IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 08.10.2018

DELIVERED ON : 23.10.2018

CORAM

THE HONOURABLE MR. JUSTICE ABDUL QUDDHOSE

C.M.A.Nos.861, 361, 862 to 865 of 2008
&
M.P.Nos.1,1,1,1,1 & 1 of 2008

In CMA.No.861 of 2008

The Divisional Manager
The National Insurance Company Ltd.,
Divisional Office, Vellore. ... Appellant

vs.

1.G.Verrandra Babu
2.M.V.G.Prasad Reddy
3.M.Mobiyudeen
4.The Depot Manager,
A.P.S.R.T.C. Tirupati ... Respondents

In CMA.No.361 of 2008

The National Insurance Company Ltd.,
Rep. by its Regional Manager,
No.19, Officers Line,
Opp. Lakshmi Theatre, Vellore - 1. ... Appellant

vs.

1.Vasantha
2.Balaji
3.Karthik
4.M.V.G.Prasad Reddy ... Respondents

In CMA.No.862 of 2008

The National Insurance Company Ltd.,
Regional Manager,
No.19, Officer's Line,
Opp Lakshmi Theatre, Vellore - 1. ... Appellant

vs.

1.Saradha
2.M.V.G.Prasad Reddy ... Respondents

In CMA.No.863 of 2008

The National Insurance Company Ltd.,
Regional Manager,
No.19, Officer's Line,
Opp Lakshmi Theatre, Vellore - 1. ... Appellant

vs.

1.Saradha
2.Balaji
3.M.V.G.Prasad Reddy ... Respondents

In CMA.No.864 of 2008

The Divisional Manager
The National Insurance Company Ltd.,
Divisional Office, Vellore. ... Appellant

vs.

1.G.Verrandra Babu

2.M.V.G.Prasad Reddy

3.M.Mobiyudeen
4.The Depot Manager,
A.P.S.R.T.C. Tirupati ... Respondents

In CMA.No.865 of 2008

The Divisional Manager
The National Insurance Company Ltd.,
Divisional Office, Vellore. ... Appellant

vs.

1.G.Verrandra Babu
2.M.V.G.Prasad Reddy
3.M.Mobiyudeen
4.The Depot Manager,
A.P.S.R.T.C. Tirupati ... Respondents

Common Prayer: Civil Miscellaneous Appeals filed under Section 173 of the Motor Vehicles Act, 1988 against the award and decree dated 28.02.2007 made in O.P.Nos.278, 257, 252, 258, 276 & 277 of 2004 on the file of the Motor Accident Claims Tribunal (Subordinate Judge), Gudiyatham.

For Appellant in all CMAs. : Mr.D.Bhaskaran
For 2nd respondent in CMA.Nos.861, 862, 864 and 865 of 2008, for 4th respondent in CMA.No.361 of 2008 and 3rd respondent in CMA.No.863 of 2008 : Mr.K.A.Ravindran
For 1st respondent in CMA.Nos.861, 864 & 865 of 2008 :Mrs.A.B.Fathima Sulthana
For 1st respondent in CMA.Nos.361, 862 and 863 of 2008, for 2nd respondent in CMA.No.863 of 2008 and 3rd respondent in CMA.No.361 of 2008 :Mr.G.Vinothkumar
For R3 & R4 in CMA.No.861 of 2008, CMA.No.864 of 2008 CMA No.865 of 2008: No Appearance

J U D G M E N T

The instant Appeals have been filed by the insurance company challenging the common Award dated 28.02.2007 passed in MCOP.Nos.276, 277, 278, 252, 257 and 258 of 2004 by the Motor Accident Claims Tribunal, Gudiyatham.

The brief facts leading to the filing of the instant Appeals are as follows:

2. The compensation claimed by the respective claimants in MCOP.Nos.276, 277, 278, 257 and 258 of 2004 are all fatal accident claims. The compensation claimed by the claimant in MCOP.No.252 of 2004 is an injury claim. All the deceased persons as well as the injured were travelling in a Tata Sumo bearing registration No.AP03-G-5119 on 02.05.2004 from Paradami to Tirupati. The vehicle in which they were travelling dashed against a bus bearing registration No.AP10 Z 4925 which resulted amongst others in the death of V.Pooja, V.Nitish Kumar, Ammulu, Sundarajulu Naidu and Manoj Kumar and Saradha sustained injury. The dependents of the respective deceased and the injured preferred separate claims before the Motor Accident Claims Tribunal. The Motor Accident Claims Tribunal by its common Award dated 28.02.2007 awarded compensation to the respective claimants as hereunder:

MCOP.No.	Type of claim	Award amount
276 of 2004	Fatal	Rs.75,000/-
277 of 2004	Fatal	Rs.98,466/-
278 of 2004	Fatal	Rs.2,23,000/-
252 of 2004	Injury	Rs.31,338/-
257 of 2004	Fatal	Rs.77,000/-
258 of 2004	Fatal	Rs.75,000/-

3. Aggrieved by the common Award dated 28.02.2007, the instant appeals have been filed by the insurance company.

4. Heard D.Bhaskaran, learned counsel for the Appellant, in all these Appeals and Mr.K.A.Ravindran, learned counsel appearing for the owner of the vehicle, second respondent in CMA.Nos.861, 862, 864 and 865 of 2008, fourth respondent in CMA.Nos.361 of 2008 and third respondent in CMA.No.863 of 2008 and Mrs.A.B.Fathima Sulthana, learned counsel appearing for the claimants, first respondent in CMA.Nos.861, 862, 864 and 865 of 2008, first and second respondents in CMA.No.863 of 2008 and first, second and third respondents in CMA.No.361 of 2008.

5. According to the learned counsel for the Appellant in all these appeals, the insured vehicle is a private car and all the deceased and the injured persons were travelling in the insured vehicle which was given on hire to them by the owner of the vehicle. According to the learned counsel for the Appellant in all these appeals, the owner of the vehicle had willfully violated the policy conditions and disregarded the provisions of the Motor Vehicles Act, 1988. The learned counsel for the Appellant in all these appeals contended that as per the provisions of the Motor Vehicles Act, a private vehicle cannot be used for commercial purpose. The learned counsel would further contend that the liability can be determined only on the basis of the premium collected. The learned counsel for the Appellant in all these appeals further submitted that the contractual liability under the insurance policy is only for nine passengers besides driver. According to him, the Tribunal failed to take note of the fact that the rates of road tax and insurance premium are different in case of private vehicle and commercial vehicle and it is more in the case of commercial vehicle.

6. Further, the learned counsel for the Appellant in all these appeals contended that in the case of commercial vehicle to move outside the state, a national permit is required. The learned counsel for the Appellant in all these appeals drew the attention of this Court to the deposition of PW2, who according to him, has admitted in his cross examination that he was not aware of the owner of the vehicle and that the insured vehicle was engaged on hire basis and Rs.1,050/- was paid towards hire charges. The learned counsel for the Appellant in all these appeals also drew the attention of this Court to the deposition of PW3 to PW5 in their cross examination wherein they have admitted that the insured vehicle was engaged by them only on hire basis.

7. The learned counsel for the Appellant in all these Appeals submitted that the respective claimants were not even cross examined by the owner of the vehicle. According to the learned counsel, excepting for filing his counter, the owner of

the vehicle has not let in any evidence either oral or documentary before the Tribunal. The learned counsel for the Appellant in all these appeals further submitted that the Appellant's witness RW1 has deposed before the Tribunal that fourteen persons were travelling in the insured vehicle as against the seating capacity of only nine. According to the learned counsel for the Appellant in all these appeals, as per the terms and conditions of the insurance policy, the insured vehicle cannot be used for hire.

8. Further the learned counsel for the Appellant in all these appeals contended that the insurance policy gives personal accident cover only for five named passengers and the seating capacity only for nine passengers and a driver. The learned counsel for the Appellant in all these appeals drew the attention of this Court to the findings of the Tribunal and submitted that the Tribunal under the impugned Award has given an erroneous finding that four children below ten years who were also occupants of the insured vehicle, at the time of the accident, cannot be treated as adults and hence, came to an erroneous conclusion that there is no violation of policy condition by the owner of the vehicle. The learned counsel for the Appellant in all these appeals relied upon a Division Bench Judgment of this Court in the case of National Insurance Company Limited vs. S.Sankara Narayanan reported in 2013 (1) TN MAC 73 (DB) and submitted that the use of private car for hire is a fundamental breach of terms and conditions of the policy.

9. The learned counsel for the Appellant in all these appeals also drew the attention of this Court to the latest Judgment of the Hon'ble Supreme Court in the case of Shamanna and another vs. Divisional Manager, Oriental Insurance Co. Ltd. and others reported in 2018 (2) TN MAC 151 (SC) which has followed the earlier Judgment of the Hon'ble Supreme Court in the case of Oriental Insurance Co. Ltd. vs. V.Nanjappan and others reported in 2004 (1) TN MAC 211 (SC) and submitted that pay and recovery rights will have to be granted to the Appellant in view of the policy violation committed by the insured (owner of the vehicle), which the Tribunal has failed to grant under the impugned Award.

10. The learned counsel for the Appellant in all these appeals would further contend that as against the findings given by the Tribunal against the owner of the vehicle under the impugned Award, no appeal has been filed by the owner of the vehicle.

11. Per contra learned counsel for the owner of the vehicle (Mr.M.V.G.Prasad Reddy) would submit that the claim made by the claimants in some of the Appeals without impleading the APSRTC,

is not maintainable. According to the learned counsel for the owner of the vehicle, only due to the rash and negligent driving by the driver of the APSRTC bus, the accident had happened. The learned counsel for the owner of the vehicle would further contend that the vehicle was driven by the owner's friend K.Sundarajalu Naidu along with his family who went to Tirupati regarding his son's matrimonial alliance.

12. According to the learned counsel for the owner of the vehicle, the Appellant has not let in any evidence to prove that the vehicle was used for commercial purpose. According to the learned counsel for the owner of the vehicle, merely by lifting excess passengers, it could not be said that there is a fundamental breach of policy conditions. According to the learned counsel for the owner of the vehicle, the Tribunal has rightly excluded the four minors while calculating the number of passengers for the purpose of permit stipulation regarding seating capacity. The learned counsel for the owner of the vehicle further contended that the Appellant has not placed any material from whom or where or when they got information that the vehicle was on hire.

13. The learned counsel for the owner of the vehicle would further contend that the respective claimants have not pleaded in their claim petition filed before the Tribunal that they have taken the car for hire. According to the learned counsel for the owner of the vehicle, when the Appellant/insurance company has not pleaded that the vehicle was used for commercial purpose, they have to prove the same. But before the Tribunal, the Appellant has not produced any material to establish that the vehicle was hired on commercial basis.

14. The learned counsel for the owner of the vehicle would further contend that the Appellant cannot rely upon the deposition of PW2, PW3 to PW5 and the Appellant's witness to come to the conclusion that the vehicle was given on hire, at the time of the accident. The learned counsel for the owner of the vehicle also drew the attention of this Court to the pleadings in the claim petition and submitted that the pleading does not state that the vehicle was being used on hire at the time of the Accident.

15. The learned counsel for the owner of the vehicle also contended that the owner of the vehicle filed C.D.No.93 of 2005 on the file of the District Consumer Disputes Redressal Forum, Chittoor claiming Rs.3,00,000/- towards damage to the vehicle. The learned counsel for the owner of the vehicle further contended that the Appellant took a stand before the District Consumer Disputes Redressal Forum, Chittoor that the owner has violated the policy condition so they are not liable. But the District Consumer Disputes Redressal Forum, Chittoor relying on the deposition of Karthi (PW3) and Balaji (PW5) that they did

not pay any hire charges and awarded Rs.74,000/- as compensation towards damage to the vehicle.

16. According to the learned counsel for the owner of the vehicle, before the Tribunal, PW3 Karthi deposed that they have paid Rs.1,050/- and diesel has to be filled up by the owner of the vehicle. It is very clear from the evidence that excluding diesel they have paid only Rs.1,050/-. The learned counsel for the owner of the vehicle further submitted that the distance between Paradami to Tirupati is nearly 115 km and so up and down it comes to 230 kms. The learned counsel for the owner of the vehicle submitted that the diesel per litre in the year 2004 was Rs.35.48 and the Tata Sumo car could ply for 10kms. per litre. For covering 230 kms. in Tata Sumo car, it requires nearly 23 litres diesel. So, According to the learned counsel, towards cost of diesel, engine oil, break oil etc., the owner of the vehicle has been paid only Rs.1,050/-, whereas it would have cost much more. According to him, it can be inferred that the vehicle was not used for commercial purpose.

17. The learned counsel for the owner of the vehicle further submitted that the insurance policy is a package policy (comprehensive policy) and therefore, the Appellant is liable to pay the entire extent of liability incurred by the insured. The learned counsel for the owner of the vehicle drew the attention of this Court to the Judgment of the Hon'ble Supreme Court in the case of B.V.Nagarajan vs. Oriental Insurance Company Limited reported in 1997 (1) MLJ 5 that the use of vehicle may be irregular, but no fundamental breach of contract has been committed by the owner of the vehicle to dissentitle the insured from being indemnified for the damage caused to the vehicle. The learned counsel for the owner of the vehicle also drew the attention to a Division Bench Judgment of this Court in the case of Royal Sundaram Alliance Insurance Co. Ltd., vs. A.Meenakshi and others reported in 2009 (1) TNMAC 249 and submitted that since subject insurance policy is a comprehensive policy, the Appellant is liable to compensate the respective claimants. The learned counsel for the owner of the vehicle concluded by submitting that the Tribunal under the impugned Award has rightly not granted pay and recovery rights to the Appellant.

18. This Court after having considered the materials available on record and after examining the impugned Award and after hearing the submissions of the respective counsels, observes the following:

a) The instant appeals have been filed by the insurance company challenging the findings of the Tribunal in not granting pay and recovery rights.

b) It has been the consistent stand of the Appellant that the insured vehicle carried more passengers than what was sanctioned under the permit. They have taken this defence in their counters filed before the Tribunal. It is an admitted fact that the seating capacity of the Tata Sumo (insured vehicle) is 9+1. But at the time of the accident, fourteen passengers travelled in the said vehicle. It has also been the consistent stand of the Appellant before the Tribunal that only due to overloading of persons, the accident had happened. It is also the consistent stand of the Appellant before the Tribunal that the Tata Sumo (insured vehicle) which is a private vehicle was used for commercial purpose by the insured (owner) at the time of the accident and therefore, he has violated the terms and conditions of the insurance policy. RW1, Mani vel, the Appellant's witness before the Tribunal has also deposed that fourteen persons travelled in the Tata Sumo (insured vehicle). He has also deposed that the vehicle is a private vehicle but used for commercial purpose by letting the vehicle on hire to passengers. He has also deposed that under Ex.R1, the Insurance Policy, only five persons were covered for personal accident and liability is only upto Rs.2,00,000/- and 9+1 persons alone are permitted to travel. The witnesses on the side of the claimants before the Tribunal have also deposed that the persons travelling in the Tata Sumo (insured vehicle) paid hire charges to the owner of the vehicle. Even though the owner of the vehicle filed his counter to all the claim petitions, he did not let in any oral or documentary evidence on his side to disprove the contention of the Appellant insurance company that the insured vehicle was used for commercial purpose by the owner of the vehicle at the time of the accident.

c). It is also an admitted fact that only 9+1 persons can travel in the Tata Sumo (insured vehicle), but admittedly, fourteen persons were travelling in the insured vehicle at the time of the accident. The permit does not give any exemption for minors while calculating the number of persons. But under the impugned Award, the Tribunal has exempted four minors who travelled in the Tata Sumo (insured vehicle) from being counted as persons for the purpose of calculating the total number of persons who travelled in the Tata Sumo (insured vehicle) at the time of the accident. The Tribunal has not given its finding as to how it has come to such a conclusion. In the considered view of this Court, the permit stipulating number of persons does not differentiate between adults and minors. It merely states that total number of persons allowed to travel in the Tata Sumo (insured vehicle) is 9+1 i.e., nine persons apart from the driver. In the instant case, Tata Sumo (insured vehicle) carried fourteen persons which has also not been disputed by the owner of the said vehicle before the Tribunal as well as this Court.

d) Without any basis, the Tribunal has given an erroneous finding that four children below ten years who were travelling in the Tata Sumo (insured vehicle) at the time of the accident, cannot be treated as persons travelling in the said vehicle and therefore, based on the said erroneous finding, the Tribunal has held that there is no violation of policy condition committed by the owner of the said vehicle.

e) Under the impugned Award, the owner of the vehicle has also been held to be jointly and severally liable to pay respective claimants the compensation amount awarded by the Tribunal. No appeal has been filed by the owner of the vehicle challenging the common award passed against him as well as the Appellant. Therefore, as regards the owner of the vehicle, the findings of the Tribunal have become final.

f) Excepting for objecting the pay and recovery rights in favour of the Appellant in this appeal, the owner of the vehicle has not let in any oral or documentary evidence before the Tribunal or not filed any application seeking permission of this Court to raise any additional evidence before this Court.

g) From the above observations, it is clear that the owner of the vehicle has committed violation of conditions of the insurance policy by letting the Tata Sumo (insured vehicle) to carry persons more than permissible limit and also using the private vehicle for commercial purpose.

h) The Judgments reported in 2013(1) TNMAC 731 (DB), 2018 (2) TNMAC 151 (SC) and 2004 (1) TN MAC 211 (SC) relied upon by the learned counsel for the Appellant in his submissions are squarely applicable to the facts of the instant case.

i) The Award passed by the Consumer Court awarding compensation towards damage to the vehicle in favour of the owner of the vehicle in C.D.No.93 of 2005 was never produced before the Tribunal and therefore, the said Award of the Consumer Court cannot be looked into by this Court in the instant Appeals.

j) The Judgment of the Hon'ble Supreme Court relied upon by the owner of the vehicle reported in 1997 (1) MLJ 5 is not applicable to the facts of the instant case, since the claim in the said reported case was a consumer claim and not a motor accident claim. Further, in the instant case, the liability of the Appellant insurance company to pay the respective claimants has not been exonerated. But due to the policy violation committed by the owner of the vehicle (insured), the interest of the Appellant will have to be protected by permitting them to recover the compensation amount paid to the respective claimants from the owner of the vehicle (insured).

20. In the light of the above observations, this Court is of the considered view that the Tribunal ought to have granted pay and recovery rights to the Appellant, under the impugned Award which erroneously was not granted.

21. In the result, the Appeals are partly allowed by directing the Appellant to deposit the compensation amount awarded by the Tribunal together with interest, if not already deposited, to the credit of MCOP.Nos.276, 277, 278, 252, 257 and 258 of 2004, within a period of four weeks from the date of receipt of a copy of this Judgment. On such deposit being made, the respective claimants are permitted to withdraw their respective compensation amount together with the accrued interest lying to the credit of their respective MCOP by filing appropriate applications and the Appellant is permitted to recover the amount deposited by them to the credit of MCOP.Nos.276, 277, 278, 252, 257 and 258 of 2004 in the same proceedings from the owner of the vehicle, M.V.G.Prasad Reddy (insured) in accordance with law. Consequently connected miscellaneous petitions are closed. However, there shall be no order as to costs.

Sd/-
Assistant Registrar(CS-VI)

//True copy//

Sub Assistant Registrar

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To

1.The Motor Accidents Claims Tribunal,
Subordinate Judge,
Gudiyatham.

2.The Section Officer,
VR Section,
High Court, Madras.

+1cc to Mr.D.Bhaskaran, Advocate SR.No.71864

+1cc to Mr.K.A.Ravindran, Advocate SR.No.72900

+1cc to Mr.G.Vinoth Kumar, Advocate SR.No.72220

C.M.A.Nos.861, 361, 862 to 865 of 2008
&
M.P.Nos.1,1,1,1,1 & 1 of 2008

RGN(CO)
GMY(16/12/2019)