IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 21.12.2020

CORAM:

THE HONOURABLE MS.JUSTICE V.M.VELUMANI

C.M.A.No.3121 of 2014
and
M.P.No.1 of 2014

National Insurance Company Limited,
Salem. ... Appellant/Respondent in Tribunal below

Vs.

Nachammal (deceased)
1.Boopathy
2.Krishnamurthy
3.Jothimani ....Claimants 1 to 3 and RR1,2 in Tribunal below
(I.A.No.1697/2011 order dated 23.12.2011)
4.S.Kathirvel
5.M.Sivaraj .. Respondents

Prayer: This Civil Miscellaneous Appeal is filed under Section 173 of the Motor Vehicles Act, 1988, against the Judgment and Decree dated 20.12.2012 made in M.C.O.P.No.608 of 2006 on the file of the Motor Accidents Claims Tribunal, Chief Judicial Magistrate Court, Tirupur.

For Appellant : Mr.S.Arunkumar

For RR 1 to 3 : No appearance

J U D G M E N T

The matter is heard through "Video-Conferencing".

2.This Civil Miscellaneous Appeal has been filed against the award dated 20.12.2012 made in M.C.O.P.No.608 of 2006 on the file of the Motor Accidents Claims Tribunal, Chief Judicial Magistrate Court, Tirupur.

3.The appellant is the 3rd respondent in M.C.O.P.No.608 of 2006 on the file of the Motor Accidents Claims Tribunal, Chief Judicial Magistrate Court, Tirupur. Originally one Nachammal filed the said claim petition, claiming a sum of Rs.5,00,000/- as compensation for the injuries sustained by her in the accident that took place on 24.12.2005. Pending claim petition, the said Nachmmal died on 01.10.2006 and therefore the respondents 1 to 3 were impleaded as legal heirs of the deceased Nachammal as per the order dated 23.12.2011 made in I.A.No.1697 of 2011.

4.According to respondents 1 to 3, on 24.12.2005 at about 07.00 P.M., while the deceased was travelling as a passenger in the auto bearing Registration No.TN 39 AC 4494 on Perumanallur - Pongupalayam road, near Pongupalayam Sudukadu, the driver of the auto drove the same in a rash and negligent manner in an uncontrollable speed, capsized the auto on the road and caused the accident. In the accident, the deceased and other passengers in the auto were thrown away and they sustained grievous injuries. The said Nachammal sustained fracture of right hand wrist, injuries on the face, right hand fingers and multiple injuries all over the body. Immediately after the accident, the said Nachammal was taken to Sri Kumaran Hospital, Tiruppur and thereafter she was referred to Mayura Hospital, Perumanallur. Therefore, the said Nachammal filed the said claim petition claiming a sum of Rs.5,00,000/- as compensation for the injuries sustained by her against the respondents 4, 5 and appellant-Insurance Company, being the driver, owner and insurer of the auto respectively.

5.The respondents 4 and 5, the driver and owner of the auto respectively remained exparte before the Tribunal.

6.The appellant-Insurance Company, the insurer of the auto filed counter statement and denied all the averments made by the deceased. According to the appellant, at the time of accident, six persons travelled in the auto whereas only four persons are allowed to travel in the auto. Further, the 5th respondent has not filed any claim form and also has not intimated to the appellant about the accident. Therefore, for violation of policy conditions, the appellant is not liable to pay any compensation. The deceased has to prove that the accident has occurrd only due to rash and negligent driving by 4th respondent. The accident has occurred only due to overloading of the auto and hence, the deceased is not entitled to get any compensation from the appellant. The appellant denied the age, avocation, income, nature of injuries and treatment taken by the deceased. In any event, the quantum of compensation claimed by the deceased is highly excessive and prayed for dismissal of the claim petition.

7.The appellant filed additional counter statement and denied various averments made by the respondents 1 to 3. The said Nachammal has not died due to the injuries sustained by her in the accident. The respondents 1 to 3 have not filed the claim petition as the legal heirs of the deceased and hence, the appellant is not liable to pay any compensation. The appellant is liable to pay compensation only for four persons including the driver of the auto, but at the time of accident, six persons have traveled in violation of policy conditions. Therefore, the appellant is not liable to pay any compensation. In any event, the quantum of compensation claimed by the respondents 1 to 3 is exorbitant and prayed for dismissal of the claim petition.

8.Before the Tribunal, the 1st respondent examined himself as P.W.1 and one Rani, eyewitness to the accident was examined as P.W.2 and 10 documents were marked as Exs.P1 to P10. On behalf of appellant, one R.Krishnaswamy was examined as R.W.1 and 6 documents were marked as Exs.R1 to R6.

9.The Tribunal considering the pleadings, oral and documentary evidence held that the accident occurred only due to rash and negligent driving by the driver of the auto belonging to 5th respondent and directed the appellant to pay a sum of Rs.3,44,613/- as compensation to the respondents 1 to 3 at the first instance and recover the same from respondents 4 and 5.

10.Against the said award dated 20.12.2012 made in M.C.O.P.No.608 of 2006, the appellant has come out with the present appeal.

11.The learned counsel appearing for the appellant contended that the Tribunal erred in directing the appellant to pay the compensation to the respondents 1 to 3 at the first instance and recover the same from the respondents 4 and 5, when the risk of such passenger is not covered under the policy marked as Ex.R1. The Tribunal erroneously directed the appellant to perform an act contrary to the terms of contract and beyond statutory liability in the absence of any clause in insurance policy / contract of insurance and the same is not permissible as per the judgment of the Hon'ble Apex Court reported in 2002 (1) ACC 299, [New India Assurance Company Limited Vs. C.M.Jaya and others]. The 1st respondent traveled in the auto beyond the seating capacity and other persons who traveled along with 1st respondent filed claim petitions in M.C.O.P.Nos.408, 602, 605 & 607 of 2006 on the file of I Additional Sub Court, Tirupur. The Tribunal directed the appellant to pay the compensation as per the seating capacity and directed the appellant to pay the highest three awards and directed the appellant to apportion the highest three amount proportionately to all the four claimants in M.C.O.P.Nos.408, 602, 605 & 607 of 2006. The Tribunal failed to take note that respondents 4 and 5 have not challenged the said award against them. In view of the above, the order of the Tribunal ordering pay and recovery is liable to be set aside. In support of his contention, the learned counsel relied on the following judgments:

(i) (2007) 7 SCC 445, [National Insurance Company Limited Vs. Anjana Shyam and others]

> "...18.In this situation, the insurance taken out for the number of permitted passengers can alone determine the liability of the insurance company in respect of those passengers. In terms of Section 149 of the Act, the duty of the insurer is only to satisfy judgments and awards against persons insured in respect of the third party risk. Obviously, this is to the extent the third party risk is coverable and is covered. Section 149 of the Act speaks of judgment or award being obtained against any person insured by the policy and the liability of the insurer to pay to the person entitled to the benefit of the decree any sum not exceeding the sum assured payable thereunder subject to any claim the insurer may have against the owner of the vehicle. Section 149 could not be understood as compelling an insurance company to make payment of amounts covered by decrees not only in respect of the number of persons covered by the policy itself but even in respect of those who are not covered by the policy and who have been loaded into the vehicle against the terms of the permit and against the terms of the condition of registration of the vehicle and in terms of violation of a statute.
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> 22.Then arises the question, how to determine the compensation payable or how to quantify the compensation since there is no means of ascertaining who out of the overloaded passengers constitute the passengers covered by the insurance policy as permitted to be carried by the permit itself. As this Court has indicated, the purpose of the Act is to bring benefit to the third parties who are either injured or dead in an accident. It serves a social purpose. Keeping that in mind, we think that the practical and proper course would be to hold that the insurance company, in such a case, would be bound to cover the higher of the various awards and will be compelled to deposit the higher of the

amounts of compensation awarded to the extent of the number of passengers covered by the insurance policy.

23.Illustratively, we may put it like this. In the case on hand, 42 passengers were the permitted passengers and they are the ones who have been insured by the insurance company. 90 persons have either died or got injured in the accident. Awards have been passed for varied sums. The Tribunal should take into account, the higher of the 42 awards made, add them up and direct the insurance company to deposit that lump sum. Thus, the liability of the insurance company would be to pay the compensation awarded to 42 out of the 90 passengers. It is to ensure that the maximum benefit is derived by the insurance taken for the passengers of the vehicle, that we hold that the 42 awards to be satisfied by the insurance company would be the 42 awards in the descending order starting from the highest of the awards. In other words, the higher of the 42 awards will be taken into account and it would be the sum total of those higher 42 awards that would be the amount that the insurance company would be liable to deposit. It will be for the Tribunal thereafter to direct distribution of the money so deposited by the insurance company proportionately to all the claimants, here all the 90, and leave all the claimants to recover the balance from the owner of the vehicle. In such cases, it will be necessary for the Tribunal, even at the initial stage, to make appropriate orders to ensure that the amount could be recovered from the owner by ordering attachment or by passing other restrictive orders against the owner so as to ensure the satisfaction in full of the awards that may be passed ultimately.”

(ii) 2011 (1) TNMAC 441 (SC), [United India Insurance Company Limited Vs. K.M.Poonam & Others]

“...11.Learned counsel appearing for the appellant submitted that having regard to the provisions of Section 149 of the

Motor Vehicles Act, 1988, the liability, if any, of the Insurance Company for payment of compensation would have to be limited to the number of passengers validly permitted to be carried in the vehicle covered by the insurance policy and did not extend to the number of passengers carried in excess of the permitted number. Learned counsel submitted that the said question had been considered by a two-Judge Bench of this Court in National Insurance Co. Ltd. Vs. Anjana Shyam & Ors. [(2007) 7 SCC 445] decided on 20th August, 2007. While considering the provisions of Section 147 (1)(b)(ii) and (2) and Section 149(1)(2) and (5) of the 1988 Act in relation to an insurer's liability, their Lordships came to the conclusion that the insurer's liability was limited by the insurance taken out for the number of permitted passengers and did not extend to paying amounts decreed in respect of other passengers. Taking recourse to a harmonious construction of the relevant provisions, their Lordships held that the total amount of compensation payable should be deposited by the Insurance Company which could be proportionately distributed to all the claimants, who could recover the balance of the compensation amounts awarded to them from the owner of the vehicle.

23. Sub-section (1) of Section 149 of the Motor Vehicles Act, 1988, makes it amply clear that once a certificate of insurance is issued under sub-section (3) of Section 147, then notwithstanding that the insurer may be entitled to avoid or cancel the policy, it shall pay to the person entitled to the benefit of the decree any sum not exceeding the sum assured, payable thereunder, as if he was the judgment debtor, in respect of the liability, together with any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments. Sub-section (2), however, places a fetter on the payment of any sum by the insurer under sub-section (1) in respect of

> any judgment or award unless, the insurer had notice of the proceedings in which the said judgment or award is given and an insurer to whom such notice is given shall be entitled to be made a party thereto and to defend the action on the grounds enumerated therein involving a breach of a specified condition of the policy.
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> 24. The liability of the insurer, therefore, is confined to the number of persons covered by the insurance policy and not beyond the same. In other words,as in the present case, since the insurance policy of the owner of the vehicle covered six occupants of the vehicle in question, including the driver, the liability of the insurer would be confined to six persons only, notwithstanding the larger number of persons carried in the vehicle."

12.Though notice has been served on the respondents 1 to 3 and their names are printed in the cause list, there is no representation for them either in person or through counsel.

13.Heard the learned counsel appearing for the appellant and perused the entire materials on record.

14.It is the contention of the respondents 1 to 3 that on 24.12.2005 at about 07.00 P.M., while the deceased was traveling with other passengers in a auto belonging to 5th respondent, the 4th respondent driver of the auto drove the same in a rash and negligent manner, suddenly turned the auto and capsized the auto and caused the accident. In the accident, the said Nachammal sustained injuries. Therefore, the said Nachammal filed the said claim petition claiming compensation for the injuries sustained by her in the accident. Pending claim petition, the said Nachammal died. Therefore, the respondents 1 to 3 were impleaded as legal heirs of the deceased Nachammal and contended that the claimant died only due to the injuries sustained by her in the accident. The Tribunal considering the evidence let in by the respondents 1 to 3 both oral and documentary placed before it, held that accident has occurred only due to rash and negligent driving by the driver of the auto belonging to 4th respondent and the said Nachammal died due to the injuries sustained in the accident. There is no error in the said finding of the Tribunal.

15.It is the contention of the appellant that the seating capacity of the auto is 3 + 1 and at the time of accident, six persons traveled in the auto and hence appellant is not liable to pay the compensation more than 3 + 1 persons. The appellant also contended that four claimants filed claim petition in M.C.O.P.Nos.408, 602, 605 & 607 of 2006 on the file of I Additional Sub Court, Tirupur. The learned I Additional Subordinate Judge, Tirupur, considering the materials placed before him, passed an award holding that appellant is liable to pay the highest three amounts awarded and all the four claimants are entitled to compensation proportionately. In view of the said award, the appellant is not liable to pay the compensation to the respondents 1 to 3. The contention of the learned counsel appearing for the appellant is not acceptable in view of the judgments of the Hon'ble Apex Court reported in (2007) 7 SCC 445 and 2011 (1) TNMAC 441 (SC), referred to above.

16.In the said judgments, the Hon'ble Apex Court has held that insurer is liable to pay compensation only to the number of persons permitted to travel. The insurer is liable to pay highest award amounts of permitted capacity and Tribunal has to proportionately distribute the same to all claimants. From the materials on record, it is seen that when four passengers filed claim petition before the I Additional Sub Court, Tirupur, the claim petition filed by the deceased Nachammal in the present case was pending before Chief Judicial Magistrate, Tirupur. The claimant in the present case made claim against the appellant also as in the case of other four claimants. The other 4 claimants were awarded compensation together by the award in M.C.O.P.Nos.408, 602, 605 & 607/2006. The appellant has not taken any steps to transfer the present claim petition to be tried along with other four claim petitions. Had the present claim petition been transferred and tried along with other four claim petitions, the respondents 1 to 3 would have got compensation proportionately from the highest three award amounts deposited by the appellant. In view of the judgments of the Hon'ble Apex Court reported in (2007) 7 SCC 445 and 2011 (1) TNMAC 441 (SC), referred to above, the case of the appellant is not acceptable. For the above reason, this Court is of the considered view that award of the Tribunal ordering pay and recovery is valid and the same is not interfered with.

17.In the result, this Civil Miscellaneous Appeal is dismissed and sum of Rs.3,44,613/- awarded by the Tribunal alongwith interest @ 7.5% per annum, as compensation to the respondents 1 to 3, along with interest and costs is confirmed. The appellant-Insurance Company is directed to deposit the award amount along with interest and costs, less the amount if any already deposited, within a period of six weeks from the date of receipt of a copy of this judgment to the credit of M.C.O.P.No.608 of 2006 on the file of the Motor Accidents Claims Tribunal, Chief Judicial Magistrate Court, Tirupur, at the first instance and recover the same from the respondents 4 and 5. On such deposit, the respondents 1 to 3 are permitted to withdraw the respective share of the award amount as per the ratio of apportionment fixed by the Tribunal, along with proportionate interest and costs, after adjusting the amount, if any already withdrawn, by filing necessary applications before the Tribunal. Consequently, the connected Miscellaneous Petition is closed. No costs.

Sd/-
Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

krk
To

The Chief Judicial Magistrate,
Motor Accidents Claims Tribunal,
Tirupur.

Copy to

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

+1cc to M/s.S.Arunkumar, Advocate Sr.42730

C.M.A.No.3121 of 2014

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