

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 17.09.2020	Pronounced on: 30.09.2020
-------------------------	---------------------------

CORAM

THE HONOURABLE DR. JUSTICE G.JAYACHANDRAN

C.M.A.No.1309 of 2016
& C.M.P.No.10054 of 2016

The Superintending Engineer,
Tamil Nadu Electricity Board,
Villupuram Electricity Distribution Circle,
Villupuram ...Appellant/1st Respondent

/versus/

1. Thiru.Pandurangan,
S/o.Perumal,
Se. Kunnathur Village,
Gingee Taluk, Villupuram District.
2. Tmt.Sangeetha,
W/o.Pandurangan,
Se.Kunnathur Village,
Gingee Taluk, Villupuram District. ...Respondents/Claimants
3. The National Insurance Company Limited,
Nehru Street, Pondicherry. ...Respondent/2nd Respondent

Prayer: Civil Miscellaneous Appeal filed under Section 173 of the Motor Vehicles Act, 1988, against the Decretal order and order dated 18.07.2014 made in M.C.O.P.No.283 of 2009 on the file of the Motor Vehicle Accident Claims Tribunal, Gingee.

For Appellant : Mr.V.Viswanathan,

For R1 & R2 : M/s.Sai and Bharath,

For R3 : Mrs.Sree Vidhya

J U D G M E N T

(The case has been heard through video conference)

Heard the Learned Counsel for the Appellant and the Learned Counsel for the Respondents.

Page numbers

2. This Appeal is filed by the vehicle owner aggrieved by the award passed by the Tribunal fixing the liability on the vehicle owner though the vehicle duly insured with the 3rd respondent/Insurance Company.

3. The brief facts of the case is that, on 16.02.2009, the lorry owned by the appellant carrying electrical poles was proceeding towards Gingee to Villupuram. Near Se.Kunnathur Village, suddenly the left side rear outer wheel unfastened from the bolt and nuts pulled away from the vehicle and dashed the compound wall of the near by school and hit minor boy named Mr.Prem Kumar. The boy head got crushed and he died on the way to hospital. The parents of the deceased Minor Prem Kumar filed claim petition seeking a sum of Rs.5,00,000/- as compensation against the vehicle owner and the insurer.

4. In the said claim petition, it was specifically stated that the accident occurred due to poor maintenance of the vehicle by the owner. The left rear side outer wheel unfastened from the vehicle when the bolts and nuts got loosen. The Insurance Company alone contested the claim petition. The appellant herein remind ex parte.

5. In the counter filed by the Insurance Company, they denied the liability making specific averments as stated below:

"The 1st respondent maintains the vehicle very poor that is the only causes of the accident. This respondent furthermore submits that the accident only due to the mechanical defect of the vehicle it is also breach of the policy and terms and conditions. This accident not accrued due to rash and negligent of the driver. The petitioners claim any event of the compensation from the 1st respondent alone. The deceased Prem Kumar only five year aged child, he never earning person at the time of accident."

6. The Tribunal, after considering the oral and documentary evidence held that the accident was due to the poor maintenance of the vehicle. Relying upon the Motor vehicle Inspector report marked as Ex.P.3 it held that the vehicle was not properly maintained by its owner, therefore the insurer is not liable to indemnify. Therefore, a sum of Rs.3,16,000/- was awarded as compensation to the parents of the deceased, 5 years old Prem Kumar.

7. The owner of the lorry which is Tamil Nadu Electricity Board has preferred this appeal, challenging the liability alleging that the Tribunal has failed to apply its

Page numbers

mind while fixing the liability on the Tamil Nadu Electricity Board. The vehicle is duly insured under the 3rd respondent/Insurance Company and the victim being a third party, the insured is fully indemnified under the Policy coverage.

8. Therefore, the Tribunal ought to have held that the accident occurred due to the rash and negligently driving of the vehicle by his driver. The Learned Counsel appearing for the appellant would further submit that assuming without admitting poor maintenance there is no clause in the Insurance Policy that the insured will not indemnify the insured, in case of poor maintenance.

9. The short point involved in this case is that, whether the Insurance Company can deny the liability on the allegation of poor maintenance. In this case, the manner in which the accident occurred is not denied. The nuts pulled off from the spoiled bold while the vehicle was moving. As a result, the rear left side outer wheel has come out and moved on its own, hit the 5 years old boy playing in the school ground. How this was happened is spoken by R.W.2, the Motor Vehicle Inspector through his report Ex.P.3. In the column No.12 of the Motor Vehicle Inspector report, it is mentioned that L/S rear outer wheel pulled off, all wheel bolt thread spoiled. In the column No.19, he has mentioned that "the accident has occurred due to the mechanical defeat. Due to improper maintenance, the left side rear wheel mounting nuts got loosened and come out of bold. The vehicle bold eight in numbers with spoiled threads were seized and handed over to the Inspector of Police for inspection." Thus, it is clearly from the evidence that the wheel got released from the moving lorry due to spoiled threads of the bold and nuts. The wheel hit the minor boy, causing death the evidence clearly prove that the accident happened because the owner of the vehicle has not properly maintained the vehicle.

10. The next issue, whether improper maintenance of the vehicle will exonerate the Insurance Company.

11. On reading through the policy terms and conditions, this Court finds no clause in the policy exempting the insurer in case of poor maintenance. Except a note that the insured has not indemnified, if, the vehicle is not used for driving otherwise thus, in accordance with the schedule. D.W.1, the Assistant working in National Insurance Company, Pondicherry has deposed that the accident occurred due to poor maintenance of the vehicle. So the Insurance Company is not liable to indemnify. However, he has not placed any records to show that the Insurance Company enjoys such exemption. The vehicle had a

Page numbers

valid permit and insurance coverage. The driver of the vehicle had proper Driving License in force. No specific clause in the Insurance agreement granting exemption to the insurer from liability in case of poor maintenance and no explanation for what poor maintenance meant. On the vague allegation of poor maintenance of the vehicle will not exonerate the insurance Company to pay the third party insured/deceased.

(i). In The New India Assurance Company Limited -vs- Er.K.Jothilingam reported in 2009 TN MAC 53(DB), the Division Bench of this Court while considering a case related to mechanical failure due to ill maintenance, observed that,

"In the present case, there is no evidence that the steering wheel got stuck except for the statement of P.W.1, who himself was the driver. There is no proof that the vehicle was not maintained properly, since the owner of the vehicle was none other than the father of P.W.1, who conveniently remained ex parte. If there is no evidence to show that the deceased was maintaining the vehicle properly, the logical conclusion is not to hold that the vehicle was not being maintained properly when the evidence is not to the effect. The lack of evidence with regard to one does not automatically mean proof of the other. Therefore, we will have to hold that there is no evidence regarding the maintenance of the vehicle whether properly or otherwise."

(ii). In National Insurance Company -vs- Ammu, the Madurai Bench of Madras High Court in an unreported judgment in CMA (MD).No.209/2015 judgment, dated 12/03/2015, when defence of poor maintenance pleaded, observed that,

"Just because the front wheel axis cut off from the vehicle, it could not be inferred that it was due to the poor maintenance of the vehicle. No endeavour was made by the insurance company to examine any mechanic to establish that the accident was due to poor maintenance. Making mere allegation is not sufficient to say that the vehicle was not properly maintained and therefore, the front wheel got cut off. One could not jump to such a conclusion based on

allegations. The duty is cast on the insurance company to establish the allegation to escape the liabilities. They failed to discharge their duty. In fact, the appellant insurance company appointed an investigating officer to give a report on the investigation. The said report was marked as Ex.P R1. But, the officer, who conducted investigation was not produced for cross examination, but some other person, who has nothing to do with the same appeared and he could speak only the policy and he could not speak about the accident.

(iii). In *Minu B. Mehta and Another -vs- Balkrishna Ramchandra Nayan and Another* reported in 1977 ACJ 118 (SC) the Hon'ble Supreme Court has observed that,

"14. In order to sustain a plea that the accident was due to the mechanical defect the owners must raise a plea that the defect was latent and not discoverable by the use of reasonable care. The owners is not liable if the accident is due to a latent defect which is not discoverable by reasonable care. The law on this subject has been laid down in *Henderson v. Henry E. Jenkins & Sons* ([1970] AC 282 : [1969] 2 All ER 756). In that case the lorry driver applied the brakes of the lorry on a steep hill but they failed to operate. As a result the lorry struck and killed a man who was emerging from a parked vehicle. The defence was that brake failure was due to a latent defect not discoverable by reasonable care on driver's part. It was found that the lorry was five years old and had done at least 1, 50, 000 miles. The brakes were hydraulically operated. It was also found after the accident that the brake failure was due to a steel pipe bursting from 7 mm to 1 mm. The corrosion had occurred where it could not be seen except by removing the pipe completely from the vehicle and this had never been done. Expert evidence showed that it was not a normal precaution to do this if, as was the case, the visible parts of the pipe were not corroded. The corrosion was unusual and unexplained. An expert

Page numbers

witness said it must have been due to chemical action of some kind such as exposure to salt from the roads in winter or on journeys near the sea. The House of Lords held that the burden of proof which lay on the defendants to show that they had taken all reasonable care had been discharged. The defect remained undiscovered despite due care. As the evidence had shown that something unusual had happened to cause this corrosion it was necessary for the defendants to show that they neither knew nor ought to have known of any unusual occurrence to cause the breakdown. (See Bingham's Motor Claims Cases, Seventh Ed., p. 219).

15. The burden of proving that the accident was due to a mechanical defect is on the owners and it is their duty to show that they had taken all reasonable care and that despite such care the defect remained hidden. In this case in the written statement all that is pleaded is that the axle brake ring of the lorry came out and the driver lost control of the motor lorry and that the defect can develop in a running vehicle resulting in the driver's losing control of the steering wheel. Though it was stated that all precautions were taken to keep the lorry in a roadworthy condition it was not specifically pleaded that the defect i.e. the axle brake ring coming out, is a latent defect and could not have been discovered by the use of reasonable care. This lack of plea is in addition to the lack of evidence and the fact that the defence set up has been rightly rejected by the Tribunal."

12. In this case, this Court finds that the Tribunal has failed to consider certain facts elucidated during the cross examination. The vehicle was proceeding from Gingee to Villupuram carrying load of electrical poles. The eye witness admits that the stretch of the road near the site of accident was poor and ill-maintained. The wheel has pulled out from the vehicle only after travelling substantial distance from Gingee. Therefore, the Insurance Company cannot get exonerated from its liability on the allegation of poor maintenance.

Page numbers

13. Hence, while confirming the quantum of compensation, the Court set aside the liability fastened on the appellant and direct the 3rd respondent/Insurance Company to pay the compensation. The Insurance Company/3rd respondent shall deposit the award amount with interest @ 7.5 %, from the date of claim petition till deposit. Time to deposit is 12 weeks, from the date of receipt of a copy of this order. On such deposit the claimants 1 & 2 in this appeal are entitled to withdraw the same on filing proper application.

14. In the result, the Civil Miscellaneous Appeal is Party-Allowed. Consequently, connected Miscellaneous Petition is closed. No costs.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

bsm

To,

1. The Judge,
Motor Vehicle Accident Claims Tribunal, Gingee.
2. The Section Officer,
V.R.Section, High Court, Madras.

+lcc to M/s.T.Saikrishnan, Advocate SR.32049
+lcc to Mr.V.Viswanathan, Advocate SR.32264

C.M.A.No.1309 of 2016
& C.M.P.No.10054 of 2016

LN(CO)
CB(10/02/2021)

सत्यमेव जयते

WEB COPY

Page numbers