IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 30.07.2018

CORAM:

THE HONOURABLE MR.JUSTICE S.BASKARAN

C.M.A.No.3356 of 2010

National Insurance Company Ltd.,
Divisional Office,
P.B.No.157,
No.110, Jawaharlal Nehru Street,
II Floor,
Pondicherry-605 001 ..Appellant/ 2nd respondent.

-Vs-

1.Andal
2.Radhakrishnan
3.CASA Tsunami Rehabilitation Program
No.6, Radha Nagar, Beach Road
Cuddalore ..Respondents.

Civil Miscellaneous Appeal filed under Section 173 of Motor Vehicles Act, against the order and decree dated 22.01.2010 made in M.C.O.P.No.333 of 2007 on the file of Motor Accident Claims Tribunal,sub Judge, Chidambaram.

For appellant : : Mr.S.Srinivasan Ramalingam
For Respondents : : Mr.D.Ravichander for R1 and R2.
R3- No appearance

J U D G M E N T

The Appellant is the Insurance company, who is the 2nd respondent before the Tribunal, has filed this appeal challenging the order and decree dated 22.01.2010 made in M.C.O.P.No.333 of 2007 on the file of Motor Accident Claims Tribunal, Chidambaram.

2. For convenience sake, the parties are referred to hereunder according to their litigative status before the Tribunal. It is a fatal case. The case of the Petitioner is that on 30.05.2006, while the deceased Kamesh was travelling in the Mini door van bearing Reg.No.TN-31-F-7933

from Kumarapettai to Periyapattu along with some other persons carrying paint and other materials, due to rash and negligent driving by the driver of the said Mini van, the driver lost control of the vehicle and the van capsized on the left side of the road. The accident occurred only due to negligence of the Mini door van driver. The deceased was aged 23 years and by working as Sculptor was earning Rs.10,000/- per month. The Petitioners who are the parents of the deceased were depending on his income. Thus the Petitioners are suffering from loss of income and also missing the love and affection of their deceased son. Thus, the Petitioners seek a sum of Rs.10,00,000/- as compensation.

3. On the other hand, opposing the claim of the Petitioners, by filing counter, the 2nd respondent denies the claim of the Petitioners about the manner in which the accident occurred. The Petitioners' claim about the age, occupation and income of the deceased is denied. The vehicle bearing Reg.No.TN-31-F-7933 was not insured with them. The driver of the 1st respondent vehicle did not possess valid driving licence. The accident occurred only due to negligence of the deceased and three other persons who travelled in the vehicle as unauthorized passengers. As the deceased travelled in the goods vehicle as a gratuitous passenger, the 2nd respondent is not liable to pay any compensation. Hence, they seek dismissal of the Petition.

4. Before the Tribunal, the Petitioners/claimants examined P.W.1 and P.W.2, produced documents Ex.P.1 to Ex.P.8 to prove their claim. The respondent examined R.W.1, produced Ex.R.1 to Ex.R.6 documents to counter the claim of the Petitioners. The Tribunal after analyzing the evidence on record found negligence of the 1st respondent vehicle driver alone caused the accident, passed an award for a sum of Rs.8,04,400/- payable by the respondents to the Petitioners. The Tribunal also held that as there is violation of policy conditions, the 2nd respondent / Insurance company is entitled to recover the amount from the 1st respondent owner after satisfying the award. Aggrieved over the said finding of the Tribunal, the 2nd respondent/Insurance company has come forward with the present appeal.

5. The learned counsel for the 2nd respondent/Insurance company contends that the lower court erred in overlooking

the averments in paragraph 22 of the claim petition admitting that the passengers were transported in the goods vehicle bearing Reg.No.TN-31-F-7933. As the goods vehicle was used for transporting passengers, the appellant/Insurance company is not liable to pay any compensation. Further, the father of the deceased/2nd petitioner who deposed as P.W.1 clearly admitted that the deceased travelled as passenger with other persons in the goods vehicle. Hence, no legal liability can be fixed on the appellant/Insurance company. The Petitioners have not produced any evidence to prove that the deceased travelled in the Mini door van as the authorized representative of the owner of the goods. The Tribunal also failed to consider the fact that mini van bearing Reg.No.TN-31-F-7933 was a goods vehicle as evidenced by Ex.P.3 - Copy of R.C. and Ex.P.4/EX.R.6 copy of insurance policy of the vehicle bearing Reg.No.TN-31-F-7933. The Tribunal also failed to consider the fact that the driver of the mini lorry was holding licence to drive LMV while the vehicle involved in the accident was transport vehicle, and the same amounts to violation of Section 3 of Motor Vehicles Act, 1988. The Tribunal has wrongly applied the Pay and Recovery principles. The quantum of the award passed by the Tribunal is also on the higher side. Thus,t he 2nd respondent/Insurance company seeks to set aside the award passed by the Tribunal by entertaining the appeal.

6. Per contra, the learned counsel for the Petitioners/claimants contends that the accident occurred only due to negligence of the 1st respondent vehicle driver and as the deceased was travelling in the vehicle with his goods, he is entitled to seek compensation from the respondents as the owner and insurer of the offending vehicle. Thus, the Petitioners/claimants seek dismissal of the appeal.

7. It is admitted by both that on 30.05.2006 that the deceased Kamesh aged 24 years travelled in the 1st respondent Mini door van bearing Reg.No.TN-31-F-7933 and the said vehicle met with the accident in which the deceased Kamesh suffered fatal injuries and due to that died subsequently. It is also admitted that the said vehicle was driven by one Ramachandran and the vehicle was insured with the 2nd respondent on the date of the occurrence.

8. Before the Tribunal, the eye witness to the occurrence examined as P.W.2 clearly stated about the manner in which the accident occurred. The Police also registered Ex.P.1-FIR against the 1st respondent van driver only. It is clear from Ex.P.2-M.V.I. report that there was no mechanical defect in the vehicle. As such, it is clear from the above said documents and the evidence of P.W.2 that the accident occurred only due to negligence of the 1st respondent vehicle driver. Further on the basis of evidence available on record, the Tribunal found the deceased Kamesh travelled in the mini door van as an unauthorized passenger and therefore, the 2nd respondent/Insurance company is not liable to pay any compensation. However, the Tribunal held that the act of the 1st respondent in carrying the deceased person in his goods vehicle will only amount to violation of policy condition and as the policy coverage was in force on the date of the accident, the 2nd respondent/Insurance company is liable to pay the compensation at first instance and then to recover the same from the 1st respondent/owner of the vehicle. Aggrieved over the said finding, the 2nd respondent/Insurance company has come forward with the appeal.

9. Now the questions to be decided in this appeal are as follows:-

(i) Whether the deceased travelled in the Mini door van as an unauthorized passenger ?

(ii) Whether the 2nd respondent is liable to pay compensation to the unauthorized passenger?

(iii) Whether the quantum of the award passed by the Tribunal is correct ?

10. The father of the deceased who deposed as P.W.1 stated in his evidence that his son deceased Kamesh and his co-employees travelled in the Mini door van and all of them were employed with the 1st respondent. P.W.1 also stated that the vehicle involved in the accident belongs to the 1st respondent. He also admitted that the 1st respondent vehicle was used to carry employees regularly to their work spot. There is no evidence on record to show that the deceased travelled in the vehicle with goods.

11. The official of the 2nd respondent/Insurance company who deposed as R.W.1 stated that the vehicle bearing Reg.No.TN-31-F-7933 is a goods vehicle and as per the Policy taken with them, the insurance coverage is provided only for the driver and no coverage was provided for any passengers. It is therefore clear from the said evidence of R.W.1 that apart from the driver of the vehicle no other person is entitled to seek any compensation from the 2nd respondent/Insurance company under Ex.P.4/Ex.R.6-Insurance Policy.

12. As stated earlier, there is no evidence to prove that the deceased travelled with goods in the vehicle. Even though it is contended that the deceased was employed in the 1st respondent company, the father of the deceased who deposed as P.W.1 stated his son was employed on behalf of Kanchi Kamakodi Peetam to build Tsunami affected buildings in Cuddalore. Apart from that, there is no evidence on record to show that the deceased was employed under the 1st respondent. Even assuming he was employed under the 1st respondent, there is no evidence on record to prove that on the occurrence day, the deceased travelled with goods in the vehicle. In such circumstances, pointing it out, the appellant/2nd respondent/Insurance company contended that the deceased and four other persons travelled in the said mini door van only as unauthorized passengers and as such, the 2nd respondent is not liable to pay any compensation. It is also pointed out that no additional premium was paid to cover the passengers who travelled in the vehicle.

13. The learned counsel for the Appellant/2nd respondent/Insurance company, in support of his contention that the direction issued by the Tribunal to the Insurance company to satisfy the award and to recover the amount from the owner of the vehicle is contrary to law, relied upon Ruling of the Apex Court in 2018 ACJ 69 [New India Assurance Co.Ltd., Vs.Ashok Kumar Yadav and others], 2017 ACJ 2850 [Harjit Singh Vs. Rameshwar Dass and others], 2017 ACJ 2169 [United India Insurance Co.Ltd., Vs.George and others]. Further, the learned counsel relied upon the Ruling reported in 2013 ACJ 1187[Manager, Iffco Tokio General Insurance Co.Ltd., Vs. G.Ramesh and others], wherein, it is held as follows:-

> "19. In the present case, the accident and the claims is of the year 2007 and the award is made on 12.1.2009 much after the decision of

Baljit Kaur’s case, 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 the vehicle-cum-insured.”

14. The learned counsel for the 2nd respondent/Insurance company relying upon Ruling reported in 2009 ACJ 865 [Branch Manager, United India Insurance Co.Ltd., Vs. Nagammal and others] contended that if unauthorized passengers travelling in the goods vehicles met with an accident, the insurance company is not liable to pay any compensation and they cannot be directed to pay the amount first and then to recover the amount from the owner of the vehicle. In the said Ruling, it is held in paragraph 31, (iii), (iv) and (v) as follows:-

“31. Thus, Thus from an analysis of the statutory provisions as explained by the Supreme Court in various decisions rendered from time to time, the following picture emerges :

(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 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 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. "

Further, in the Ruling reported in 2013 (1) TNMAC 198 [Oriental Insurance Co.Ltd., Vs. R.Siva and others], in paragraph 11, it is held as follows:-

"17. In the present case, on the basis of the evidence on record, it is apparent that the deceased and the injured claimants were not travelling as owner of the goods, but was merely a gratuitous passengers. It is thus obvious that they were only gratuitous passengers and even assuming that the injured claimant Sanker had taken some goods, he could not be said to be travelling as owner of the goods. To be covered under the terms of the Act, some evidence must be led to show that the deceased had hired the goods vehicle for transportation of his goods. In this case, the evidence of the injured Claimant-Sanker which is inconsistent with the statement made by him in the First Information Report clearly indicated that he was travelling only as a gratuitous passenger and not as owner of the goods.

18. At this juncture, it is relevant to refer to the decision of the Honourable Supreme Court reported in National Insurance Co. Ltd., Vs. Cholleti Bharatamma and others, 2008 ACJ 268 (SC), wherein, it was specifically held that the Insurance company even in respect of the owner is only liable if such owner travels in the cabin of the truck and not if he is travelling in the rear of the truck. Therefore, the injured Claimant and the deceased having travelled as gratuitous passengers the Insurance Company cannot be be held liable to pay compensation."

15. Thus, the learned counsel for the Appellant/2nd respondent/Insurance company relying upon the above said Ruling contends that if unauthorized passengers travelling in the goods vehicle met with accident, the Insurance company is not liable to pay any compensation and they cannot be directed to pay the amount first and then to recover the amount from the owner of the vehicle.

16. It is clear from the above said Ruling that if any person travels as an unauthorized passenger, it amounts to violation of Policy condition and the insurer cannot be made liable to pay compensation to them. It is also clear from the above Ruling that in such cases, the insurer cannot be directed to pay the compensation amount at first and then to recover the same from the owner of the vehicle.

17. In this case, the Tribunal has given a clear cut finding in paragraph 22 of its order that the deceased Kamesh travelled in the Mini door van as an unauthorized passenger, but directed the Insurer to pay the award and then recover the same from the owner.

18. In the light of the above said decisions relied upon by the 2nd respondent/Insurance company, such direction to the 2nd respondent/Insurance company i.e., "Pay and Recover" is not appropriate. The conclusion of the Tribunal that the deceased travelled only as an unauthorised passenger is not challenged by the Petitioners/claimants by filing any appeal. Therefore the conclusion of the Tribunal in that regard has become final. As such, following the above said Rulings, it is clear that the 2nd respondent/Insurance company cannot be fastened with any liability to pay any compensation for the death of an unauthorized passenger.

19. In view of the above said reasonings of this court, the conclusion of the Tribunal directing the Insurer to pay and recover is unsustainable and accordingly, the same is set aside.

20. The learned counsel for the 2nd respondent/Insurance company pointed out that in the appeal grounds challenge to the quantum of the award is not

seriously contested, this court while considering the reasons stated by the Tribunal for arriving at the quantum of the award is found to be based on documents available on record. This court finds that there is no need to interfere with the quantum of the award passed by the Tribunal as the same appears to be just and proper. Hence, the sum of Rs.8,04,000/- awarded by the Tribunal as compensation to the Petitioners/claimants is confirmed.

21. In the result,

(i) This Civil Miscellaneous Appeal is Partly allowed.

(ii) The quantum of the Award passed by the Tribunal is confirmed. (iii)The award passed against the 2nd respondent/Insurance company/appellant alone is set aside.

(iv)The amount of compensation awarded by the Tribunal is hereby confirmed with right given to the claimants to recover the same from the 1st respondent/owner-cum-insured/3rd respondent.

(v) The award passed in MCOP.No.333 of 2007 dated 22.01.2010 stands modified by setting aside the finding of the Tribunal in respect of payment of compensation by the appellant/2nd respondent/Insurance company to the claimants.

(vi) As far as quantum, interest and apportionment of the award are concerned, there is no modification.

(vii)The amount deposited by the Appellant-Insurance company shall be refunded to the Insurance company.

(viii) No costs. Consequently, connected MPs are closed.

Sd/-
Assistant Registrar(CS)

//True Copy//

Sub Assistant Registrar

nvsri
To
1.The Motor Accident Claims Tribunal,
Subordinate Judge,
Chidambaram.

2.The Section Officer, V.R.Section, High Court, Madras.

+1cc to Mr.S.Srinivasan Ramalingam , Advocate SR.No. 52505

+1cc to Mr.D.Ravi chandar, Advocate SR.No. 51588

C.M.A.No.3356 of 2010

ASK(25/09/2018)