IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 07.03.2019

Pronounced on : 18.03.2019

CORAM:

THE HONOURABLE Mr.JUSTICE RMT.TEEKAA RAMAN

C.M.A.No.966 of 2011
and
MP.No.1 of 2011

M/s ICICI LOMBARD GENERAL INSURANCE CO.,LTD.,
Swarnambigai Plaza,
Omalur Main Road,
Salem - 636 009. ... Appellant/2nd Respondent

Versus

1.Yashoda

2.Sakthivel
3.Pachiammal
4.Senthil
5.Nanjappan .. Respondent/ Petitioner
6.S.Devan
[R6 set exparte in Lower Court]... Respondent/ 1st Respondent

Prayer : Civil Miscellaneous Appeal filed under Section 173 of the Motor Vehicles Act, 1988, against the Judgment and Decree dated 22.09.2010 made in M.C.O.P.No.813 of 2007 on the file of the Motor Accident Claims Tribunal (I Additional District Judge) at Salem.

For Appellant : Mrs.R.Sreevidhya
For Respondents : Mr.S.Kalyanaraman (forR1 to R5)
: Exparte (for R6)

JUDGMENT

The present appeal has been filed by the Insurance Company challenging the award dated 22.09.2010 passed in M.C.O.P.No.813 of 2007 on the file of the Motor Accident Claims Tribunal (I Additional District Judge) at Salem in so far as it relates to fastening liability on them.

2.The respondents 1 to 5 are the claimants, before the Tribunal, who are the legal heirs of the deceased one Sithan. The claim petition had been filed by the claimants alleging that on 30.04.2007 at about 1.00 pm., while the said Sithan was travelling as a load man in the first respondent's vehicle viz., TATA Ace Tempo bearing Regn.No.TN-29-AA-7772, owned by the 6th respondent herein and insured with the appellant/insurance company. When the vehicle was proceeding from Arakasanahalli to Kadathikuttai, the driver of the said

Tempo had driven the vehicle in a rash and negligent manner in a slope road near Kattumariamman Kovil, lost his control, resulting in the tempo turned on the left side of the road and fell into a ditch. In the said accident, the deceased sustained fatal injuries. He was taken to Dharmapuri Government Hospital, but he died inspite of the treatment. The deceased was a load-man and was earning a sum of Rs.100/- daily and Rs.50/- as batta. The claimants, being the legal heirs of the deceased, claimed a sum of Rs.7 Lakhs as compensation.

2.The first respondent/6th respondent herein remained exparte before the Tribunal.

3.The Insurance company denied the manner of accident and specifically pleaded that the deceased Sithan traveled in the said TATA Ace Tempo as an unauthorized/gratuitous passenger and as such, the claimants are not entitled for any compensation. According to the Insurance Company, the vehicle in question is a goods vehicle in which passengers are not permitted to travel, except load man and cleaner. Therefore, according to the Insurance Company, when there is a breach of policy condition, the insurance company cannot be mulcted with any liability to pay compensation to the claimants.

4.Before the Tribunal, on the claimants side, PW.1/Sakthivel and PW.2/Palani were examined and Ex.P1 to P4 were marked. On the respondents side, three witnesses were examined as RW.1 to RW.3 and four documents were marked as Ex.R1 to R4.

5.After analyzing the oral and documentary evidence adduced on either side, the Tribunal has awarded a sum of Rs.3,51,000/- as compensation and directed the insurance company to deposit the award amount and recover the same from the owner of the vehicle. Aggrieved over the same, the insurance company has filed this present appeal.

6.The learned counsel appearing for the insurance company would contend that at that time of accident, the driver of the TATA Ace Tempo did not posses valid driving licence and the deceased travelled as gratuitous passenger. When there is a violation or breach of condition of the policy, the appellant/Insurance company cannot be mulcted with the liability to pay the compensation amount.

7.Heard both sides and perused the materials available on record.

8.It is seen that while the deceased was traveling in the TATA Ace Tempo, the driver of the said Tempo, drove the vehicle in a rash and negligent manner, turned the vehicle on the left side of the slope road and lost his control and fell down into the ditch, thereby, the deceased Sithan sustained fatal injuries and died. Hence, the findings of the Tribunal stating that the accident took place due to the rash and negligent driving of the driver of the tempo owned by the first respondent/6th respondent herein requires no interference and it is hereby confirmed.

9.It is contended by the learned counsel for the appellant/insurance company that as per the evidence of RW.3/Junior Assistant of RTO Office, Dharmapuri, the driver of the TATA Ace tempo did not posses valid license at the time of accident. It is seen from the records under Ex.R2/ Notice, issued to the owner of the vehicle and the driver of the vehicle, for the production of the valid driving licence and the same was served, which could be evident from the postal acknowledgment card, which was marked as Ex.R3 series. Furthermore, RW.3/ Junior Assistant of the RTO has categorically stated that the driver possessed valid license at that time of accident. In view of the factual position as could be seen from the documentary evidence Ex.R3, R4 and the statement of the RTO office staff/RW.3, the finding as regards possession of valid driving licence by the driver of the vehicle is hereby confirmed.

10.The learned counsel for the appellant/ insurance company would contend that the insurance company cannot fastened with the liability to pay the compensation amount and to recover it from the owner when there is a breach of policy condition. According to the counsel for the appellant, even as per Ex.P1/First Information Report, 28 persons traveled in the said vehicle and the time of accident and it is also admitted that the vehicle is goods carrying vehicle. It is also claimed that the deceased travelled as an unauthorized passenger/ gratuitous passenger. Hence, the insurance company has to be exonerated from any liability.

11.This Court has given its anxious consideration to the said contention raised by the appellant counsel. On perusing of Ex.P1/FIR, it is seen that 25 persons travelled in the said TATA Ace tempo at that time of accident. It remains to be stated that RW.2/Dr.Gowri Shankar, who examined on behalf of the insurance company has clearly stated in his deposition on 30.04.2007, that in between 1.45 pm, to 4.20 pm, 28 persons were brought for treatment for the injuries sustained in the road accident. Therefore, it is clear that at the time of accident, 28 persons travelled in the said vehicle Admittedly, as per Ex.R1/Insurance policy the vehicle has been insured to cover a driver, cleaner and a load man in the vehicle. The insurance company is unable to make any submissions as to whether any other claim petition before the Tribunal. In view of the specific evidence of RW.2/Doctor to the effect that 28 persons came for treatment for the injury it is clear that there is a policy violation on the part of the owner of the vehicle in using the vehicle for the purpose other than the one stated in the insurance company. At the same time, since, the deceased Sithan was stated to have traveled as a load man, not as unauthorized passenger, the Tribunal has rightly come to the conclusion is that he comes within the coverage of Insurance Policy, however, the Tribunal, while confirming the said finding, assigned difference reasons, as narrated supra.

12.As regards the claim of the Insurance Company that when once they have established their defence, they need not be mulcted with liability to pay the compensation amount to the claimants and to recover it from the owner, the Full Bench of the Honourable Supreme Court in the case of Pappu and others Vs. Vinod Kumar Lamba and another reported in 2018 (2) CTC 232 has specifically held that even though there is a breach of policy condition, yet it is the Insurance Company which has to pay the compensation amount to the claimants and thereafter recover it from the owner of the vehicle. In paragraph 14 of the said Judgment, it is held as follows:

> "14. The next question is: Whether in the fact situation of this case the Insurance Company can be and ought to be directed to pay the claim amount, with liberty to recover the same from the Owner of the vehicle (Respondent No.1)? This issue has been answered in the case of National Insurance Co.Ltd., (supra). In that case, it was contended by the Insurance Company that once the defence taken by the Insurer is accepted by the Tribunal, it is bound to discharge the Insurer and fix the liability only on the Owner and/or the Driver of the vehicle. However, this Court held that even if the Insurer succeeds in establishing its defence, the Tribunal or the Court can direct the Insurance Company to pay the Award amount to the Claimant(s) and, in turn, recover the same from the Owner of the vehicle."

Thus, this Court finds that the accident has taken place due to rash and negligent driving of the driver of the lorry and the driver has valid and effective driving licence and the injured/claimant had travelled as loadman and hence, the order of the Tribunal is in order and does not call for any interference.

14.In the result, the Civil Miscellaneous Appeal is dismissed. The appellant/Insurance Company is directed to deposit the amount as determined by the Tribunal together with interest, after adjusting amount, if any, already deposited within a period of eight weeks from the date of copy of this Judgment. On such deposit, the respondents/ claimants are permitted to withdraw the same with accrued interest, less the amount if any, already withdrawn. No costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar(CS)

//True Copy//

Sub Assistant Registrar

klt
To

1.The Motor Accident Claims Tribunal
(I Additional District Judge) at Salem.

+1cc to Mrs.R.Sreevidhya, Advocate SR.No.26434
+1cc to Mr.S.Kalyanaraman , Advocate SR.No. 26090

CMA.No.966 of 2011
and
MP.No.1 of 2011

A.SK(13/06/2019)