IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 16.09.2020

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THE HONOURABLE MR.JUSTICE T.RAJA

C.M.A.No.3031 of 2017

Branch Manager,
National Insurance Co. Ltd.,
638, Cuddalore Main Road,
Ranipettai, Atthur,
Salem District. ..Appellant/2nd Respondent

Versus

Mrs.Selvarani (died),
W/o. Late Lucas @ Selvam

1.Mr.Krishnamoorthy
2.Minor Thangam ..1st and 2nd Respondent/ 1st and 2nd Petitioner

3.Mr.Palani ..3rd Respondent/1st Respondent

Prayer: Civil Miscellaneous Appeal has been filed under Section 30 of the Employees Compensation Act, 1923, praying to set aside the order passed in W.C.No.25 of 2016, dated 30.05.2017 by the Commissioner for Employees Compensation (Deputy Commissioner of Labour) at Salem District.

For Petitioner : Mr.J.Chandran

For R1 & R2 : Mr.Ma.Pa.Thangavel

For R3 : Mr.J.Ramakrishnan

JUDGMENT

Heard Mr.J.Chandran, learned counsel for the appellant/Insurance Company, Mr.Ma.Pa.Thangavel, learned counsel for the respondents 1 and 2/claimants, and Mr.J.Ramakrishnan, learned counsel for the third respondent/owner of vehicle, through Video Conferencing due to COVID-19 pandemic.

2. The appellant/Insurance Company has filed this Civil Miscellaneous Appeal challenging the order passed by the learned

Commissioner for Employees Compensation, Salem, in W.C.No.25 of 2016, dated 30.05.2017, awarding a sum of Rs.2,57,809/- with interest at 12% per annum in favour of claimants, on the ground that the deceased/Late Lucas/father of claimants does not cover under the policy.

3. Learned counsel for the appellant/Insurance Company submitted that the claimants/respondents 1 and 2 herein were under the habit of filing multiple claim petitions with huge delay and finally, this claim petition was filed with a delay, because, originally they filed in MCOP.No.45 of 2002 before the MACT, Attur, for the death of deceased Lucaus, and after dragging the matter for more than 8 years, finally the said case was dismissed as not pressed. Thereafter, once again, after a delay of three years, the respondents 1 and 2 have filed another claim petition on 03.10.2013 before the learned Labour Commissioner, Salem, and the same has been numbered as in W.C.No.750 of 2014. Pending the same, the claimants have filed the present claim petition in W.C.No.25 of 2016.

4. Adding further, learned counsel argued that the deceased/ Lucaus was not employed under the third respondent/owner of the vehicle. Moreover, according to the investigation done by Kallakurichi Police Station in Crime No.849/2001, on the fateful day i.e. 21.12.2001, 17 persons including the deceased Lucaus were travelling in the lorry bearing Registration No.TCF-8193 and as per the Registration Certificate of the Lorry, seating capacity of the vehicle is only 3 including the driver. However, owner of the vehicle/third respondent herein has violated the provisions of Rules 236 and 238 of the Tamil Nadu Motor Vehicles Rules, 1989, and the terms and conditions of the policy, as the lorry, which is a goods vehicle, has been used for carrying passengers, that too, beyonds it permitted seating capacity of three numbers, therefore, as they have used the vehicle contrary to the terms and conditions of policy, Insurance Company is not liable to pay the compensation. But, without taking note of any of these aspects, learned Commissioner has wrongly passed the impugned order awarding compensation in favour of the claimants/respondents 1 and 2 herein and to recover the same from the owner of the vehicle/ third respondent herein by applying the principles of pay and recovery. Such an approach of the learned Commissioner is not sustainable in law, therefore, the impugned award is liable to be set aside.

5. Learned counsel appearing for the claimants/respondents 1 and 2 herein submitted that on 21.12.2001 at about 5 a.m., while deceased Lucaus was driving the lorry bearing Registration No.TCF-8193, in which, 16 other persons were also travelling, the deceased and one another persons died on the said fateful

day and 15 other persons sustained grievous injuries. Thereafter, 8 claim petitions were laid before the learned Tribunal under the Motor Vehicles Act and one claim petition was laid before the learned Commissioner, Salem, under the Employees Compensation Act, 1923. In the claim petition, Insurance Company raised the very same argument that in view of breach of terms and conditions of the Policy, the Insurance Company is not liable to pay compensation, but, the said argument was rejected, hence, they are estopped from raising the very same argument in the present case.

6. Secondly, learned counsel placed reliance on a decision of this Court passed in C.M.A.Nos.945, 3826 to 3828, 3883, 3966 to 3968 of 2008, dated 30.09.2011, whereby eight awards passed by the learned Tribunal in favour of injured/claimants arising out of the present accident were questioned before this Court by the Insurance Company and this Court held that the Insurance Company is liable to pay the compensation, therefore, argument advanced by the appellant herein that due to violations of terms and conditions of policy, Insurance Company is not liable to pay compensation and that the order of the learned Commissioner fixing pay and recovery also should be dismissed cannot be entertained.

7. He further submitted that the learned Commissioner has awarded only a paltry sum of Rs.2,57,809/- alone for the loss of deceased/driver with interest at the rate of 12% per annum. As the said sum itself is a meagre one, appellant/Insurance Company ought not to have filed this appeal. On this basis, he has prayed for dismissal of the appeal by following the similar order passed by this Court in C.M.A.Nos.945, 3826 to 3828, 3883, 3966 to 3968 of 2008, dated 30.09.2011.

8. Learned counsel appearing for the owner of the vehicle / third respondent herein, supporting the arguments of learned counsel for the claimants, argued that even if there is a violation of terms and conditions of policy, the Insurance Company cannot escape from the liability and therefore, the impugned award passed by the learned Commissioner applying principles of pay and recovery is unsustainable in law. In support his submissions, he has relied on a decision of this Court in the case of N.Senthilkumar Vs. S.Ramesh and another [2008 (2) LLN 584] for a proposition that when premium has been paid so as to meet the requirements of Workmen's Compensation Act, it is not open to the Insurance Company to raise the defence which is available to it under the Motor Vehicles Act, therefore, exonerating the Insurance Company from its liability suffers from perversity and vitiated by error of law and cannot be sustained. Therefore, as the vehicle in question was admittedly insured with the appellant/Insurance Company,

Insurance Company cannot be exonerated from payment of compensation, hence, the impugned order directing the Insurance Company to recover the awarded sum from the owner of the vehicle is liable to be set aside.

9. I also find merit on the above said submission of the learned counsel for the respondents. Admittedly, on the fateful day i.e. 21.12.2001 at about 5 A.M., while the deceased Lucaus was driving the lorry bearing Registration No.TCF-8193 belonging to the third respondent/owner of the vehicle, on the Salem-Cuddalore main road, near Pananchalai, due to over-speed, lost his control and dashed against the roadside tamarind tree, due to which, the deceased and one load-man died on the sport and 15 others sustained grievous injuries. These injured persons have filed 8 claim petitions against the Insurance Company/appellant herein and owner of the vehicle/third respondent herein before the learned Tribunal (Additional District and Sessions Court-cum-Special Court) at Salem. The learned Tribunal, by order dated 02.04.2007, allowed the claim petitions and against which, when a batch of Civil Miscellaneous Appeals i.e. C.M.A.Nos.945, 3826 to 3828, 3883, 3966 to 3968 of 2008 were filed, Insurance Company put-forth the very same argument that they are not liable to pay the compensation as the deceased drove the vehicle in a rash and negligent manner and that he was carrying 17 persons against the terms and conditions of the policy, and by rejecting the said contention, this Court held that the Insurance Company is liable to pay the compensation. For better appreciation, paragraph Nos.13 to 16 thereof are extracted below:-

> 13. Having heard the arguments of the learned counsel on either side, I find that the main submission of the appellant insurance company is that they are liable to pay compensation as per the terms of the policy only on two circumstances;
>
> (i) if the persons travelled in the goods carrying vehicle as 'persons accompanying goods';
>
> (ii) if the persons had travelled as the 'employees of the owner of the vehicle'.
>
> Now it is the submission of the appellants that the claimants/victims will not come under either of the two categories. Though it has been stated that they had travelled as the coolies, unless it is established that they are the employees of the owner of the vehicle, the insurance company is not liable to pay compensation. Absolutely, there is no controversy in accepting the submission made by the learned counsel for the appellants with regard to the liability of the insurance company in paying the compensation. Therefore, I am not dealing with the said submission. But at the same time, I find that

the question as to whether the claimants had travelled as the employees of the owner of the vehicle or not has to be seen only based on the evidence available in the particular case. In the instant cases, admittedly, the owner of the vehicle, who examined himself as R.W.1, had admitted in his evidence that on the date of accident, the victims had travelled as coolies in the lorry in order to load the goods. Therefore, I am of the view that at the time of accident, they had travelled as the employees of the owner of the vehicle to carry out the work.

14. As contended by the learned counsel for the 1st respondent, before the Tribunal, the defence of the insurance company is totally contra to the submission made by the learned counsel for the appellants in these appeals. Before the Tribunal, it is the defence taken out by the appellants that all the victims had travelled as unauthorised passengers in the lorry, whereas in the present appeals, it is the stand of the appellants that though the victims are coolies, they are not the employees of the vehicle owner. But, on a careful scrutiny of the evidence of R.W.1, the owner of the vehicle, I find that the appellant insurance company has not broughtforth any favourable reply from R.W.1 to the effect that the victims are not the employees under him. Moreover, the appellants insurance company has also not chosen to adduce contra evidence in this case.

15. As contended by the learned counsel appearing for the claimants in CMA No.945 of 2008, at the time of the accident, the victims had travelled in the insured vehicle only to carry out the work of the owner of the goods. In such a situation, no infirmity could be found in the award passed by the Tribunal since there was a policy coverage for 9 employees. In fact, the judgment relied on by Mr.P.Jagadeesan, the learned counsel for the claimants reported in 1998 ACJ 309 (supra) would go to the extent of laying down the principle that even if there was no contract of employment in writing between the owner of the vehicle and the loadmen, the case of the victims cannot be rejected and the relevant portion in the said judgment reads as follows:

"5. Mr.Suri, learned counsel for the Insurance Company, with his usual ability and frankness, has not contested this issue. The only surviving question therefore is as to whether simply because there was no contract of employment in writing, the plea of claimants that they were hired by the appellant could be ignored? The Court is of the considered view that in a case of this kind there could not be any writing evidencing contract of employment between the appellant and the claimants. As mentioned above, it has been consistent case of the claimants that the deceased and the injured had boarded the truck simply for loading and unloading on a particular day. In a way, therefore, they were daily wage employees only for one day. They were only to go to the distance the goods were to reach and load and unload the same. Such a short durated contract is normally not reduced into writing and is oral. Such contracts, which are normally oral, cannot be rejected on the ground that there should have been writing of the same. The findings of the learned Tribunal that the words 'contract of employment' signify the employment of permanent or temporary post and not on adhoc basis, deserves to be simply rejected. It may, however, be stated that for coming to the conclusion as afore said, learned Tribunal relied upon two judgments of this Court in New India Insurance Company v. Shanti Devi, and Oriental Fire and General Insurance Company v. Gurdev Kaur's cases, (supra). The facts in New India Assurance Company v. Shanti Devi's case reveal that the hirers of the truck were travelling with a view to guard their goods. It was not at all a case of casual labour boarding the truck for a short duration of day or so. The facts of the case in Oriental Fire and General Insurance Company v. Gurdev Kaur and Ors. (1967) 69 P.L.R. 461 (F.B.) (not 1987 A.C.J.158, as mentioned by the Tribunal), reveal that the deceased was travelling in a truck. He was accompanying his goods carried in the truck. On his death on account of the accident, his dependents filed an application Under Section 110-A of the Motor Vehicles Act, 1939. The facts of the cases aforesaid have, thus, no parity with the facts of the case in hand and the Tribunal was not justified in placing reliance upon these two judgments to come to the conclusion as aforesaid".

16. In (2000) 2 MLJ 559 (supra), it has been held as follows:

"7. All the above mentioned particulars would clearly show that the deceased Annadurai was engaged by the owner of the tractor and trailer as a coolie and he died when the vehicle was in use for agricultural purpose. I have already stated that R.W.1 has admitted that the owner had paid Rs.1,340/-

as premium for tractor and Rs.441/- for trailer. I have also extracted the details of payments in the earlier part of my order. Taking note of all the above aspects, namely, the tractor and trailer were engaged only for agricultural purpose on 9.6.1994, in view of payment of separate premium for tractor and trailer covering the driver and the other third parties of both the tractor and trailer, even though there is no specific reference covering the liability for the death or injury to the coolies and in the absence of any specific exclusion, I am of the view that the insurer has to pay the compensation to the claimants for the death of Annadurai. It is not the case of the insurance company or any one that the trailer can be used for agricultural purpose without the assistance of certain workmen. When the vehicle is intended for agricultural operation undoubtedly without the assistance of certain workmen, no work can be done. I have already stated that the owner had taken policy for both tractor and trailer and paid substantial amount towards premium. In such a circumstances, I am unable to accept the contrary view taken by the Tribunal exonerating the insurance company from its liability, and in the light of the valid policy for the tractor and trailer and of the fact that the deceased met with the accident in the course of agricultural operations, I am of the view that both the owner and his insurer are liable to pay compensation".

In my considered opinion, in the absence of any specific admission from the claimants that they were not the employees of the owner of the vehicle and also in the absence of any contra evidence produced on the side of the insurance company, I am of the opinion that on the date of accident, the victims had travelled in order to carry out the work of the 1st respondent, namely, to load the goods. Since there is a coverage for 9 employees, the insurance company is liable to pay compensation. Under these circumstances, I do not find any infirmity in the awards passed in all the claim petitions and the appeals are liable to be dismissed."

In view of the above said decision of this Court deciding in favour of injured/claimants, who suffered grievous injuries while travelling in the very same lorry bearing Registration No.TCF-8193, I do not find any merit in the contention of the appellant/Insurance Company that the policy does not cover the deceased/driver of the lorry.

10. As rightly argued by the learned counsel for the third respondent/owner of the vehicle, it is not a case where the learned Commissioner can apply the principles of pay and recovery in the light of a decision of this Court in N.Senthilkumar's case (cited supra), which held that as the driver suffered personal injuries during the course of and arising out of employment while he was discharging his service obligations, the compensation payable would be squarely covered by the provisions of Workmen's Compensation Act and the Insurance Company cannot be absolved of its liability. In the present case, it is not in dispute that the deceased/driver of the lorry died on the spot while he was driving the lorry carrying goods. Therefore, the findings of the learned Commissioner applying the principles of pay and recovery directing to recover the awarded sum from the owner of the vehicle/third respondent herein alone is set aside and on all other aspects, this award is upheld.

11. In fine, for the reasons stated above, the Civil Miscellaneous Appeal is dismissed. The award of the learned Commission is modified to the extent mentioned above. As the amount has already been deposited, the claimants/respondents 1 and 2 herein are permitted to withdraw the same forthwith. No Costs. CMP.No.18357 of 2017 is closed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

To
The Commissioner for Employees Compensation,
Deputy Commissioner of Labour,
Labour Court, Salem.

+1cc to Mr.J.Chandran, Advocate, Sr.No.30549

C.M.A.No.3031 of 2017

rld (co)
rr ii (18/11/2020)