BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 28.08.2018

CORAM:

THE HONOURABLE MS.JUSTICE V.M.VELUMANI

C.M.A.(MD)No.449 of 2011

1.Anusiya
2.Minor Angala Easwari
3.Minor Siranjeevi
4.Minor Harikrishnan
(Minor Appellants are represented by their Mother and Guardian 1st Appellant Mrs. Anusiya)
5.Dhanalakshmi (died) ... Appellants/Claimants

Vs.

1. Subha Seshagiri

2. New India Assurance Co. Ltd.,
Division Office,
Second Floor, Jerome Building,
Fort Station Road,
Trichy. ... Respondents/Respondents

PRAYER: Appeal filed under Section 173 of the Motor Vehicles Act, 1988, to set aside or modify the order of the Tribunal of MACT-cum-Principal District Judge, Tiruchirappalli made in M.C.O.P.No.1252 of 2009, dated 04.09.2010.

For Appellants : Mr.T.Senthil Kumar
For R2 : Mr.D.Sivaraman

JUDGMENT

This Civil Miscellaneous Appeal has been filed by the appellants-claimants against the award, dated 04.09.2010, made in M.C.O.P.No.1252 of 2009, passed by the Motor Accident Claims Tribunal-cum-Principal District Judge, Tiruchirappalli.

2.The appellants, who are the claimants in M.C.O.P.No.1252 of 2009, filed a claim petition claiming a sum of Rs.8,00,000/- as compensation for the death of one Selvakumar husband of the first appellant, father of the appellants 2 to 4 and son of fifth appellant.

3.Facts of the case:-

According to the appellants, on 07.11.2008 at 00.30 hours, while the said Selvakumar was travelling in Eicher Van, bearing registration No.TN-48-A-1257 belonging to the first respondent along with goods, due to rash and negligent driving by driver of the Van, the Van capsized and fell into Sannasikulam. Due to the said accident, the said Selvakumar sustained multiple injuries all over the body and he was taken to K.M.C.Hospital, Trichy. Subsequently, he died in-spite of treatment given to him. The First Information Report was registered against the driver of the Eicher Van. The deceased was 35 years at the time of accident and was an agricultural coolie and was earning Rs.250/- per day. The appellants are the legal heirs and dependants of the deceased. The Van belonging to the first respondent was insured with the second respondent Insurance Company. Hence, they filed a claim petition, claiming a sum of Rs.8,00,000/- as compensation.

4.The first respondent remained ex-parte before the Tribunal.

5. The second respondent filed counter statement and denied all the averments made by the appellants. According to the second respondent, the deceased did not travel as owner of the goods. He is only a gratuitous passenger. The second respondent is not liable to pay any compensation. The deceased was already sick person and due to his ill-health, he died. In any event, the appellants have to prove the income and occupation of the deceased. The amount claimed by the appellants is excessive.

6. Before the Tribunal, on behalf of the appellants, first appellant examined herself as P.W.1 and two other witnesses were examined as P.W.2 & P.W.3 and 6 documents were marked as Ex.P1 to Ex.P6. The second respondent Insurance Company examined the Investigating Officer as R.W.1 and Assistant Manager as R.W.2 and marked three documents as Ex.R1 to Ex.R3.

7.The Tribunal, considering the pleadings, oral and documentary evidence, held that the accident occurred only due to rash and negligent driving by the driver of the Van. Considering the contradiction of evidence between P.W.1 and P.W.3, the Tribunal held that the deceased travelled as a gratuitous passenger and not as a owner of the goods and hence, the second respondent Insurance Company is not liable to pay any compensation to the appellants. The Tribunal fixed the notional income of the deceased at Rs.4,500/- per month, after deducting 1/3rd towards his personal expenses and applying '15' multiplier and awarded a sum of Rs.5,40,000/- for loss of dependency. Apart from the above, the Tribunal has awarded a sum of Rs.20,000/- towards loss of love and affection, Rs.20,000/- towards loss of consortium, Rs.2,500/- towards loss of estate and Rs.5,000/- towards funeral expenses with interest at 7.5% p.a., from the date of petition till the date of realisation and directed the first respondent to pay the award amount and dismissed the claim petition against the second respondent.

8. Aggrieved against the said award, the appellants/claimants have filed the present appeal.

9.The learned Counsel appearing for the appellants/claimants contended that P.W.3, the driver of the Van has stated that he loaded the vegetables belonging to the deceased and the deceased was travelling as owner of goods. P.W.3 is an eye witness and he deposed that the deceased travelled in the Van along with his goods as owner. The respondents have not let in any evidence to contradict the same. The Tribunal erroneously rejected the evidence of P.W.3. The notional income fixed by the Tribunal is very low. The first appellant as P.W.1 has deposed that the deceased was earning Rs.250/- per day. No contra evidence was let in by the respondents. The vehicle was insured with the second respondent. The second respondent is liable to pay compensation to the third party and violation of policy condition by owner of vehicle cannot be put against the third party victim. Both this Court and the Hon'ble Apex Court have directed the Insurance Company even when there was violation of policy condition, to pay the compensation at the first instance and recover the same from the owner of the goods.

10.Per contra, the learned counsel appearing for the second respondent contended that the evidence of P.Ws.1 & 3 shows that the deceased did not travel as owner of goods. The Investigating Officer, who was examined as R.W.1, has not mentioned about the vegetables being transported and that the deceased travelled as owner of goods in the Van at the time of accident. When the deceased travelled as gratuitous passenger, the Insurance Company is not liable to pay any compensation. When there is no liability on the Insurance Company, pay and recovery cannot be ordered. The Tribunal has considered the judgment on this point and exonerated the second respondent Insurance Company and prayed for dismissal of the appeal.

11. I have heard the learned counsel appearing for the appellant and the second respondent and also perused the materials on record.

12. Though notice was served on the first respondent and her name is also printed in the cause list, she has not chosen to appear either in person or through counsel.

13. The first point to be considered in this appeal is whether

the deceased travelled in the goods vehicle as owner of his goods or whether he travelled as gratuitous passenger. The first appellant gave evidence as P.W.1. She deposed that the deceased travelled as owner of the goods at the time of accident. Similarly, P.W.3 also deposed that the deceased travelled as owner of goods and P.W.3 only loaded the vegetables belonging to the deceased. Both P.W.1 and P.W.3 are interested witnesses. The evidence of P.W.1 is hearsay, as she did not have any personal knowledge as to whether the deceased travelled on that day or not. P.W.2, who is an eye witness, has not deposed anything about the goods carried on in the offending vehicle on that day. No other independent witness was examined to prove that the deceased was travelling in the vehicle along with his goods. The Tribunal considering the evidence on record, held that the deceased travelled only as a gratuitous passenger. There is no reason to interfere with the said finding, as the Tribunal has considered the evidence and has given valid reason for such conclusion.

14.Whether gratuitous passenger is entitled to get compensation from the Insurance Company is no longer res integra. The Judgment of Division Bench of this Court in **2009(1) TNMAC 1 (FB) (United India Insurance Co. Ltd., vs. Nagammal & others)** held that insurance Company is not liable to pay any compensation to the victim or legal heirs of the deceased gratuitous passenger. This Judgment has been followed in number of subsequent cases. The learned counsel for the second respondent also relied on the judgment of the Hon'ble Apext Court reported in **2004(1) TNMAC SC Pg 1** (***National Insurance Co. Ltd. v. Baljit Kaur)*** and full Bench Judgment of this Court reported in **2009(1) TNMAC 1 (FB) (United India Insurance Co. Ltd., vs. Nagammal and others)** wherein it has been held that Insurance Company is not liable to pay compensation to the gratuitous passenger. In view of judgements referred to above, the conclusion of Tribunal that the second respondent insurance company is not liable to pay compensation is valid and legal. Once it is held that insurance company is not liable to pay compensation, principle of pay and recovery is also not applicable.

15.In the result, the Civil Miscellaneous Appeal is dismissed. No costs.

Sd/-
Assistant Registrar (CS-II)

/True Copy/

Sub Assistant Registrar (CS-I)

To

The Principal District Judge,
Motor Accidents Claims Tribunal,
Tiruchirappalli.

Copy To:-

The Record Keeper,
V.R.Section,
Madurai Bench of Madras High Court,
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+ 1 CC TO Mr.T.SENTHIL KUMAR, ADVOCATE IN SR No. 80722
+ 1 CC TO Mr.D.SIVARAMAN, ADVOCATE IN SR No. 80505

AM
TE/SKN/SAR-1 : 11/10/2018 : 5P/6C

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