IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 20.04.2018

CORAM:

THE HONOURABLE MR.JUSTICE S.BASKARAN

C.M.A.No.3652 of 2006
and M.P.1 of 2006 and
C.M.P.No.19294 of 2017

Branch Manager
National Insurance Co.Ltd.,
Branch Office, No.1, Pondicherry. ..Appellant/ 2nd respondent

Versus

1.Vasantha
2.Minor. Rajalakshmi
3.Minor. Rajasekar
4.Minor. Vijayalakshmi
5.Minor. Jayalakshmi
6.Minor. Selvasekar
(All minor petitioners are rep.by
Next friend/Guardian Mother of
1st petitioner)
7.Periyakkal ..Respondents 1 to 7 /Petitioners

8.Sheik Ahamed ..Respondent No.8/ 1st Respondent.

Prayer: Civil Miscellaneous Appeal filed under Section 173 of the Motor Vehicles Act, 1988, against the judgment and decree dated 21.07.2006 made in M.C.O.P.No.100 of 2003 on the file of the Motor Accident Claims Tribunal, Sub Judge, Hosur.

For Appellant : Mr.S.Arun Kumar
For Respondents : Mr.J.Nandagopal [for R1 to R7]

J U D G M E N T

The appellant/Insurance Company has filed this appeal against the judgment and decree dated 21.07.2006 made in M.C.O.P.No.100 of 2003 on the file of the Motor Accident Claims Tribunal, Sub Judge, Hosur.

2. For the sake of convenience, the parties are referred to hereunder according to their litigative status before the Tribunal.

3. The case of the petitioners/claimants is that on 16.03.2003 at about 2.10 p.m., while the deceased Raja was standing on the left side mud portion of the road near the Roundana at Uthangarai, the lorry bearing Registration No.PY-01-H-8303 came at high speed dashed against the deceased, causing him fatal injuries and he died on the spot. The accident occurred due to negligence of the 1st respondent lorry driver only. The petitioners/claimants who are wife, children and mother of the deceased were depending on his income. Thus, the petitioners/claimants sought for a sum of Rs.15,00,000/- as compensation from the respondents who are the owner and insurer of the vehicle.

4. On the other hand, opposing the claim of the petitioners/claimants, by filing counter, the 2nd respondent/Insurance Company contends that the accident did not occur in the manner alleged by the petitioners/claimants. The lorry bearing Registration No.PY-01-H-8303 was not insured with them and the driver of the lorry did not possess valid driving license. The said lorry was going from Banglore to Pondicherry, while so the deceased Raja along with 14 others boarded the lorry at Hosur and they were travelling as a gratuitous passenger sitting on the rear side of the local lorry above the paper roll bundle carried in the lorry; when the lorry came near Uthangarai at about 11.00 p.m., a cycle suddenly crossed the road and on seeing the same, the driver of the lorry applied brake, to avoid hitting him and in the process, the lorry driver lost control dashed against the compound wall of the rountana and the lorry capsized. Secondly, the paper roll bundles rolled out of the lorry and all the persons travelling on top of the bundle fell down and the said Raja suffered injury and died on the spot. As the deceased travelled as a non-fare passenger in the goods vehicle, the 2nd respondent/Insurance Company is not liable to pay compensation. Thus, the 2nd respondent/Insurance Company sought for dismissal of the petition.

5. Before the Tribunal, the petitioners examined P.W.1 to P.W.3 and produced documents Exs.P.1 to P.3 to prove their claim. On the side of the respondents, R.W.1 was examined. The Tribunal, on the basis of available evidence on record, found negligence of the 1st respondent lorry driver alone caused the accident passed an award for a sum of Rs.3,50,000/-. The Tribunal holding that the deceased travelled as a gratuitous passenger, directed the 2nd respondent/Insurance Company to pay the award amount and then to recover the same from the 1st respondent owner of the vehicle. Aggrieved over the same, the 2nd respondent/Insurance Company has come forward with the present appeal.

6. The learned counsel for the 2nd respondent/Insurance Company/appellant contends that the driver of the lorry permitted more than 14 passengers to travel upon the paper roll bundles in the goods vehicle and the same amounts to violation of policy condition. The deceased being an unauthorized passenger, the Tribunal ought to have dismissed the claim against the 2nd respondent/Insurance Company. Thus, the 2nd respondent/Insurance Company sought for entertaining the appeal and to set aside the award passed against them.

7. On the other hand, the learned counsel for the petitioners/claimants contended that even if they are gratuitous passengers, the insurance policy was in force as evidenced by Ex.P.3, therefore, the 2nd respondent/Insurance Company is liable to pay compensation. Hence, the learned counsel for the petitioners/claimants sought for dismissal of the appeal.

8. The only issue raised by the Appellant/2nd respondent-Insurance Company is that as the victim travelled in the goods vehicle as a non-fare paying passenger, they need not pay any compensation and even if the policy coverage was in force they cannot be directed to pay and recover the award amount.

9. Before the Tribunal, the 1st petitioner/wife of the deceased who deposed as P.W.1 also examined the eye-witness to the occurrence as P.W.3 to prove the accident. It is clear from Ex.P.1 - F.I.R that the police registered a case against the driver of the 1st respondent lorry only. P.W.3 eye-witness has clearly stated that only due to rash and negligent driving of the lorry driver, the accident occurred.

10. On the other hand, the official of the 2nd respondent/Insurance Company, who deposed as R.W.1, clearly stated that the deceased along with 13 other persons travelled in the lorry as unauthorized passengers and suffered fatal injuries in the accident. Even though in the petition averments it is stated, while the deceased was standing near the rountana, the lorry dashed against him, the contents of Ex.P.1 - F.I.R is contrary to that. The eye-witness P.W.3 - Balu who lodged the complaint to register Ex.P.1 - F.I.R has clearly stated that the deceased Raja who was travelling in the lorry sitting above the paper roll bundle fell down and suffered injuries. It is apparent that the averments in the petition that the deceased while standing near Rountana was hit by the lorry, cannot be true. Thus, it is clear from P.W.3 evidence and Ex.P.1 - F.I.R contents that the deceased travelled in the lorry and as the same capsized, the deceased fell down and suffered fatal injuries.

11. It is contended by the learned counsel for the appellant/2nd respondent-Insurance company that R.W.1 in his deposition has stated that in the said lorry 14 persons including the deceased were travelling as passengers by sitting on the top of the said goods vehicle. The Tribunal, also categorically found that the deceased was travelling in the goods vehicle as a gratuitous passenger. In such circumstances, even though the lorry was insured with the 2nd respondent/Insurance Company, as per Ex.P.3 - Insurance Policy, the deceased being a gratuitous passenger, the insurance company cannot be asked to pay compensation amount and then to recover the same from the owner of the lorry. In support of the same, the 2nd respondent/Insurance Company relied upon the ruling reported in (2004) 2 SSC 1 [National Insurance Co. Ltd., Vs. Baljit Kaur and others] wherein it is held as follows:-

> "17. By reason of the 1994 amendment what was added is "including owner of the goods or his authorised representative carried in the vehicle". The liability of the owner of the vehicle to insure it compulsorily, thus, by reason of the aforementioned amendment included only the owner of the goods or his authorised representative carried in the vehicle besides the third parties. The intention of Parliament, therefore, could not have been that the words "any person" occurring in Section 147 would cover all persons who were travelling in a goods carriage in any capacity whatsoever. If such was the intention, there was no necessity of Parliament to carry out an amendment inasmuch as the expression "any person" contained in sub-clause (i) of clause (b) of sub-section (1) of Section 147 would have included the owener of the goods or his authorised representative besides the passengers who are gratuitous or otherwise."

Likewise, he relied upon the ruling reported in 2017 (2) TN MAC 214 [Branch Manager, Bajaj Allianz General Insurance Co. Ltd., Vs. Diwan Ali] wherein it is held as follows:-

> "4. Despite the said finding and despite the fact that the decision of the Full Bench of this Court in the case of the Branch Manager, United India Insurance Company Limited, Branch Office, Nethaji, Bye Pass Road, Dharmapuri Town V. Nagammal and two others, 2009 (1) TN MAC 1 (FB): 2009 (1) CTC 1 (FB) having been brought to the notice of the Tribunal, the Tribunal has chosen to order the Insurance Company to pay Compensation and recover the same from the Owner of the vehicle. This in my opinion is unwarranted. The Full Bench of this Court in Nagammal's case has very

categorically held that no such direction can be issued by any Trial Court to the Insurance Company to pay and recover relation to liability in respect of a passenger travelling in a Goods Vehicle after the decision in National Insurance Co.Ltd. V. Baljit Kaur, 2004 (1) TN MAC 1 (SC) : 2004 (1) CTC 210 (SC), merely because the date of accident was before such decision. The date of accident is immaterial and it has been clarified that no Trial Court is expected to decide contrary to such decision. It is rather shocking to note that despite the decision of the Full Bench having been brought to the notice of the Tribunal, the Tribunal has gone ahead and ordered the Insurance Company to pay the Compensation and then recover the same from the Owner of the vehicle. This action by the Tribunal would amount to transgression of the law laid down by the Honourable Apex Court in Baljit kaur's case and the specific directions of this Court in Nagammal's case."

12. It is clear from the above said rulings relied upon by the 2nd respondent/Insurance Company that any person travelling as a gratuitous passengers in a goods vehicle is not entitled to seek compensation from the insurer and as such, the 2nd respondent/Insurance Company is not liable to pay any compensation. Thus, the petitioners/claimants are entitled to seek for the award amount from the owner of the vehicle only. The appellant as well as the 1st respondent, on the other hand has not disputed the quantum of the award. Therefore, the award passed by the Tribunal, granting a sum of Rs.3,50,000/- as compensation to the petitioners/claimants is confirmed. The petitioners/claimants are entitled to seek the same from the 1st respondent/owner of the offending vehicle. The claim of the petitioners/claimants against the 2nd respondent/Insurance Company is unsustainable and the award in that regard is to be set aside. The point is answered accordingly.

13. In the result, the Civil Miscellaneous Appeal is allowed and the award passed by the Tribunal against the 2nd respondent/Insurance Company alone is set aside and in other aspects, the award dated 21.07.2006 made in M.C.O.P.No.100 of 2003 on the file of the Motor Accident Claims Tribunal, Sub Judge, Hosur, shall remain unaltered. Consequently, connected miscellaneous petitions are closed. No costs.

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

To

1.The Sub Judge, Motor Accident Claims Tribunal,
Hosur.

Copy to:The Section Officer,
V.R.Section, High Court, Madras.

+1cc to Mr.S.Arunkumar, Advocate SR.No.29609

RJ(CO)
sm:3.7.2018