
(2009) 04 MAD CK 0284
In the Madras High Court
Case No : CMA No. 3254 of 2006

The Oriental Insurance Co. Ltd.

APPELLANT

Vs

M. Pushpan and Others

RESPONDENT

Date of Decision : 24-04-2009

Acts Referred:

Constitution of India, 1950 — Article 142
Motor Vehicles Act, 1988 — Section 147, 149, 149(4), 149(5)

Citation : (2010) ACJ 2117 : (2009) 5 MLJ 733

Hon'ble Judges : T.S. Sivagnanam, J;Prabha Sridevan, J

Bench : Division Bench

Advocate : S. Arun Kumar, for the Appellant; N. Damodharan, for R1 to R5 and R. Shivakumar, for R6, for the Respondent

Final Decision : Dismissed

Judgement

T.S. Sivagnanam, J.—Heard Mr. S. Arun Kumar, learned Counsel for the appellant and Mr. N. Damodharan, learned Counsel for the claimants (respondents 1 to 5) and Mr. R. Shivakumar, learned Counsel for the 6th respondent.

2. The above appeal has been directed against the award of the Motor Accidents Claims Tribunal, Cuddalore in M.C.O.P. No. 15 of 2004, granting an award of Rs. 14,30,000/- together with interest at 9% p.a. The claimants before the Tribunal were the wife and four children of one P. Marthandan.

3. On 24.8.2003, at about 11.30 a.m., the deceased was standing at the extreme eastern side of the Cuddalore to Chidambaram Main Road at Cuddalore old Town and the vehicle owned by the 6th respondent namely a Tata Sumo Car proceeding from North to South direction driven in a rash and negligent manner hit against the deceased and caused the accident. Due to the accident, the deceased sustained grievous injuries and died after two days. In the Claim Petition, it was stated that the deceased was 50 years old, earned Rs. 15,000/- per month as Timber, Wood Merchant and as Casuarina Dealer, that he is the only bread winner of the family and due to the accident, the entire family is

suffering for their livelihood. Accordingly, a claim for Rs. 25 lakhs was made with interest at 18% p.a.

4. The Insurance Company resisted the Claim Petition by filing a counter affidavit disputing the age of the deceased as well as his income. The Insurance Company also contended that the accident occurred since the deceased suddenly crossed the road without minding about the on coming vehicle and invited the accident. The Insurer claimed that the compensation was highly speculative and prayed for dismissal of the Petition.

5. During the course of argument, the Counsel for the appellant stated that an additional counter statement was filed by the Insurance Company stating that the cheque issued towards the premium had returned unpaid and that the Insurance Company on receipt of the intimation from their Bankers had cancelled the Policy on 3.9.2003 and the intimation of the cancellation was sent on 3.9.2003 and received by the Insurer on 4.9.2003 and the postal acknowledgment card showed that the Insurer had received the intimation on 8.9.2003. It was further contended that the Insurer had taken a fresh Policy with validity from 11.11.2003 to 10.11.2004. Therefore, the learned Counsel contended that Insurer is not liable to pay the compensation.

6. On the side of the claimants, the first respondent/claimant examined herself as P.W.1 and one Ramesh, who had seen the accident and lodged the Police complaint was examined as P.W.2 and marked Exs.P1 to P8. On the side of the Insurer, one Ravi was examined as R.W.1 and marked Exs. R1 to R5.

7. The Tribunal after considering the oral and documentary evidence available on records, framed two questions for consideration namely

(i) as to whether the accident was caused on account of the rash and negligent driving of the Tata Sumo owned by the 6th respondent herein? and

(ii) as to whether the claimants are entitled for compensation and if so what is the quantum?

8. Before, we proceed to deal with the reasoning given by the Tribunal on two issues, it would be necessary for us to consider the preliminary point raised by the learned Counsel for the appellant that the Insurance Policy had been cancelled and therefore, the Insurance Company is not liable to settle the claim.

9. It is to be seen that the Insurer had issued a cheque dated 29.7.2003 towards the premium, which was marked as Ex.R1. Based on the said payment, an Insurance Policy, Ex.R2 was issued to the owner of the vehicle, which has validity from 30.7.2002 to 29.7.2003. The cheque issued towards the premium is said to have been returned by the Indian Overseas Bank, Vadakarai Branch by a written memo dated 4.8.2003 and the same having been communicated to the State Bank of India, Myliaduthurai Branch (Banker's of the Insurance Company) on 5.8.2003 and that the said intimation was received by the Insurance Company on 3.9.2003. Based on the said intimation, the Policy was cancelled on 3.9.2003

under Ex.P4.

10. The intimation of cancellation was sent to the insured under Ex.R5 on 3.9.2003 by a registered post with acknowledgment due and the same was received by the Insured on 4.9.2003 and the postal acknowledgment card was received by the Insurance Company on 8.9.2003. Thereafter, the Insured had approached the Insurance Company and taken a fresh Policy from 11.11.2003 to 10.11.2004.

11. By relying upon the above mentioned dates, the learned Counsel for the appellant would contend that the Insurance Company having cancelled the Policy, cannot be mulcted with the liability to settle the claim. The learned Counsel for the appellant placed reliance on the Judgment of the Hon''bel Supreme Court in Deddappa and Ors. v. The Branch Manager, National Insurance Co. Ltd. Reported in 2008 (2) TN MAC 138 (SC). In the said case, the factual position was that the Insurance Policy was to remain valid for the period from 17.10.1997 to 16.10.1998; the Insurer had issued a cheque on 15.10.1997; the said cheque was presented for encashment and the same was returned and thereafter the Insurance Company had cancelled the Policy. The Postal Acknowledgment Card was produced to prove that the cancellation of the Policy was communicated to the Insured. The accident had occurred in the said case on 6.2.1998 i.e. much after the communication of cancellation of the Policy. In the said factual scenario the Hon''ble Supreme Court after analyzing the various provisions of the Motor Vehicles Act and also the law laid down has laid down as follows:

26. We are not oblivious of the distinction between the statutory liability of the Insurance Company vis-?-vis a third party in the context of Sections 147 and 149 of the Act and its liabilities in other cases. But the same liabilities arising under a contract of insurance would have to be met if the contract is valid. If the contract of insurance has been cancelled and all concerned have been intimated thereabout, we are of the opinion, the Insurance Company would not be liable to satisfy the claim.

12. The learned Counsel for the appellant would next placed reliance upon the decision of the Hon''ble Supreme Court in United India Insurance Co. Ltd. Vs. Gian Chand and others, , wherein the Hon''ble Suprme Court had held that when the Insured had handed over the vehicle for being driven by an unlicenced driver, the Insurance Company would get exonerated from its liability to meet the claim of third party, on account of the accident caused by such unlicensed driver.

13. The learned Counsel for the appellant would however fairly admit that the accident took place on 24.8.2003 and for the cancellation of the Policy was done only on 3.9.2003 and received by the Insured on 4.9.2003. However, the learned Counsel for the appellant would state that there was no delay on the part of the Insurance Company to take steps to cancel the Policy since they had received intimation from their Bankers about the return of the cheque issued by the Insured only on 3.9.2003. It is the further contention of the appellant that the

owner of the vehicle is a prudent business man who ought to have taken immediate steps to pay the premium on coming to know that the cheque issued by him was dishonoured on 4.8.2003. Further the owner of the vehicle had taken a fresh Policy with validity from 11.11.2003 to 10.11.2004. In such circumstances, the learned Counsel for the appellant would submit that the Insurance Company cannot be held liable.

14. Mr. R. Sivakumar, learned Counsel appearing for the owner of the vehicle would contend that they had not received any intimation of cancellation of the Policy and in any event the accident having occurred prior to the cancellation, the Insurance Company cannot disown their liability. He further submits that the decision of the Hon''ble Supreme Court in Deddappa's case (cited supra) would not advance the case of the appellant Insurance Company since the facts in the said case was different.

15. As discussed above, the accident took place much after the communication of the cancellation of the Policy and therefore the Hon''ble Supreme Court held that the Insurer is liable to satisfy the claim. However, in the present case, it is an admitted fact that the accident took place much prior to the cancellation and therefore applying the law laid down by the Hon''ble Supreme Court, the Insurance Company cannot disown their liability.

16. Likewise, the other decision relied on by the learned Counsel in United India Insurance Co. Ltd. Vs. Gian Chand and others, , (cited supra) was entirely in a different circumstances, where the vehicle was driven by a person who did not possess a valid driving licence. The said issue does not arise for consideration in the present matter.

17. The Hon''ble Supreme Court in a decision in New India Assurance Co. Ltd. Vs. Rula and Others, , held that in a contract of Insurance under Chapter 11 of the Motor Vehicles Act a third party who is not a signatory to the contract of Insurance, is nevertheless protected by such a contract. It is further held that the third party is not concerned and does not come into the picture at all in the matter of payment of premium. Whether the premium has been paid or not is not a concern of the third party who is not concerned with the fact that there was a Policy issued in respect of vehicle involved in the accident and it is on the basis of this Policy that the claim can be maintained by the third party against the Insured. It was further held in the said decision, if on the date of the accident, there was a Policy of Insurance in respect of the vehicle in question, the third party can claim against the Insurance Company and the owner of the vehicle would have to be indemnified in respect of the claim of that party and any subsequent cancellation of the Insurance Policy on the ground of non payment of premium would not affect the rights already accrued in favour of the third party. So it would appear that it was in not payment of premium or non-payment thereof, but whether the policy was alive or cancelled.

18. The said decision of the Hon''ble Supreme Court applies squarely to the facts

of the present case. As stated, the accident took place on 24.8.2003 and the cancellation of the Policy was on 3.9.2003 i.e. much after the accident. Therefore, it is to be seen that on the date of the accident, the Insurance Policy was not cancelled. If the Insurance Company had been diligent, they could have asked from their Bankers about the dishonour of the cheque at the earliest point of time and intimated the Insured, the Insured would have had an option to immediately remit the premium. Therefore, we hold that the Insurance Company is liable to settle the claim.

19. The further contention raised by the learned Counsel for the appellant that the Insurer had taken a fresh Policy from 11.11.2003 and had not renewed the cancelled one would not in any way alter the position. The vital fact which is to be noted as to whether the Policy was cancelled prior to the date of accident or thereafter. It is not in dispute that the cancellation was after the accident, so the Insurance Company has to be held liable.

20. On the ground of negligence, the first respondent claimant examined herself as P.W.1 and she deposed that on 24.8.2003 at about 11.30 a.m., her husband was standing in the corner of the Road, the Tata Sumo Car came in a rash and negligent manner and dashed against her husband, ultimately resulting in the death of her husband. One Ramesh was examined as P.W.2 who had deposed that the accident did not occur when the deceased crossed the road, but the accident occurred when he was standing on the lefthand side of the road and that P.W.2 was at a distant of about 10 ft. and after seeking the accident, he had lodged the Police complaint.

21. Thus on appreciation of the evidence on record, the Tribunal has rightly come to the conclusion that the accident occurred due to the rash and negligent driving of the Tata Sumo Car. Therefore, the finding regarding the negligence as arrived by the Tribunal stand confirmed.

22. The next issue to be seen is regarding the quantum of compensation payable to the claimants. It is the case of the claimants that the deceased was aged about 50 years and that he had been carrying on business in Timber, rice, Wood merchant and as casuarina dealer and was earning Rs. 15,000/- per month. Ex.P4 is the licence issued under the provisions of the Standards of Weights and Measurements Enforcement Act 1986 to establish that he was carrying on rice business. Ex.P5 is the Lease Agreement entered into between the deceased and one Selvarj in respect of the of the shop which he had taken on rent. Ex.P6 is a "Bogyam Deed" entered into between one Dhandapani and the deceased Marthandan, where he was entitled to enjoy the property for the amount of Rs. 80,000/- paid.

23. P.W.1, the wife of the deceased in the cross examination has clearly stated that her husband used to earn Rs. 15,000/- per month. There is no contrary evidence. The Tribunal fixed the monthly income only at Rs. 10,000/-. The Tribunal accepted that the age of the deceased at 50 years, adopted the Unit

method and calculated that the deceased would have been utilizing Rs. 2,000/- per month for his personal expense and contribute Rs. 8,000/- per month to the family, thus multiplied by 12, works out to Rs. 96,000/- and considering the age of the deceased 13 was adopted as the multiplier. The Counsel for appellant submitted that the rice business is still continuing and therefore at best what should be deducted is only the loss of services. The evidence of P.W.1 is that he was also doing timber and Casuarina business. This was not contradicted. Considering the nature of business and the income and deduction of loss of service, the monthly income could have been fixed at Rs. 12,000/- instead of Rs. 15,000/-. If so we arrive at the same figure by deducting 1/3rd under conventional heads the award may be marginally high and hence we are not inclined to interfere. Therefore, we find that there is no error in the amount of compensation awarded by the Tribunal by adopting the multiplier at 13. Similarly the compensation awarded under the conventional heads also is reasonable and called for no interference.

24. The learned Counsel for the appellant would contend that in the event we hold that the Insurance Company is liable to settle the claim and they may be permitted to settle the claim and recover from the owner of the vehicle. In this regard, the learned Counsel would relied upon the observation of the Hon''ble Supreme Court in Deddappa's case (cited supra) in paragraph No. 28, which reads as follows:

28. However, as the appellant hails from the lowest strata of society, we are of the opinion that in a case of this nature, we should, in exercise of our extraordinary jurisdiction under Article 142 of the Constitution of India, direct the Respondent No. 1 to pay the amount of claim to the appellants herein and recover the same from the owner of the vehicle viz. Respondent No. 2, particularly in view of the fact that no Appeal was preferred by him. We direct accordingly.

25. In a recent decision of the Full Bench of this Court reported in 2009 (1) CTC 7, it had an occasion to consider the dictum of "Pay and Recover". The question that was referred for consideration before the large Bench in the said matter is to the following effects:

28. In the light of the latest decisions of the Supreme Court, exonerating the Insurance Company from its liability to pay compensation for the death injury to the gratuitous passenger traveling in a goods vehicle, substantial doubt arises whether the decision of the Division Bench of this Court made in United India Insurance Company Ltd. Vs. Selvam and A. Govindarajan, could be followed.

29. In view of the latest decisions of the Supreme Court, in my considered view, the decision of the Division Bench of this Court made in United India Insurance Company Ltd. Vs. Selvam and A. Govindarajan, is to be clarified.

The Hon''ble Full Bench held that the doctrine of pay and recover in the context of Section 149 of the Motor Vehicle Act has been recognized by the Hon''ble

Supreme Court in *New India Assurance Co., Shimla Vs. Kamla and Others* etc. etc., and AIR 2004 SC (National Insurance Co. v. Swaran Singh and Anr.) and that the decisions of the Hon"ble Supreme Court are in the context of the provisions contained in Section 149(4) and Section 149(5) of the Act. The Hon"ble Full Bench next proceeded to consider whether the doctrine of "pay and recover" can be invoked in another cases even though Section 149 is not as such application. The Hon"ble Full Bench then proceeded to take in to consideration the Judgments of Hon"ble Supreme Court reported in

1. *National Insurance Co. Ltd. Vs. Baljit Kaur and Others*,
2. *Oriental Insurance Co. Ltd. Vs. Shri Nanjappan and Others*,
3. *Oriental Insurance Co. Ltd. Vs. Brij Mohan and Others*,
4. *National Insurance Co. Ltd. Vs. Kusum Rai and Others*,
5. 2008 (3) MLJ 568 (SC), *Premkumari and Ors. v. Prahlad Dev and Ors.*

and held that even though the statutory provisions u/s 149(4) and 149(5) was not applicable the Hon"ble Supreme Court applied in doctrine of pay and recover and the ratio of the decision has been applied selectively in some of the later decisions and has not been applied by the Hon"ble Supreme Court depending on the facts of a particular case. After analysis of the statutory provisions which were explained by the Hon"ble Supreme Court in the various decisions, the Hon"ble Full Bench held 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. Whether the Insurance Company is not successful in its defence, obviously it is required to satisfy the decree and the award. Whether 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) Whether, 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 traveling in a goods vehicle after the decision in Baljit Kaur's 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) Whether, however, the matter 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 i.e., the driver or the owner, as the case may be.

Thus as held by the Hon''ble Full Bench it is 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. In the earlier part of this Judgment we have upheld the conclusion of the Tribunal that the accident occurred due to the negligence of the Tata Sumo Vehicle and that the Insurance Policy was admittedly cancelled only after the date of accident. From the chronology of dates given by the Learned Counsel for the Appellant it is seen that no steps were taken by the Insurance Company for nearly one month after their bankers received intimation regarding the dishonour of the cheque. Therefore the Insurance Company have to be held responsible for their own act and cannot be heard to say that even though the accident occurred prior to the cancellation of the policy they have to be absolved of their liability. It is to be noted that the Hon''ble Full Bench had stated that the doctrine of "pay and recover" has not been applied in all cases by the Hon''ble Supreme Court in respect of matters which are not strictly covered u/s 149(4) and 149(5) and it has been applied by the Hon''ble Supreme Court depending upon the facts and circumstances of a particular case. Therefore we are not inclined to grant the prayer sought for by the Learned Counsel for the Appellant to "pay and recover". In the light of the decision rendered by the Full Bench of our Court, we are unable to accept the submissions made by the learned Counsel for the appellant.

26. It is to be noted that the Insurance Company was not diligent in the sense that the fact of dishonour was made known to the insured belatedly. He was therefore perhaps denied the opportunity to have the policy renewed immediately thereafter. It is true that the insured obtained a fresh policy on 11.11.2003 though he was informed of the dishonour on 08.09.2003. But there

is no evidence regarding the date when he approached the company for renewal or fresh issue. The fact remains he issued a cheque within time to pay the premium. The fact also is that the cancellation was made after the accident. In respect of the cheque having been dishonoured on 4.8.2003 cannot now state that they should be absolved of the liability since they cancelled the Policy as soon as they received intimation from their Bankers. However, the test laid down by the Hon''ble Supreme Court is to the effect that if the cancellation is after the accident, the third party risk has to be covered and the Insurance Company cannot deny their liability.

27. For the above reason, we hold that the award of the Tribunal calls for no interference and the Appeal stands dismissed. However, there will be no order as to costs.