IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 25.02.2020

CORAM:

THE HONOURABLE MRS.JUSTICE V. BHAVANI SUBBAROYAN

CMA Nos.2119, 2120 and 2121 of 2010
and
M.P.Nos.1, 1 and 1 of 2010

M/s.United India Insurance Company Ltd.,
by its Branch Manager, Branch Office-4
1940-B, Trichy Road,
Ramanathapuram,
Coimbatore. ... Appellant/2nd Respondent in all CMAs

vs.

Minor Santhoshkumar,
rep. by next friend Guardian,
Father Vijayabaskar ... 1st Respondent/Claimant in CMA No.2119 of 2010

Minor Balaji,
rep. by next friend Guardian,
Father Vimalnath ... 1st Respondent/Claimant in CMA No.2120 of 2010

V.Shanthi ... 1stRespondent/Claimant in CMA No.2121 of 2010

Chandiramani
(R-2 set exparte in the Lower Court) ... Second Respondent/1st Respondent in all CMAs

Common Prayer: Civil Miscellaneous Appeals filed under Section 173 of M.V.Act, 1988, against the Judgments and Decrees dated 19.05.2008 on the file of the Motor Accident Claims Tribunal (Chief Judicial Magistrate) at Salem, in MCOP No.476/2004, MCOP No.478/2004 and MCOP No.479/2004 respectively.

For Appellant in all CMAs : Mrs.R.Sree Vidhya

For Respondents in all CMAs : R1 – served – name printed - NA
Mr.M.Parthasarathy for R2

COMMON JUDGMENT

All the appeals are arising out of the same accident, this Court is disposing of all the Civil Miscellaneous Appeals by a Common Judgment.

2.These appeals have been filed against the Judgments and Decrees dated 19.05.2008 on the files of the Motor Accident Claims Tribunal (Chief Judicial Magistrate) at Salem, in MCOP Nos.476/2004, 478/2004 and 479/2004.

3.On 02.05.2004, at about 1.00 pm petitioner in MCOP No.479/2004, minor Santhoshkumar in MCOP No.476/2004 and minor Balaji in MCOP No.478/2004 were travelling in mini auto bearing Registration No.TN-38-P-9871 and the same was driven by the second respondent. The accident had occured due to the fact that the vehicle was driven by the driver in a rash and negligent manner. The vehicle bearing Registration No.TN-38-P-9871 owned and driven by the second respondent insured with the Appellant/ Insurance Company.

4.In MCOP No.479/2004, Shanthi sustained major injuries and was admitted in KPS Hospital thereafter admitted in Salem Chellappa Hospital. She was 36 years at the time of accident. She was working as a Cable TV operator and earning Rs.4,000/- per month. Due to the accident, she was unable to work as before.

5.In MCOP No.476/2004, minor Santhoshkumar aged 13 at the time of accident. He was studying eighth standard in a school. In accident, Santhoskumar sustained major injury on his left shoulder, due to that, he lost retention and unable to concentrate on education.

6.In MCOP No.478/2004, minor Balaji aged 16 at the time of accident. He was working as a salesman in a ready made shop and was earning Rs.3,000/- per month. In accident, Balaji sustained major injury on his left hand, due to that Balaji was unable to continue his job.

7.The Tribunal considering the pleadings, counter pleadings and the materials produced on record has awarded a sum of Rs.1,36,819/- to V.Shanthi, 1st respondent in CMA.No.2121 of 2010, Rs.95,126/- to 1st respondent in CMA.No.2119 of 2010 and Rs.72,575/- to 1st respondent in CMA.No.2120 of 2010 and directed the appellant being Insurer of the offending vehicle to pay the same with 7.5% interest per annum from the date of claim petition till the date of realisation. Challenging the liability fixed on the Insurance Company, they have come up with these appeals.

8.On perusal of records, it is observed that on the side of claimants in all CMA, four witnesses were examined viz. Shanthi as PW1, Vijayabaskar as PW2, Vimalnath as PW3 and Dr.Rajamanikam as PW4 and 19 documents were marked as exhibits P1 to P19. On the side of the appellant, Mr.Marimuthu was examined as witness and copy of Insurance Policy was marked as exhibit.

9.The learned counsel for the appellant submitted that the learned Tribunal has erred in directing the appellant to satisfy the award and to recover the same after giving a finding that the victims were unauthorised passengers and were not required to be covered. The learned Tribunal has failed to note that the three wheeler auto was authorized to carry only 2 persons (including driver one more coolie) but it was carrying 5 passengers at the time of the accident.

10.The learned counsel for the appellant further submitted that the Tribunal failed to note that when the risk was not required to be covered under M.V.Act, and not covered under the Policy, the direction to pay and recover cannot be made and failed to appreciate the ruling of Hon'ble Full Bench of this Hon'ble Court. The learned Tribunal has failed to note that the Art.142 of Constitution cannot be invoked by the Tribunal and Apex Court had referred the same to a larger Bench and so far this claim is concerned, it is covered by several decisions of Hon'ble Apex Court and the learned Tribunal ought to have exonerated the appellant herein.

11.The learned counsel for the second respondent relying upon the judgment of the Hon'ble Supreme Court in the case of Anu Bhanvara, etc vs. Iffco Tokio General Insurance Co. Ltd and others reported in 2019 (2) TN MAC 433 (SC), held that for gratuitous passengers in goods vehicle, the High Court has exonerated the insurer, holding owner and driver of goods vehicle liable to pay compensation. Appeal filed against the said order and the contention was that vehicle insured with insurer, principle of pay and recover can be invoked for making insurer liable to pay compensation. Gratuitous passengers in the goods vehicle are young children, who suffered permanent disability of 55% to 70% due to the said accident. Considering peculiar facts and circumstances of case, invoking principle of pay and recover, insurer was directed to pay compensation and the insurer is entitled to recover award amount from driver and owner of goods vehicle in accordance with law.

12.Though notice was served and name is printed in the causelist, neither the learned counsel nor for the first respondent(s) appeared before this Court.

13.In the case before the Hon'ble Supreme Court was that two children were travelling as gratuitous passengers in the goods jeep/goods vehicle and they suffered permanent disability of amputation of wrist and another person suffered amputation of his arm upto below elbow resulting in 70% to 55% disabiltiy and the Court has stated that considering the children were travelling in the jeep as gratuitous passengers in the goods vehicle, had come to the conclusion keeping in view the peculiar facts and circumstances of this case applied the principle of pay and recover. But in the present case, this

Court is not inclined to accept the said theory as in the present case on hand, the vehicle involved is a minidoor auto, which has a seating capacity of only one person which a three wheeler and in that mother aged 36 years along with her two children were travelling as gratituous passengers in the auto, while taking a turn, the vehicle was capsized and they sustained injuries.

14.Moreover, the Insurance company has submitted that the insurance coverage is only for the goods vehicle for third party insurance and not for the passengers travelling in the said vehicle. Accordingly, they have also submitted that as per our Hon'ble Division Bench judgment in CMA Nos.1529 to 1533 of 2015 dated 24.10.2018 [Bharati Axa General Insurance Company Limited vs. Anandi & others], gratituous passengers are not entitled to receive any compensation.

15.Considering the facts and circumstances of the present case in hand and this Court being bound by the judgment of Hon'ble Division Bench of this Court cited supra in CMA Nos.1529 to 1533 of 2015 dated 24.10.2018 (Bharati Axa General Insurance Company Limited vs. Anandi & others), which squarely applies to the case on hand and coupled with the fact that the Insurance Policy covers only the third party coverage and the said vehicle is meant for only carrying goods, which is also evident from the order of the Tribunal, is of the view that the order passed by the Tribunal by directing the Insurance Company to pay the compensation and thereafter recover the same from the second respondent, alone needs interference.

16.Accordingly, the present civil miscellaneous appeals are allowed by exonerating the Appellant/Insurance Company from paying the compensation. It is needless to pointout that the claimants/first respondent are at liberty to approach the second respondent/owner cum driver of the vehicle for the compensation. The orders passed by the Tribunal in MCOP No.476/2004, MCOP No.478/2004 and MCOP No.479/2004 is modified to the extent mentioned above. Consequently, connected miscellaneous petitions are closed. No costs.

Sd/-

Assistant Registrar (CS-VIII)

//True Copy//

Sub Assistant Registrar

pam

To

1.The Motor Accident Claims Tribunal
(Chief Judicial Magistrate) at Salem.

Copy To

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

+1cc to Mr.R.Sreevidhya, Advocate, S.R.No. 16904
+3cc to Mr.Ma.P.Thangavel, Advocate, S.R.No. 16776 to 16778

CMA Nos.2119, 2120 and 2121 of 2010

SSI(CO)
GN(12/08/2021)