

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 02.01.2020

CORAM:

THE HONOURABLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

C.M.A.No.2447 of 2012
and M.P.No.1 of 2012

The National Insurance Company Ltd.,
Rep. Its Regional Manager,
No.19, Officer's Line,
Opp. Lakshmi Theatre,
Vellore-1.

... Appellant/2nd Respondent

Vs.

1. S.Kavitha

...1st Respondent/Petitioner

2. M.V.G.Prasad Reddy

...2nd Respondent/1st Respondent

Civil Miscellaneous Appeal filed under Section 173 of Motor Vehicles Act, 1988, against the award and decree dated 28.02.2007 made in M.C.O.P.No.253 of 2004, on the file of Motor Accidents Claims Tribunal (Subordinate Judge), Gudiyatham.

For Appellant : Mr.D.Bhaskaran

For Respondents : Mr.K.A.Ravindran - For R2

J U D G M E N T

This Civil Miscellaneous Appeal has been filed by the appellant Insurance Company against the award and decree dated 28.02.2007 made in M.C.O.P.No.253 of 2004, on the file of Motor Accidents Claims Tribunal (Subordinate Judge), Gudiyatham.

2.Brief facts which are necessary for disposal of this appeal are as follows:-

On 02.05.2004 at about 10.50 A.M., when the claimant/first respondent and others were travelling in a TATA Sumo bearing Registration No.AP 03 G 5119, from Paradarami to Tiruppathi near Cystain Factory in between Chandragiri to Ithepalli Road, the vehicle hit behind the rear side of the bus bearing Registration No.AP 10 Z 4925, which was standing near the

cystain factory. Due to the accident, five persons died and seven were injured and the claimant was taken to the SCRRGG Hospital, Tirupathi for treatment. Alleging that the accident was due to negligent driving of the driver of the TATA Sumo, the first respondent/claimant and other injured persons have filed a claim Petition before the Motor Accidents Claims Tribunal, Gudiyatham, Vellore under Section 166 of the M.V.Act, claiming compensation of Rs.1,00,000/- against the owner of the TATA Sumo and its insurer. The same was taken on file in MCOP. No.253 of 2004.

3.Before the Tribunal, during trial, in order to prove the case, the claimants have examined seven witnesses and marked 28 documents viz., Exs.P1 to P28. On the side of the respondents, two witnesses were examined and three documents were marked. The Tribunal, after hearing the arguments on either side and after considering the oral and documentary evidences, has come to the conclusion that the accident occurred only due to negligent driving of the driver of the TATA Sumo. As the second respondent's Sumo was insured with the appellant-insurance company, the Tribunal held that the first and second respondents are liable to compensate the claimant. After considering the oral and documentary evidence, the Tribunal has passed common order and awarded a sum of Rs.17,000/- as compensation to this claimant with interest at the rate of 6% per annum from the date of petition till the date of realization.

4. Aggrieved by the said common order dated 28.02.2007, the appellant Insurance Company has filed this appeal before this Court for reduction of the compensation.

5.The learned counsel appearing for the appellant-Insurance Company would submit that the Tribunal, by considering the evidence of PW1 and evidence of RW2, had come to the conclusion that the accident was occurred due to rash and negligent driving of the driver of the Sumo. Admittedly, the owner of the vehicle was not challenged the findings of the Tribunal. PW2, in his cross-examination, stated that he was not aware of the owner of the Car, they engaged the vehicle for hire and paid Rs.1,050/- toward hire charges. P.W.3 to P.W.5 also, in their cross examination categorically admits that they have engaged the vehicle in question for hire. On the other hand, RW1, in his cross examination, stated that 14 persons were traveled as against the seating capacity of 9. As per the policy, the vehicle cannot be used for hire. Further, the driver of the TATA Sumo has not possessed any valid driving license at the time of the accident. Hence, the owner of the vehicle is liable to pay the compensation to the claimant. Therefore, the award amount passed by the Tribunal is unfair.

6. Further the learned counsel for the Appellant would contend that the Tribunal under the impugned Award has given an erroneous finding that four children below ten years who were also occupants of the insured vehicle, at the time of the accident, cannot be treated as adults and hence, came to an erroneous conclusion that there is no violation of policy condition by the owner of the vehicle.

7. The learned counsel for the Appellant would further contend that as against the findings given by the Tribunal against the owner of the vehicle under the impugned Award, no appeal has been filed by the owner of the vehicle. The Tribunal failed to consider all these aspects and awarded a sum of Rs.17,000/- to the claimant as compensation and prayed for setting aside the award of the Tribunal.

8. Per contra learned counsel for the second respondent ie. the owner of the vehicle would submit that the claim made by the claimants in some of the appeals without impleading the APSRTC, is not maintainable. According to the learned counsel for the owner of the vehicle, only due to the rash and negligent driving of the driver of the bus, the accident had happened. The learned counsel for the owner of the vehicle would further contend that the vehicle was driver by the owner's friend K.Sundarajalu Naidu along with his family who went to Tirupathi regarding his sons matrimonial alliance.

9. According to the learned counsel for the owner of the vehicle, the appellant has not let in any evidence to prove that the vehicle was used for commercial purpose. According to the learned counsel for the owner of the vehicle, merely by lifting excess passengers, it could not be said that there is a fundamental breach of policy conditions. Accordingly to the learned counsel for the owner of the vehicle, the Tribunal has rightly excluded the four minors while calculating the number of passengers for the purpose of permit stipulation regarding seating capacity. The learned counsel for the owner of the vehicle further contended that the appellant has not placed any material from whom or where or when they got information that the vehicle was on hire.

10. The learned counsel for the owner of the vehicle would further contend that the respective claimants have not pleaded in their claim petition filed before the Tribunal that they have taken the car for hire. According to the learned counsel for the owner of the vehicle, when the Appellant/insurance company has not pleaded that the vehicle was used for commercial purpose,

they have to prove the same. But before the Tribunal, the Appellant has not produced any material to establish that the vehicle was hired on commercial basis.

11. The learned counsel for the owner of the vehicle would further contend that the Appellant cannot rely upon the deposition of PW2, PW3 to PW5 and the Appellant's witness to come to the conclusion that the vehicle was given on hire, at the time of the accident. The learned counsel for the owner of the vehicle also drew the attention of this Court to the pleadings in the claim petition and submitted that the pleading does not state that the vehicle was being used on hire at the time of the Accident.

12. The learned counsel for the owner of the vehicle also contended that the owner of the vehicle filed C.D.No.93 of 2005 on the file of the District Consumer Disputes Redressal Forum, Chittoor claiming Rs.3,00,000/- towards damage to the vehicle. The learned counsel for the owner of the vehicle further contended that the Appellant took a stand before the District Consumer Disputes Redressal Forum, Chittoor that the owner has violated the policy condition so they are not liable. But the District Consumer Disputes Redressal Forum, Chittoor relying on the deposition of Karthi (PW3) and Balaji (PW5) that they did not pay any hire charges and awarded Rs.74,000/- as compensation towards damage to the vehicle.

13. According to the learned counsel for the owner of the vehicle, before the Tribunal, PW3 Karthi deposed that they have paid Rs.1,050/- and diesel has to be filled up by the owner of the vehicle. It is very clear from the evidence that excluding diesel they have paid only Rs.1,050/-. The learned counsel for the owner of the vehicle further submitted that the distance between Paradami to Tirupati is nearly 115 km and so up and down it comes to 230 kms. The learned counsel for the owner of the vehicle submitted that the diesel per litre in the year 2004 was Rs.35.48 and the Tata Sumo car could ply for 10kms. per litre. For covering 230 kms. in Tata Sumo car, it requires nearly 23 litres diesel. So, According to the learned counsel, towards cost of diesel, engine oil, break oil etc., the owner of the vehicle has been paid only Rs.1,050/-, whereas it would have cost much more. According to him, it can be inferred that the vehicle was not used for commercial purpose.

14. The learned counsel for the owner of the vehicle further submitted that the insurance policy is a package policy (comprehensive policy) and therefore, the Appellant is liable to pay the entire extent of liability incurred by the insured. The learned counsel for the owner of the vehicle drew the attention of this Court to the Judgment of the Hon'ble Supreme Court in

the case of B.V.Nagarajan vs. Oriental Insurance Company Limited reported in 1997 (1) MLJ 5 that the use of vehicle may be irregular, but no fundamental breach of contract has been committed by the owner of the vehicle to dissentitle the insured from being indemnified for the damage caused to the vehicle. The learned counsel for the owner of the vehicle also drew the attention to a Division Bench Judgment of this Court in the case of Royal Sundaram Alliance Insurance Co. Ltd., vs. A.Meenakshi and others reported in 2009 (1) TNMAC 249 and submitted that since subject insurance policy is a comprehensive policy, the Appellant is liable to compensate the respective claimants. The learned counsel for the owner of the vehicle concluded by submitting that the Tribunal under the impugned Award has rightly not granted pay and recovery rights to the Appellant.

15. This Court after having considered the materials available on record and after examining the impugned Award and after hearing the submissions of the respective counsels, observes the following:

a) The instant appeal has been filed by the insurance company challenging the findings of the Tribunal in not granting pay and recovery rights.

b) It has been the consistent stand of the Appellant that the insured vehicle carried more passengers than what was sanctioned under the permit. They have taken this defence in their counters filed before the Tribunal. It is an admitted fact that the seating capacity of the Tata Sumo (insured vehicle) is 9+1. But at the time of the accident, fourteen passengers travelled in the said vehicle. It has also been the consistent stand of the Appellant before the Tribunal that only due to overloading of persons, the accident had happened. It is also the consistent stand of the Appellant before the Tribunal that the Tata Sumo (insured vehicle) which is a private vehicle was used for commercial purpose by the insured (owner) at the time of the accident and therefore, he has violated the terms and conditions of the insurance policy. RW1, Mani vel, the Appellant's witness before the Tribunal has also deposed that fourteen persons travelled in the Tata Sumo (insured vehicle). He has also deposed that the vehicle is a private vehicle but used for commercial purpose by letting the vehicle on hire to passengers. He has also deposed that under Ex.R1, the Insurance Policy, only five persons were covered for personal accident and liability is only upto Rs.2,00,000/- and 9+1 persons alone are permitted to travel. The witnesses on the side of the claimants before the Tribunal have also deposed that the persons travelling in the Tata Sumo (insured vehicle) paid hire charges to the owner of the vehicle. Even though the owner of the vehicle filed his counter to all the claim petitions, he did not

let in any oral or documentary evidence on his side to disprove the contention of the Appellant insurance company that the insured vehicle was used for commercial purpose by the owner of the vehicle at the time of the accident.

c). It is also an admitted fact that only 9+1 persons can travel in the Tata Sumo (insured vehicle), but admittedly, fourteen persons were travelling in the insured vehicle at the time of the accident. The permit does not give any exemption for minors while calculating the number of persons. But under the impugned Award, the Tribunal has exempted four minors who travelled in the Tata Sumo (insured vehicle) from being counted as persons for the purpose of calculating the total number of persons who travelled in the Tata Sumo (insured vehicle) at the time of the accident. The Tribunal has not given its finding as to how it has come to such a conclusion. In the considered view of this Court, the permit stipulating number of persons does not differentiate between adults and minors. It merely states that total number of persons allowed to travel in the Tata Sumo (insured vehicle) is 9+1 i.e., nine persons apart from the driver. In the instant case, Tata Sumo (insured vehicle) carried fourteen persons which has also not been disputed by the owner of the said vehicle before the Tribunal as well as this Court.

d) Without any basis, the Tribunal has given an erroneous finding that four children below ten years who were travelling in the Tata Sumo (insured vehicle) at the time of the accident, cannot be treated as persons travelling in the said vehicle and therefore, based on the said erroneous finding, the Tribunal has held that there is no violation of policy condition committed by the owner of the said vehicle.

e) Under the impugned Award, the owner of the vehicle has also been held to be jointly and severally liable to pay respective claimants the compensation amount awarded by the Tribunal. No appeal has been filed by the owner of the vehicle challenging the common award passed against him as well as the Appellant. Therefore, as regards the owner of the vehicle, the findings of the Tribunal have become final.

f) Excepting for objecting the pay and recovery rights in favour of the Appellant in this appeal, the owner of the vehicle has not let in any oral or documentary evidence before the Tribunal or not filed any application seeking permission of this Court to raise any additional evidence before this Court.

g) From the above observations, it is clear that the owner of the vehicle has committed violation of conditions of the insurance policy by letting the Tata Sumo (insured vehicle) to carry persons more than permissible limit and also using the private vehicle for commercial purpose.

h) The Judgments reported in 2013(1) TNMAC 731 (DB), 2018 (2) TNMAC 151 (SC) and 2004 (1) TN MAC 211 (SC) relied upon by the learned counsel for the Appellant in his submissions are squarely applicable to the facts of the instant case.

i) The Award passed by the Consumer Court awarding compensation towards damage to the vehicle in favour of the owner of the vehicle in C.D.No.93 of 2005 was never produced before the Tribunal and therefore, the said Award of the Consumer Court cannot be looked into by this Court in the instant Appeals.

j) The Judgment of the Hon'ble Supreme Court relied upon by the owner of the vehicle reported in 1997 (1) MLJ 5 is not applicable to the facts of the instant case, since the claim in the said reported case was a consumer claim and not a motor accident claim. Further, in the instant case, the liability of the Appellant insurance company to pay the respective claimants has not been exonerated. But due to the policy violation committed by the owner of the vehicle (insured), the interest of the Appellant will have to be protected by permitting them to recover

the compensation amount paid to the respective claimants from the owner of the vehicle (insured).

16. In the light of the above observations, this Court is of the considered view that the Tribunal ought to have granted pay and recovery rights to the Appellant, under the impugned Award which erroneously was not granted.

17. In the result, the Appeal is partly allowed by directing the Appellant to deposit the compensation amount awarded by the Tribunal together with interest, if not already deposited, to the credit of MCOP.No.253 of 2004, within a period of six weeks from the date of receipt of a copy of this Judgment.

On such deposit being made, the claimant is permitted to withdraw her compensation amount together with the accrued interest lying to the credit of the MCOP by filing appropriate application and the Appellant is permitted to recover the amount deposited by them to the credit of MCOP.No.253 of 2004 in the same proceedings from the owner of the vehicle, M.V.G.Prasad Reddy (insured) in accordance with law. Consequently connected miscellaneous petition is also closed. However, there shall be no order as to costs.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

To

The Subordinate Judge,
Motor Accidents Claims Tribunal,
Gudiyatham.

Copy to

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

+1cc to Mr.D.Bhaskaran, Advocate Sr. 189

C.M.A.No.2447 of 2012
and M.P.No.1 of 2012

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