of pay and recover is inapplicable to the present case and the direction issued by the Tribunal to the insurer to satisfy the award and to recover the amount from the owner of the vehicle is contrary to law and the award passed by the Tribunal hence deserves interference to that extent. As there is no dispute raised in this appeal regarding adequacy or inadequacy of quantum of compensation, the amount of compensation awarded by the Tribunal is hereby confirmed with right given to the claimants to recover the same from the owner of vehicle-cum-insured.

19. In the result, award dated 12.1.2009 made in M.C.O.P. No. 465 of 2007, on the file of Motor Accidents Claims Tribunal/ Subordinate Court, Kulithalai, Karur District, stands modified by setting aside the direction for payment of compensation by the insurer to the claimants with liberty given to the insurer to recover the same from the respondent No. 1/owner and the respondent No. 1/insured is directed to satisfy the award within two months from the date of receipt of the copy of this judgment. The award stands confirmed in all other respects. The entire award amount deposited by the appellant insurance company shall be refunded to the insurer on due application made before the Tribunal. The civil miscellaneous appeal is disposed of accordingly. No costs. Consequently, connected miscellaneous petitions are closed.