

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 18.08.2020

PRONOUNCED ON : 01.09.2020

CORAM

THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN

C.M.A.No.681 of 2016 and

C.M.P.No.5597 of 2016

(Heard through video conferencing)

M/s.United India Insurance Co. Ltd.,
Rep. By its Divisional Manager,
Arani

...Appellant/
2nd Respondent

Vs

1.Raja
S/o Munusamy,

2.Ramesh
S/o Raja

3.Minor Prabakaran
S/o Raja
(Rep. By father 1st respondent)

4.Jaya
W/o Kasi (Late)

..Respondent 1 to 4/
Claimants

5.R.Arasu
S/o Radha Mudaliar
34/4 Easwaran Koil Street,
Kalambur Village,
Polur Taluk.

..5th Respondents/
1st Respondent

Prayer:- This Civil Miscellaneous Appeal has been filed under Section 173 of Motor Vehicles Act, 1988, against the decree and judgment dated 23.12.2011 passed by the learned District Judge, Motor Accidents Claims Tribunal, Thiruvannamalai in O.P.No.674 of 2008.

For Appellant : Ms.R.Rathna Thara
For RR1 to R4 : B.Jawahar
R 5 : Exparte

JUDGMENT

This Appeal is preferred by the Insurance Company aggrieved by the award passed by the Tribunal in O.P.No.674 of 2008 dated 23.12.2011.

2.The short point 'whether the Insurance Company is liable to pay and recover the compensation awarded to the victim who travelled in a goods vehicle, contrary to the licence policy' is the points for consideration in this appeal.

3.On 28.03.2008, at about 6.00 pm, a Tempo Truck open model goods vehicle capsized near Munianthangal Junction on the Vellore to Polur Main road. Eight persons travelling in that goods vehicle were injured and one died on the way to hospital. F.I.R., was registered based on the complaint given by one Chitra W/o.Markku who was one among the passengers travelled in the Tempo Truck and also sustained injury. As per the F.I.R., the informant Chitra along with seven others were employed as Coolies in a construction Site and they were returning home in the Tempo Truck bearing Registration No.TN 25 H 8024, owned by one Balan. At about 6.30 pm on 28.03.2008, near Munianthangal Junction on the Vellore to Polur Main road, the Driver of the goods vehicle lost his control and capsized on the right side of the road. In the said accident, she sustained injury on her nose; Shanthi w/o Padavetan sustained injury on her forehead; Arpudham w/o Pichandi sustained injury on her shoulders; Ragini w/o Selvam lost her teeth and sustained injury on her forehead Panchavarnam w/o Masilamani sustained injury on her right eye brow. Sumathi w/o Prakash escaped un-injured. Selvi w/o Raja sustained severe injury all over the body. All the injured persons were taken to CMC hospital, Vellore for treatment. Selvi w/o Raja died on the way to hospital and she was declared dead.

4.Based on the above complaint given by Chitra, Sandavasal Police has registered case against the Driver of goods vehicle in Crime No.149/2008 dated 29.03.2008 for offence under Sections 279, 337, 338 and 304A I.P.C.

5.The respondents herein had filed a claim petition before the Tribunal that they are the dependants of the deceased Selvi. The said Selvi was earning Rs.4,500/- per month as Mason Assistant. She was 34 years old at the time of death. She has left behind her husband, two minor children and dependant mother. Therefore, Rs.5,00,000/- sought as compensation against the owner of the Tempo Truck and the Insurance company which has ensured the vehicle.

6.This claim has been opposed by the Insurance Company on the ground that they are not liable to pay any compensation to the claimants since, the vehicle involved in the accident and insured under the Insurance company is a goods vehicle. The said deceased Selvi and others are all unauthorised passengers. They all have travelled in the goods vehicle in violation of policy and permit condition. Further, the alleged Driver of the goods vehicle did not possess Driving Licence as required under law and insurance policy.

7.The Tribunal after considering the evidence adduced by the claimants as well as the insurance company awarded compensation of Rs.4,24,000/- applying the multiplier and by fixing the financial contribution of the deceased to her family as Rs.2,000/- per month and ordered the Insurance Company to pay and recover from the vehicle owner.

8.Aggrieved by that, the present Civil Miscellaneous Appeal is filed by the Insurance Company. The learned counsel for the Insurance company would submit that the Tribunal ought not to have ordered pay and recover, when it has been clearly established that there is a clear violation of the policy condition and statute. The judgments of the Hon'ble Supreme Court in this regard has been totally ignored by the Tribunal and has awarded compensation with direction to the Insurance company to pay and recover.

9.The learned counsel for the appellant/Insurance Company would further submit that in a case of unauthorised passengers, the Insurance Company is not liable to pay compensation. It is the responsibility of the vehicle owner to pay the compensation, if any.

10.Per contra, the learned counsel for the claimants would submit that the vehicle involved in the accident is permitted to carry one person in the cabin. The deceased was carrying construction material along with her. In the absence of evidence that the victim was travelling on the rear side of the vehicle and not in the cabin, the Insurance company is liable to pay and then recover from the owner of the vehicle. Defending the award of the Tribunal, the learned counsel for the claimants would submit that to absolve from the responsibility of pay and recover, the Insurance Company ought to have pleaded and proved that the deceased was an unauthorised passenger. There is no evidence to that effect. Therefore, the award of the Tribunal need not be interfered and the Tribunal has rightly directed the Insurance Company to pay and recover.

11.From the materials placed by the parties before the Court, the following facts are to be proved:-

(i)The deceased was travelling along with seven others in a Tempo Truck insured with the appellant Insurance Company. All the eight passengers were returning home after completing their duty in the construction site;

(ii)The Driver of the goods vehicle had no Driving Licence;

(iii)The Insurance Policy, which is marked as Ex.R.2 indicates that the Tempo Truck vehicle bearing registration No.TN 25 H 8024, is a open type;

(iv)The owner of the vehicle Mr.R.Arasu has insured this vehicle and it has insurance coverage from 23.01.2008 to at 16:16 hours to mid night of 22.01.2009. This vehicle capsized on 28.03.2008. The owner of the vehicle had paid Basic premium of Rs.4,315/-; Rs.5,580/- for third party basic; Rs.120/- for personal accident to Driver/Cleaner/Conductor Number 1 and Rs.25/- WC to employee 1. The Insurer has totally paid a sum of Rs.11,781/- inclusive of Rs.1,241/- towards service tax.

12.Thus, from the premium, it is very clear that being a goods vehicle, the insurance coverage is only for the personal accident of the Driver/Cleaner/Conductor Number 1 and for the Workmen Compensation to employee No.1.

13.It is an admitted fact in this case that, eight persons injured and one person died in the said accident. All were travelling in the said tempo Truck. In case of an unauthorised passenger or gratuitous passenger in the goods vehicle, the Insurance company is not liable to pay and then recover. This principle has been settled by the Hon'ble Supreme Court in the judgment ?New India Assurance Company v. Asha Rani?, (2003 ACJ 1 (SC). Later following this judgment, Supreme Court in New India Assurance Company Limited Vs. Vedwati (2007-ACJ-1043-SC) has held as follows:-

".....There is no provision similar to Clause (ii) of the proviso appended to Section 95 of the old Act prescribing requirement of insurance policy. Even Section 147 of the Act mandates compulsory coverage against death of or bodily injury to any passenger of "public service vehicle". The proviso makes it further clear that compulsory coverage in respect of drivers and conductors of public service vehicle and employees carried in goods vehicle would be limited to liability under the Workmen's Compensation Act, 1923 (in short 'WC Act'). There is no reference to any passenger in "goods carriage".

14. In National Insurance Co. Ltd., vs. Baljit Kaur (2004 ACJ 428), the issue of liability of the Insurer in case of unauthorised passenger was settled by the Hon'ble Supreme Court by exonerating the Insurer with prospective effect and insisted the Insurance company to first satisfy the award and thereafter, recover the amount from the owner of the vehicle without filing a separate suit.

15. The learned counsel for the claimants would submit that the Tribunal has followed the principle of pay and recover since, the Insurer could not establish that the deceased was an unauthorised passenger. Since, one passenger is permitted in the cabin unless the Insurance Company establishes that the deceased did not travel in the cabin, the award of pay and recover has to sustain.

16. This Court is of the view that the said submission of the claimants cannot be countenanced, in view of the fact that when eight persons were travelling in a Tempo Truck open model that too while returning from work, it cannot be presumed that one among them was in the cabin and carrying the goods. More particularly, when there is no material to show that in the goods vehicle, the construction materials of the owner was also been transported. In National Insurance Co. Ltd vs Chella Bharathamma & Ors (2008 (1) SCC 423), the facts of this case is almost identical to the facts of the case in hand. The plea of the learned counsel for the claimants that the deceased was travelling as the owner of the goods was turned down by the Hon'ble Supreme Court in Bharathamma case (cited supra) since, there was no evidence to show that four passengers who died in the accident due to over turn of the Lorry were carrying goods.

17. In Bharathi Axa Insurance Co. Ltd., vs. Anandi, reported in 2018 2 TNMAC 721, the Division Bench of this Court has held that there is no monetary requirement for Insurer to cover persons travelling as passengers in the goods vehicle unless such passenger is owner or agent of goods accompanied in goods vehicle. In the absence of any statutory requirement, to cover liability, in respect of passenger in the goods vehicle, the principle of pay and recover not applicable ipso facto.

18. The evidence relied by the claimants does not whisper that the deceased was carrying goods and she was travelling in the cabin. P.W.2-Jaganathan, who is carrying on business near the scene of accident, has deposed that on hearing the bang noise, he went to the scene of accident and found the tempo truck capsized in which, Selvi and few others have sustained injury.

19.The request of the learned counsel for the claimants that it has to be presumed that the deceased was travelling in the cabin is baseless. The Division Bench of this Court in Anandi case (cited supra) after analysing the judgments on either side finally settled to hold that in view of the categorical pronouncement of the Larger Bench of the Hon'ble Supreme Court in National Insurance Co. Ltd., vs. Baljit Kaur case (cited supra), the case on hand directing the Insurance company to pay the compensation and recover from the owner of the vehicle is not correct.

20.This Court is also of the view that in a case of this nature, the Insurance company cannot be mulcted with responsibility presuming certain evidence which is not pleaded or possible. Hence, while confirming the quantum of the award passed by the Tribunal, the liability foisted by the Tribunal on the appellant Insurance Company alone is set aside and instead, the liability is fixed on the owner of the offending vehicle. The claimants/respondents are at liberty to proceed against the owner of the vehicle for the award amount.

21.From the records, it is seen that while admitting the appeal, this Court has passed an interim order in CMP No.5597 of 2016 dated 31.03.2016, directing the Insurance company to deposit the entire award amount in to the credit of MACTOP No.674 of 2008 on the file of the MACT, Tiruvannamalai. The claimants were also permitted to withdraw 50% of their respective shares as apportioned by the Tribunal. If it is so, the Insurance company is at liberty to withdraw the entire amount deposited by them on filing appropriate petition before the Tribunal. In case, the claimants have withdrawn their 50% share amount for which they have been permitted to withdraw vide the above said interim order passed by this Court, to that extent, the Insurance company can proceed against the owner of the vehicle for recovery. The liability mulcted on the Insurance company is hereby set aside. However, the quantum of compensation is confirmed.

22.The Civil Miscellaneous Appeal is allowed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar

//True Copy//

Sub Assistant Registrar

jbm

To

1.The District Judge,
Motor Accidents Claims Tribunal,
Thiruvannamalai.

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

SV(CO)
RMP(20/04/2021)

C.M.A.No.681 of 2016



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