In the High Court of Judicature at Madras

Dated: 03.02.2021

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The Honourable Mr. Justice D.KRISHNA KUMAR

C.M.A.No.3292 of 2010

1.Arukkani

2.Selvamani

3.Dhanalakshmi

4.Minor Balamani

5.Minor Kalaivani

Minors rep. by mother and natural guardian Arukkani ... Appellants/Petitioners

..Vs..

1.R.Selvaraj

2.P.Subramaniam

3.M/s. Oriental Insurance Co. Ltd.,
Kumaran Road,
Tirupur. ... Respondents/Respondents

Prayer : This Civil Miscellaneous Appeal is filed under Section 173 of Motor Vehicles Act, 1988, against the award and decree passed by the learned Sub-ordinate Judge, (MACT), Tirupur in M.A.C.T.O.P.No.127 of 1991 dated 28.10.1997.

For Appellant : Mr.Radhakrishnan
for Mr.S.K.Rakhunathan

For Respondent-3 : Mr.M.J.Vijaya Raaghavan

J U D G M E N T

This appeal has been preferred by the claimants as against the award passed by the learned Sub-ordinate Judge, (MACT), Tirupur in M.A.C.T.O.P.No.127 of 1991 dated 28.10.1997, on the ground that the liability has been fastened as against the respondents 1 & 2 therein/driver and owner of the vehicle and exonerating the Insurance Company, to whom the offending vehicle was insured, from paying the compensation to them.

2. Heard Mr.Radhakrishnan, learned counsel appearing on behalf of the appellants and Mr.M.J.Vijayaraghavan, learned counsel for the third respondent/Insurance Company.

3) The brief facts of the case is as follows:-

a) On 18.01.1989 at about 11.00 a.m., when the deceased Nachimuthu along with one Ayyaswamy were travelling in the lorry bearing registration No. M.D.A.876, the lorry was capsized at Kathanoor road and Nachimuthu and Ayyaswamy died in the said accident drowned by loaded sand. Hence, the legal heirs of the deceased Nachimuthu had filed a claim petition, claiming a sum of Rs.3,52,000/- as compensation for his death.

b) Before the Tribunal, witnesses P.W.1 & P.W.2 were examined and exhibits P1 to P3 were marked on the side of the claimants whereas R.W.1 was examined and exhibits R1 and R2 were marked on the side of the respondents. After considering the oral and documentary evidences, the Tribunal had come to the conclusion that the accident had occurred only due to the rash and negligent driving of the first respondent/driver of the vehicle and fastened the liability on the first and second respondent. Since the deceased had travelled as gratuitous passenger in the lorry, the Tribunal had rendered the finding that the Insurance company is not liable to pay the compensation and the respondents 1 and 2 namely, the driver and owner of the lorry is liable to pay the compensation of Rs.1,45,000/- to the claimants with interest at the rate of 12% p.a.

4. Aggrieved over the same, the claimants has preferred the present appeal to direct the third respondent Insurance Company to pay the compensation.

5. According to the learned counsel for the appellants/claimants, the Insurance Company is liable to pay the compensation in respect of the gratuitous passenger along with the owner of the vehicle as per the decision of the Hon'ble Supreme Court in the case of New India Assurance Co. Ltd., Vs. Satpal Singh reported in 2000 (1) CTC 370. Except this ground, no other grounds have been raised by the learned counsel for the appellants before this Court and pleaded that the Insurance Company has to be directed to pay the compensation in the light of the aforesaid decision of the Hon'ble Supreme Court.

6. The learned counsel for the third respondent/Insurance Company has strongly objected that the appellants have not served notice on the respondents 1 and 2, who are liable to pay the compensation as per the judgment of the Tribunal. According to the learned counsel for the Insurance Company,

they are also relying upon the decision of a Division Bench of this Court in the case of Bharati AXA General Insurance Co. Ltd., Rep. by its Manager, Bangalore Versus Aandi & Others reported in 2018 (2) TNMAC 731 where the Hon'ble Division Bench following the various judgments of the Hon'ble Supreme Court, has elaborately discussed the aforesaid aspects, particularly, in regard to fastening of liability. The relevant portions of the said decision is as follows:-

> "31. Section 149 of the Motor Vehicles Act imposes an obligation on the Insurance Company to satisfy the judgments and awards passed against the insured. Sub-section 2 of section 149 provides that the insurer must be heard in a proceeding before the claims Tribunal seeking compensation, it also sets out the defences that are available to the Insurance Company in such claims. One of the defences that is set out in Section 149(2)(a)(i)(c) is the purpose for which the vehicle was used at the time of the accident. Under the said provision it is open to the Insurance Company to plead and prove that the vehicle was used for the purpose other than which it was permitted and extricate itself from the liability to pay compensation. ....
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> 49. We find that the judgments relied upon by the Hon'ble Supreme Court in Shivaraj v. Rajendra and another referred to supra in support of its conclusion that the Insurance Company can be directed to pay the compensation with liberty to recover the same even in respect of a gratuitous passenger or an unauthorised passenger in a goods vehicle, do not support the said conclusion.
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> 50. In fact, we find that in none of the judgments referred to viz., National Insurance Co. Ltd. v. Swarn Singh & Ors. reported in (2004) 3 SCC 297, Mangla Ram v. Oriental Insurance Co. Ltd. reported in (2018) 5 SCC 656, Rani & Ors. v. National Insurance Co. Ltd. & Ors. reported in 2018 (9) Scale 310 and Manuara Khatun and Others v. Rajesh Kumar Singh And Others reported in (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 Company Ltd., v. Baljit Kaur 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.

51. No doubt true that in many cases the claimants may not be able to realise the award amount from the owners of the vehicles involved in the accident. But, the said factual situation alone cannot impel us to do something against the provisions of the statute and the decisions of the larger benches of the Hon'ble Supreme Court of India.

52. In fine, all the appeals will stand allowed only in respect of the question of liability of the Insurance Company to pay the compensation. The quantum of compensation is affirmed and there will be an award only against the owner of the vehicle viz., 1st respondent in all the Original Petitions and the award against the Insurance Company will stand set aside. However, in view of the fact that the claimants are not before us. We do not impose any costs. Consequently, the connected Miscellaneous Petitions are closed."

7. Earlier, notice has been ordered by this Court to the respondents 1 and 2 and since the same have not been served by the appellants, this Court dismisses the appeal as against them. In the light of the aforesaid judgment, the Insurance Company is not liable to pay the compensation and it is made clear that the first and second respondents, who are the driver and the owner of the lorry are only liable to pay the compensation as rightly directed by the Tribunal.

8. On considering the aforesaid facts and submissions of the learned counsel on either side and in the light of the aforesaid decision of the Hon'ble Division Bench of this Court, the award passed by the Tribunal is perfectly correct and warrants no interference. Consequently, the appeal is liable to be dismissed.

9. Accordingly, the Civil Miscellaneous Appeal is dismissed. Consequently, connected Miscellaneous Petition is closed. There shall be no orders as to costs.

Sd/-
Assistant Registrar(CS-V)

//True copy//

Sub Assistant Registrar

DP

To

1.The Sub Court,
(The Motor Accident Claims Tribunal),
Tirupur.