

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 06.03.2020

CORAM:

THE HONOURABLE MR.JUSTICE S.M.SUBRAMANIAM

C.M.A.NOS.2241 AND 2242 OF 2016

AND

C.M.P.NOS.15892 AND 15893 OF 2016

The Oriental Insurance Co., Ltd.,
Shoba TSM Complex, R.S.Road,
Opp.Town Railway Station,
Palghad, Kerala State.

... Appellant/2nd Respondent
(in both C.M.As)

Vs.

1.M.Arul @ Arulkumar

... 1st Respondent/Petitioner
(in C.M.A.No.2241 of 2016)

1.Sathish @ Sathishkumar

... 1st Respondent/Petitioner
(in C.M.A.No.2242 of 2016)

2.M/s.Maruthi Saw Mills,
No.2/274B, Harbour Express Road,
Thoothukudi.

... 2nd Respondents/
1st Respondent (in both C.M.As)

Common Prayer:

The Civil Miscellaneous Appeals filed under Section 173 of Motor Vehicles Act, 1988, against the judgment and decree dated 27.2.2015 passed in M.C.O.P.Nos.183 & 199 of 2013 on the file of the Motor Accidents Claims Tribunal, Subordinate Judge, Gobichettipalayam.

For Appellant : Mr.S.Arun Kumar
(in both C.M.As)

For Respondents: Mr.Ma.Pa.Thangavel for R1
(in both C.M.As)
No appearance for R2
(in both C.M.As)

COMMON JUDGMENT

These appeals on hand are filed against the common judgment and decree passed in M.C.O.P.Nos.183 of 2013 and 199 of 2013 dated 27.02.2015.

2.The Oriental Insurance Company is the appellant before this Court and the liability on the Insurance Company is raised in these appeals.

3.The learned counsel appearing on behalf of the appellant/2nd respondent mainly contended that the Motor Accidents Claims Tribunal itself arrived at a conclusion that the insured has violated the policy conditions by using the goods vehicle to carry passengers and therefore, the Tribunal has committed an error in directing the Insurance Company to pay the compensation, instead of recovering the same from the 2nd respondent, who is the owner of the vehicle. As per the evidence recorded by the Tribunal, six persons were travelling unauthorisedly in the goods carrier, which is beyond the permit and therefore, the Insurance Company is not liable to pay compensation. Ex.P.1, which was inferred by the Tribunal portrays that the first respondent/claimants fully knowing well the consequences had chosen to travel in the goods vehicle instead of using public transport services and therefore, the 1st respondent/claimant in both appeals are not entitled for compensation as the appellant/Insurance Company is not obligated to pay the compensation.

4. The learned counsel for the appellant relied on the copy of the First Information Report, wherein it is stated that six persons travelled in the goods vehicle. As per the seating capacity of the goods vehicle, which met with an accident, 1+ 2 alone is permitted and 3 persons were travelled over and above the permit and thereby, the statutory provisions are violated and the policy conditions are also breached. Thus, the appellant/Insurance Company is not liable to pay the compensation. When there is a statutory violation that those, passengers who travelled in a goods carrier as gratuitous passengers, the Insurance company is not liable to pay compensation. Though, the Tribunal arrived such a finding instead of fixing the liability on the owner of the vehicle erroneously directed the appellant/Insurance Company to pay the compensation. Thus, the judgment and the decree of the Tribunal is perverse and not in consonance with the legal principles and further in violation of the terms and conditions of the policy.

5.The learned counsel for the appellant solicited the attention of this Court regarding the findings of the Tribunal,

wherein it is stated that according to P.W.1 and P.W.2 the accident occurred only due to rash and negligent driving of the driver of the lorry bearing Registration No.TN-69-J-4771. Whereas, according to the 2nd respondent/Insurance Company the accident was not occurred due to rash and negligent driving of the lorry, but due to the over load in the lorry involved in the accident. To substantiate their version that the accident has occurred only due to the over load in the lorry, the 2nd respondent/Insurance Company has examined their assistant as R.W.1. The said R.W.1 has deposed that the lorry involved in the accident TN-69-J-4771 is a goods carrier. R.W.1 has deposed that the seating capacity in the lorry is only three persons including the driver. Thus, the evidence of R.W.1 with reference to the registration certificate also reveals that the seating capacity of the vehicle has been mentioned only as three including the driver. However, at the time of accident six persons travelled in the cabin by sitting above the timber load in the lorry. R.W.1 has contended that since the petitioners/claimants travelled in the lorry as gratuitous passengers, the owner of the lorry has violated the policy conditions and that the 2nd respondent / Insurance Company is not liable to pay compensation to the petitioners.

6.The claimants filed a proof affidavit stating that they travelled as load men at the time of accident. However, they failed to mention the same in the complaint. R.W.1 further deposed that even if the petitioners are the load men as per the policy conditions, the 2nd respondent/Insurance Company is liable to pay compensation to the claimants only if the accident is occurred at the time of loading or unloading. However, the accident in the present case is occurred, when the claimants were travelling in the lorry. Thus, the Insurance Company is not liable to pay compensation.

7.Ex.R.1 is a copy of the Insurance Policy issued for lorry bearing Registration No.TN-69-J-4771. Ex.R2 is the copy of the registration certificate and as per the registration certificate, permit is granted only for three persons including driver in the lorry which met with an accident.

8.The Tribunal further arrived at a conclusion based on the deposition as well as the evidences that the claimants travelled in the lorry as gratuitous passengers. Even in the First Information Report Ex.P1, the petitioners not stated that they have travelled in the lorry as load men. Considering the oral evidences of P.W.1, P.W.2 as well the documentary evidences of Ex.P1, P3 to P7 and considering the oral evidence of R.W.1, the Tribunal arrived at a conclusion that the owner of the lorry the first respondent before the Tribunal had violated the policy conditions and accordingly, held that the first respondent owner

of the lorry is solely liable to pay compensation to the claimants.

9.While, arriving at a conclusion that the owner of the lorry is responsible and liable to pay compensation, the Tribunal granted pay and recovery considering the fact that the policy was in existence and therefore, the appellant/Insurance Company has to pay the compensation and recover the same from the owner of the vehicle.

10.The learned counsel for the appellant contended that the liability itself is questioned and the Tribunal found that the claimants are gratuitous passengers and further the permit in the goods carrier is only for three persons and there is violation of the permit conditions that six persons were travelled, under those circumstances, the order of pay and recovery is not in consonance with the legal principles settled in this regard.

11. In support of his contention, the learned counsel for the appellant relied upon Rule 236 of Tamil Nadu Motor Vehicles Rules and stated that 'No person shall be carried in the cabin of a goods carriage beyond the number for which there is a seating accommodation at the rate of thirty eight centimeters measured along the seat, excluding the space reserved for the driver, for each person and not more than six persons in all in addition to the driver shall be carried in any goods carriage'.

12. The learned counsel appearing on behalf of the 1st respondent/ claimants disputed the said contentions by stating that the claimants were travelling as load men and they have stated before the Tribunal also that they were travelled as load men. When the policy was in existence and six persons were travelled in a goods carrier, more specifically, as load men, then there is no reason to interfere with the findings of the Tribunal and the award of compensation. The Tribunal has rightly arrived at a conclusion that the owner of the vehicle though responsible to pay compensation, in view of the fact that the appellant/Insurance Company has to pay and recover based on the insurance policy, which was in force at the time of accident. The grounds raised in the present appeal deserves no merit consideration. In support of his contentions the learned counsel for the claimant cited the judgement of the Hon'ble Supreme Court of India in the case of Lakshmi Chand V. Reliance General Insurance reported in 2016(1) TN MAC 426 (SC) and the relevant paragraph no.16, is extracted hereunder :

"16.It becomes very clear from a perusal of the above mentioned case law of this Court that the Insurance Company, in order to avoid liability must

not only establish the defence claimed in the proceeding concerned, but also establish breach on the part of the owner/insured of the vehicle for which the burden of proof would rest with the Insurance Company. In the instant case, the Respondent-Company has not produced any evidence on record to prove that the accident occurred on account of the overloading of passengers in the goods carrying vehicle. Further, as has been held in the case of B.V.Nagaraju (Supra) that for the Insurer to avoid his liability, the breach of the policy must be so fundamental in nature that it brings the contract to an end. In the instant case, it is undisputed that the accident was in fact caused on account of the rash and negligent driving of the offending vehicle by its Driver, against whom a Criminal case vide FIR No.66 of 2010 was registered for the offences referred to supra under the provisions of the Indian Penal Code. These facts have not been taken into consideration by either the State Commission or National Commission while exercising their jurisdiction and setting aside the Order of the District Forum. Therefore, the Judgment and Order of the National Commission dated 26.4.2013 passed in the Revision Petition No.2032 of 2012 is liable to be set aside, as the said findings recorded in the Judgment are erroneous in law."

13. In the case of Manjula & Others Vs.M.Sakthivel & Another reported in CDJ 2018 MHC 6980, the Madurai Bench of Madras High Court, held as follows :

"25. In the said judgments, this Court held that as per Section 147(1) of the Motor Vehicles Act as well as IMT:37-A, the owner or authorised representative of goods is entitled to claim compensation from the Insurance Company and the Insurance Company is liable to pay compensation. This Court, in the judgment dated 25.09.2014, made in C.M.A.No.2825 of 2010 referred to above, elaborately considered the scope of Rule 236 of Tamil Nadu Motor Vehicles Rules. This Court held that as per the said Rule, six persons can travel along with their good. Once six persons are permitted to travel along with the goods as per the said Rule, some of the persons have to travel only in the backside of the vehicle as only three persons can travel in the Cabin. In view of the same, the contention of the learned counsel for the second respondent that the deceased Tamilselvan travelled in the backside of the goods vehicle as an unauthorised passenger and therefore, the second

respondent Insurance Company is not liable to pay compensation, is without merits.

26. The Tribunal has failed to consider Section 147(1) of the Motor Vehicles Act and Rule 236 of Tamil Nadu Motor Vehicles Rules and IMT.37-A. As per the above provision, the owner of goods, even if he travels in the backside of the goods vehicle along with his goods, is entitled to claim compensation from the Insurance Company for the injuries and his legal heirs are entitled to claim compensation from the Insurance Company for the death."

14. Yet another judgment from the High Court of Gujarat at Ahmedabad in the case of National Insurance Company Ltd., Vs. Lakhuben Punabhai Vaghari and others, the High Court held as follows :

"(62) The proposition of law is no longer res Integra that the person who alleges breach must prove the same. The Insurance Company is, thus, required to establish the said breach by cogent evidence. In the event the insurance company fails to prove that there has been breach of conditions of insurance policy on the part of the insured, the insurance company cannot be absolved of its liability.

7. Applying the ration of the law laid down by the Supreme Court, as referred to above, it is evident that the appellant, in the present case has failed to lead any evidence in order to prove that the deceased persons were gratuitous passengers who were travelling in an unauthorised manner in the truck and without any goods. The specific averment in the claim petition that the deceased persons were travelling in the truck along with their goods has not been dislodged during the entire proceedings before the Tribunal and in the absence of any evidence or material on record to the contrary, it has rightly been relied upon by the Tribunal to come to the conclusion that the deceased persons were travelling in the truck along with their goods and, as such they were not gratuitous passengers. Having failed to discharge the burden of proof in support of this contention, it is not open to the appellant at this stage to try and bring about a reappraisal of the evidence on facts. There is no reason for this Court to go into the factual aspect of the matter or enter into a reappraisal of evidence since the impugned judgment and award does not suffer from any illegality or perversity."

15.Relying on the above judgments, the learned counsel for the 1st respondent/claimants reiterated that the pay and recovery is permissible in such cases where the load men were travelling in a goods carrier. In the present case, the 1st respondent/claimants were load men and they have deposed before the Tribunal as such the said factum was not repudiated with evidence by the Insurance Company and therefore, the appeal is liable to be rejected.

16.In reply, the learned counsel for the appellant/Insurance Company cited the judgment of the Division Bench of this Court in the case of Bharati AXA General Insurance Co. Ltd., Vs.Aandi and others reported in 2018(2) TN MAC 731 (DB), the relevant paragraph no.50, is extracted here under :

"50. In fact, we find that in none of the judgments referred to viz., National Insurance Co.Ltd. V.Swaran Singh and others, 2004 (1) TN MAC 104 (SC) : 2004 (3) SCC 297 : Mangla Ram v. Oriental Insurance Co. Ltd., 2018 (1) TN MAC 681 (SC) : 2018 (5) SCC 656 : Rani & ors. V. National Insurance Co. Ltd. & Ors., 2018 (2) TN MAC 278 (SC) : 2018 (9) Scale 310 : and Manuara Khatun and others v. Rajesh Kumar Singh and others, 2017 (1) TN MAC 289 (SC) : 2017 (4) SCC 796, the question regarding the liability of the Insurance Company to pay the Compensation in respect of an unauthorised Passenger in the Goods Vehicle did arise for consideration. We are therefore of the considered opinion that the Judgment of the Two-Judge Bench in Shivaraj V. Rajendra and another referred to supra cannot be taken as a precedent to conclude that the Insurance Company would be liable to pay the Compensation even in respect of an unauthorised Passenger, in a Goods Vehicle, in the light of categorical pronouncement of Larger Bench of the Hon'ble Supreme Court in New India Assurance Company v. Asha Rani and others ; and National Insurance Co. Ltd., v. Baljit Karur and others, referred to supra. We therefore conclude that the Tribunal, in the case on hand, was not right in directing the Insurance Company to pay the Compensation and giving it the liberty to recover the same from the Owner."

17.This Court is of the considered opinion that Rule 236 of Tamil Nadu Motor Vehicles Rules unambiguously enumerates that no person shall be carried in the cabin of a goods carriage beyond the number for which there is a seating accommodation at the rate of thirty eight centimeters measured along the seat, excluding the space reserved for the driver, for each person and

not more than six persons in all in addition to the driver shall be carried in any goods carriage. Thus, the spirit of the above provision is crystal clear that if any violation is committed regarding seating capacity, it is to be treated as violation of the Rules and there is no ambiguity as such. Thus, with reference to the seating capacity, the permit document is to be verified, the seating capacity provided in a particular vehicle is to be ascertained and the insurance policy and its terms and conditions is also to be read together. All these factors are to be satisfied for the purpose of fixing the liability.

18. In the present case on hand, it is not disputed with reference to the nature of vehicle which is a lorry, the seating capacity available in the lorry which met with an accident in the present case is three persons including driver. The seating capacity is assessed with reference to the length, which is prescribed under Rule 236 of the Tamil Nadu Motor Vehicles Rules and in accordance with the length of the seating capacity in a particular vehicle, permit is granted by the concerned Registering Authority. Thus, the permit is granted by the Registering Authority with reference to the seating capacity provided in a particular vehicle and therefore, such a permit is to be followed by the owner of the vehicle strictly and any violation is to be considered as violation of the Rule as well as the violation of the permit granted.

19. As far as Section 123 of the Motor Vehicles Act, 1988 stipulates riding on running board etc., the Section provides that 'No person driving or in charge of a motor vehicle shall carry any person permit any person to be carried on the running board or otherwise than within the body of the vehicle'. Section 123(2) states that 'No person shall travel on the running board or on the top or on the bonnet of the motor vehicle.

20. Perusal of the above provisions is clear that no person shall travel on a running board beyond the seating capacity with reference to the permit granted by the Registering Authority. Thus, in the event of any violation it is to be construed as if the owner has committed breach of Act and Rules and therefore, they are not entitled for compensation from the Insurance Company with reference to the terms and conditions of the policy agreed between the parties.

21. Policy being a contract binding on both the parties, the parties if only acted in consonance with the terms and conditions of the policy then alone the Insurance Company is liable to pay compensation and not otherwise. Thus, the terms and conditions which were agreed are paramount importance to decide the liability with reference to the provisions of the Act as well as the Rules.

22. In the present case, it is an admitted fact that the lorry which met with an accident is having the seating capacity of three persons including driver, the permit granted by the Registering Authority namely the registration certificate was marked as a document and the Tribunal also considered the permit as well as the seating capacity in the goods carrier. When the Tribunal itself arrived at a conclusion that the claimants are travelled in the lorry as gratuitous passengers and even in the First Information Report the petitioners/claimants are not stated that they have travelled in the lorry as load men, then the statement made during the adjudication of the claim petition before the Tribunal by the claimants that they have travelled as load men cannot be trusted upon. When in the First Information Report they have not stated that they have travelled as load men then subsequent statement is to be construed as an after taught and the factual inference in this regard is certainly to be dropped. This apart, mere existence of a valid insurance policy is insufficient to fix the liability. Existence of an insurance policy is the primary thing to fix the liability, however, if any violations of policy conditions or the statutory violations are brought before the notice of the Tribunal, then the Tribunal has to scrutinize the policy documents with reference to the provisions of the Motor Vehicles Act and Rules and arrived at a conclusion whether the Insurance Company is liable to pay compensation or not.

23. In the present case the Tribunal rightly arrived at a conclusion that the owner of the lorry is solely liable to pay compensation to the claimants. When the tribunal rightly arrived at a conclusion that the claimants travelled as gratuitous passengers and the owner of the lorry is solely liable to pay compensation. Then, there is no reason whatsoever to order for pay and recovery from the Insurance Company. The Tribunal ought not to have granted pay and recovery by fixing the liability on the Insurance Company. Thus, this Court is of the considered opinion that the Tribunal has committed an error in appreciating the facts regarding the violations of the Motor Vehicles Act and Rules and the conditions of the policy and further, has not considered the fact that the Insurance Company is not liable to pay compensation at all. Thus, as rightly contended that the claimants are entitled to get compensation from the owner of the lorry and not from the Insurance Company.

24. Accordingly, common judgment and decree passed in M.C.O.P. Nos.183 and 199 of 2013 are set aside insofar as the fixation of liability on the appellant/Insurance Company is concerned and the Civil Miscellaneous Appeals stands allowed. However, the 1st respondent/claimant in both appeals are entitled to execute the award of compensation against the owner of the lorry and they are at liberty to institute appropriate

proceedings against the owner of the lorry for recovery of compensation. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

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To

1. The Motor Accidents Claims Tribunal,
Subordinate Judge, Gobichettipalayam.
2. The Section Officer,
V.R Section,
High Court, Madras.

+1cc to Mr.Ma.Pa.Thangavel, Advocate, S.R.No.20845

+1cc to Mr.S.Arun Kumar, Advocate, S.R.No.21295

C.M.A.No.2241 and 2242 of 2016

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