IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 1.3.2021

CORAM:

THE HON'BLE Mr.JUSTICE D.KRISHNAKUMAR

Civil Miscellaneous Appeal No.939 of 2012
and
M.P.No.1 of 2012

The Oriental Insurance Co. Ltd.,
No.4, Bharathidasan Road, 2nd Floor,
Trichy.
... Appellant/2nd Respondent

..Vs..

1. Manoharan
...Respondent-1/Petitioner

2. K.Rajeswari
... Respondent-2/1st Respondent

Appeal filed under Section 173 of the Motor Vehicles Act, 1988, against the Judgement and decree dated 14.12.2010 made in M.C.O.P.No.361 of 2009 on the file of Chief Judicial Magistrate (Motor Accidents Claims Tribunal), Namakkal.

For Appellant : Mr.M..Krishnamoorthy

For Respondent : Mr.Ma.P.Thangavel

JUDGMENT

Brief facts of the claimant's case is as follows:

On 13.06.2009 at about 9.45 a.m., at Mettupalayam to Tha.Pettai main road, south of Urudaiyapatti bus stop, while the petitioner was travelling in a TATA 407 van bearing registration No.TN 28 F 7258, driver of the said Van drove the vehicle in a rash and negligent manner and without noting the traffic and due to over speed, suddenly Van capsized in the road side, thereby caused accident, resulting in the petitioner sustained multiple fractures and grievous injuries in right leg, head, both hands and some other injuries all over the body.

Tha.Pettai police have registered F.I.R. In Cr.No.122/09/07 under Section 279, 337 of I.P.C. against the driver of the offending vehicle. The victim has filed a claim petition before the Tribunal, claiming Rs.5,00,000/- for the fractures and injuries sustained by him.

2 The second respondent herein remained exparte before the tribunal. On the side of the petitioner, P.W.1 to 3 were examined and Ex.P1 to P11 were marked. On the side of the respondent, R.W.1 was examined and Ex.R1 was marked.

3 The Tribunal, based on the oral and documentary evidence, came to the conclusion that due to rash and negligent driving of the van by its driver, the accident was occurred and directed the appellant/Insurance Company to pay compensation to the claimant and thereafter recover the same from the owner of the vehicle and awarded Rs.2,46,300/- to the claimant for the 40% disability sustained by him and other heads along with interest at the rate of 7.5% p.a from the date of petition till realization.

4. The Challenge in the instant appeal is against the award in respect of the principle of Pay and Recovery passed against the appellant/ Insurance Company.

5. Heard the learned counsel appearing for the appellant/Insurance Company and the learned counsel appearing for the respondent/claimant and perused the materials available on record.

6. The short point involved in the present appeal is that whether the Insurance Company be absolved from liability to pay compensation to the claimant.

7. According to the learned counsel appearing for the appellant/ Insurance Company, tribunal has discussed the grounds raised by the appellant Insurance Company including liability against the offending vehicle and the tribunal also discussed negligence aspect on the part of the offending vehicle and came to the conclusion that due to the negligence on the part of the offending vehicle, the accident was occurred. The tribunal while arriving such finding followed the principle of Pay and Recovery by directing the appellant/Insurance Company to pay compensation amount to the claimant and thereafter recover the said amount from the owner of the vehicle which is wholly unsustainable in law. In support of his contention, he placed reliance on the judgment of this Court in the case of BHARATI AXA GENERAL INSURANCE CO. LTD. VS. AANDI AND TWO OTHERS .

8. The learned counsel appearing for the respondent/claimant would submit that if the Insurance Company is absolved from liability far consequence to the claimant to

recover the said amount from the owner of the vehicle. The finding of the tribunal is against the offending vehicle which was insured with appellant/Insurance Company. Therefore, liability as fixed against the Insurer is perfectly correct. Further, the learned counsel appearing for the first respondent/ claimant has placed reliance on the Policy Schedule wherein it is stated as follows:

ADD: LL TO NFPP – INCLUDING EMPLOYEES-IMT-37 - 75/-

Therefore, according to the learned counsel appearing for the respondent/ claimant, premium was paid to the Non-fare Paying Passenger and therefore, the appellant/Insurance Company is liable to indemnify the amount paid towards Non-Fare Paying Passenger.

9. The learned counsel appearing for the appellant/Insurance submitted that as per the tariff for Non-fare Paying Passenger, 6 persons were entitled to claim compensation against the Insurance Company. On the facts of the case, 20 persons were unauthorisedly travelled in the goods vehicle and due to the said accident, they were injured. In view of the violation of policy conditions and also premium was not paid in sofar as unauthorised passengers, the Insurance Company is not liable to pay compensation. In support of his contention, the learned counsel appearing for the appellant/Insurance company relied on the decision of the Division Bench of this Court in the case of BHARATI AXA GENERAL INSURANCE CO. LTD. VS. AANDI AND TWO OTHERS REPORTED IN 2018 (2) TN MAC 731 (DB) wherein the Division Bench of this Court held as under:

> ''25. A reading of the above provision makes it clear that an insurance policy which is a mandatory statutory requirement is required to cover only certain classes of persons and not every person who chooses to travel in any type of vehicle. Therefore, there is no mandatory requirement for the Insurance company to cover persons who are travelling as passengers in a non passenger vehicle/ goods vehicle.
>
> 26. Section 149 imposes an obligation on the part of the insurers to satisfy the judgments and awards made against the persons insured in respect of third party risks. Section 149(2) requires the Court or the Tribunal to notify the Insurance Company regarding the claim and also hear the Insurance Company and prescribes the defences that are available to the insurer in such third party claims. One of the defences that is available to the insurer

> in such third party claims as set out under Section 149(2)(a)(i)(c) is that the insured vehicle being used for a purpose not allowed by the permit under which the vehicle is used where the vehicle is a transport vehicle. Therefore, it is clear that a Insurance Company which faces the claim petition can raise a statutory defence to the effect that the vehicle in question was used for a purpose other than the purpose for which the permit had been issued, in order to avoid the liability. Both these provisions have to be necessarily read together.''

The aforesaid decision squarely applies to the facts of the instant case.

10. On the other hand, the learned counsel appearing for the respondent/claimant also relied on the decision of this Court in the case of NATIONAL INSURANCE CO. LTD. VS. S.IBRAHIM reported in 2011 (1) TN MAC 587 wherein this Court held as under:

> ''15. When we analyse the case in C.M.A No. 778 of 2008, concerning the death of Palani, no doubt, in that case also P.W.I, the father of the deceased would contend that he was a +2 student and only in the vacation, he indulged in the business. It is further deposed that he continued his studies and his mark sheet also would prove that during the relevant point of time, he continued to be a student and there is no plausible explanation given by P.W.I that he was the owner of the goods. At the same time, P.W.2, the other coolie who was also an eye-witness and travelling in the vehicle deposed that the deceased was travelling in the vehicle as the owner or the person accompanying the goods. The fact remains that this person was accompanying the goods, namely, the chick and hen. When we analyse this aspect, the learned counsel for the Respondents/Claimants pointed out that under the Policy a sum of Rs. 75/- has been received as premium under the heading NFPP-1 which means Non-Fare Paying Passenger-1. Therefore, the Policy covers in respect of any death or accident for a person who is travelling in a vehicle, even though he was not the owner of the goods but as a non-

fare paying passenger.

11. This Court also held that the policy would cover in respect of any death of accident for a person who is travelling in vehicle, even though he was not the owner of the goods but as a non-fare paying passenger. However, the aforesaid decision would not apply to the facts of the case in hand. In the aforesaid case, the only one person viz., deceased accompanying the goods as an agent or authorised by the owner of the goods. In the case on hand, the claimant one among the 30 persons have travelled in the goods vehicle viz., tempo bearing registration No.TN 28 F 7258, as unauthorised passengers. Admittedly, the offending insured vehicle is a goods vehicle. To that effect, the tribunal in its award has clearly stated that 30 persons including claimant have travelled in the offending vehicle. Further, it is not the case of the petitioner that he had travelled along with the goods as its agent. But the petitioner had travelled one among the 30 unauthorised passengers. Therefore, it is clear that the 30 persons including claimant had travelled as unauthorised passengers in the goods vehicle. Policy schedule relied on by the counsel appearing for the appellant would also clearly shows that the unauthorised passengers were not covered under Non-Fare Paying Passengers. Since the owner of the vehicle violated the policy conditions, Insurance Company is not liable to pay compensation to the claimant.

12. In view of the above, the appellant/Insurance company is absolved from liability to pay compensation to the claimant. The appellant/ Insurance Company is permitted to withdraw the amount already deposited before the tribunal. The award passed by the tribunal against the appellant/Insurance company is set aside. Therefore, the award is only against the owner of the vehicle. It is for the respondent/claimant to recover the said amount from the owner of the vehicle in the manner known to law.

13. In fine, the Civil Miscellaneous Appeal is allowed. No costs. Connected miscellaneous petition is closed.

Sd/-
Assistant Registrar (CS-V)

//True Copy//

Sub Assistant Registrar

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To

1.The Chief Judicial Magistrate,
(Motor Accidents Claims Tribunal),
Namakkal.

+1cc to Mr.M.Krishnamoorthy , Advocate, S.R.No.12935

+1cc to Mr.Ma.P.Thangavel, Advocate, S.R.No.12722

Civil Miscellaneous Appeal
No.939 of 2012

NMI(CO)
SU(13/09/2021)