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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON :12.02.2021

PRONOUNCED ON :17.02.2021

CORAM:

THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN

C.M.A.NO.180 OF 2017

1.Maheswari

2.Minor Arikrishnan

Rep.by mother Maheswari

3.Radha

..Appellants/Petitioners

/versus/

1.M.Anthonysamy

2.The Oriental Insurance Company Ltd.,

Divisional Office,

F4, Visitors Road,

Block-2, Neyveli-1.

3.M.Pattu Mudaliyar

4.Saroja

..Respondents/Respondents

Prayer: Civil Miscellaneous Appeal has been filed under Section 173 of the Motor Vehicles Act, 1988 against the judgment and decree passed by the learned Sub Ordinate Judge, Neyveli, Motor Accidents Claims Tribunal dated 19.09.2016 in M.C.O.P.No.84 of 2012.

For Appellants : Mr.S.Udhyakumar

For Respondents : Mr.D.Bhaskaran for R2

No appearance for R1

Given up for R3 and R4

#### J U D G M E N T

Appeal against the dismissal of the claim petition is filed by the legal heirs of the accident victim, assailing the reason given by the Tribunal for dismissing their petition.

2.On 07/02/2012, at about 11.00 am, opposite to the house of one Venkatesan, the deceased Thamilarasan was unloading the hay



from the stationed trailer attached to the tractor. Suddenly, the driver of the tractor moved the tractor recklessly, while Thamilarasan was unloading the hay. Thamilarasan lost his balance and fell down from the trailer. He sustained grievous injuries over his vital organs. He was admitted in the hospital and treated as inpatient. At the hospital, he succumbed to the injuries on 29/02/2012. At the time of his death, he was 32 years old. He was earning Rs.15,000/- per month as loadman. His wife, minor son and mother were depending on his income. Hence, claim of Rs.15,00,000/- was sought as compensation against the tractor owner and its insurer.

3.The Insurance Company contested the claim on the ground that the deceased was an unauthorised passenger. The accident occurred, when the tractor was stationed and the driver of the tractor was standing near the tractor. Thamilarasan fell from the trailer, which is not insured with the second respondent. The police, who investigated the criminal case against the tractor driver, closed the case as mistake of fact. The amount claimed as compensation is excessive. The claimants have to prove that they are the dependants of the deceased.

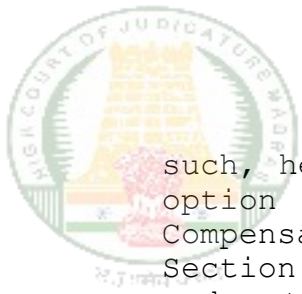
4.The claimants to prove the case examined 6 witnesses and marked 6 exhibits. On the side of the respondents, 3 witnesses were examined and 4 exhibits were marked.

5.The Trial Court, after considering the evidence, held that the accident occurred due to the negligence of Thamilarasan, who fell down from the hay load. When he slipped from the load while un-tying the rope, sustained head injury. Since it is proved that the vehicle was not moving, the driver of the tractor cannot be held to be negligent. Therefore, neither the owner of the tractor nor the insurance company is liable to compensate.

6.The learned counsel for the appellants submitted that the dismissal of the claim petition is erroneous on facts and law. The Tribunal erred in overlooking the evidence of PW-2, who witnessed the accident and the fact that the accident occurred during the course of employment involving a motor vehicle. PW-6 is the doctor who recorded the accident register has deposed that the victim informed him that he fell down, when the driver of the tractor moved the tractor and the same is recorded in Ex R-3.

7.The Tribunal failed to note that the tipper loaded with hay attached to the tractor is part of tractor. The same ought to have been treated as one unit. Fall from the tipper is a motor vehicle accident and the Tribunal ought not to have disallow the claim in toto. The contribution of the tractor and its driver ought to have been taken note by the tribunal.

8.The Tribunal erred in not considering the fact that the victim died while unloading the hay from the motor vehicle. As



such, he is the employee of the vehicle owner. The claimants had option to claim compensation either under the Workman Compensation Act (or) under the Motor Vehicles Act as per Section 167 of Motor Vehicle Act. The claimants opted to proceed under the Motor Vehicles Act. Being a welfare legislation, the Court is empowered to convert the claim under Workman compensation Act and pay compensation.

9. In support of his submission, the learned counsel for the appellants relied upon the following judgments:-

(1) In Oriental Insurance Co Ltd -vs- V. Bhuvaneswari : 2019 (1) TN MAC 72 (DB); Para 9 and 10 reads as below:-

"9. It is not in dispute about the manner of the accident and the primordial submission made by the learned counsel for the appellant is that the wrong provision of law has been invoked and as such, the Tribunal ought to have returned the appeal and had awarded the compensation by invoking Section 163-A of the Motor Vehicles Act.

10. In the considered view of this Court, the submission made by the learned counsel for the appellant is liable to be rejected. The Motor Vehicles Act is a benevolent legislation and mere applying wrong provision of law will not per se reject the claim petition and this Court can mould the record by applying the correct provision of law and the submission made by the learned counsel for the appellant is liable to be rejected."

(2) In Venkatesan -vs- M.K.V. Kandasamy Nadar and others : 2011 ACJ 366, Paras 8, 9 and 10 reads as below:-

"8. In support of his contention he places reliance upon a judgment of a Division Bench of this Court in Oriental Insurance Co. Ltd., v. Kaliya Pillai, 2003 ACJ 1021 (Madras). In the said case, the deceased was a tractor driver, who fell down from the tractor due to his own negligence while driving the tractor and died. The Tribunal held that the insurance company was liable to pay compensation. Challenging the said award, the insurance company preferred appeal before this Court and the Division Bench, after having a detailed study of the subject on this point with reference to two Division Bench decisions of this Court pronounced



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earlier, reached a conclusion that even though the insurance company could not be held liable under the Motor Vehicles Act, still the dependants of the deceased are entitled to get compensation under Workmen's Compensation Act. The Division Bench taking note of the length of litigation, for the object of shortening the litigation and in the interest of justice, held that dependants have to be extended the benefit of Workmen's Compensation Act in the circumstances available. This Court while dealing with the point has observed thus:

"It is well settled law that when the owner is not liable, the insurer cannot be held liable. "Since, the accident was caused only due to rash and negligence of the driver of the tractor, we hold that the question of vicarious liability will not arise when the claim is made by the tortfeasor himself or any other person claiming under the tortfeasor; accordingly the claim by the claimants is absolutely misconceived and they cannot claim any compensation from the owner of the vehicle; consequently, they also cannot make any claim against the appellant insurance company. However, the insurer's liability is to be determined not only with reference to the provisions under the Motor Vehicles Act, but also with reference to the contract of insurance which would extend to the liability of the insured under the Workmen's Compensation Act. There is a specific finding by the Tribunal that deceased tractor driver died in the course of his employment. Further, it is not disputed that there was a valid insurance on the date of the accident, and accordingly the insurer was liable to the extent of liability under the Workmen's Compensation Act. In other word, we hold that even though the insurance company was not liable under the provisions of the Motor Vehicles Act, it would be proper to assess the compensation under the Workmen's Compensation Act in order to shorten the litigation and also in the interest of justice, we decide to dispose of the appeal by determining the appropriate compensation in favour of the claimants."



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9. In the two other Division Bench decisions referred to in the judgment supra, the judges had dealt with the availability of remedy for the injured or the dependents, if the injured was not alive, in the identical circumstances and rendered a finding that under Motor Vehicles Act they have to be non-suited. But in Kaliya Pillai and others case cited supra, the Division Bench of this court has expressed its view vividly on this point to the effect that this court has got ample powers to allow compensation under Workmen's Compensation Act, though not under Motor Vehicles Act.

The above said decision has been followed by another Division Bench of this court in Oriental Insurance Co. Ltd. V. Krishnan and Others reported in 2004 ACJ 1790 (Madras).

10. Following the principle laid down in Kaliya Pillai and others case, it has to be necessarily held in this matter that the appellant is entitled for compensation under the Workmen's Compensation Act, even though he is termed to be a wrong doer. The findings furnished by the Tribunal in its award on the factual aspects are proper and there is no necessity to interfere with the same. However, as adverted to already, he, under law, is entitled to receive compensation from the fifth respondent."

(3) In Sivaraj -vs- Rajendra and another : 2018 ACJ 2755  
Para 9 and 10 reads as below:

"9. The High Court, however, found in favour of respondent No.2, (insurer) that appellant travelled on the tractor as a passenger which was in breach of the policy condition, for the tractor was insured for agricultural purposes and not for carrying goods. The evidence on record unambiguously pointed out that neither any trailer was insured nor was any trailer attached to the tractor. Thus, it would follow that the appellant travelled on the tractor as a passenger, even though the tractor could accommodate only one person, namely, the driver. As a result, the insurance company (respondent No.2) was not liable for the



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loss or injuries suffered by appellant or to indemnify the owner of the tractor. Thus conclusion reached by the High Court, in our opinion, is unexceptionable in the fact situation of the present case."

10. At the same time, however, in the facts of the present case the High Court ought to have directed the insurance company to pay the compensation amount to the claimant (appellant) with liberty to recover the same from the tractor owner, in view of the consistent view taken in that regard by this Court in *National Insurance Co. Ltd., v. Swaran Singh*, 2004 ACJ 1 (SC); *Mangla Ram v. Oriental Insurance Co. Ltd.* 2018 ACJ 1300 (SC), *Rani v. National Insurance Co. Ltd.*, 2018 ACK 2430 (SC) and *Manuara Khatun v. Rajesh Kumar Singh*, 2017 ACJ 1031 (SC). In other words, the High Court should have partly allowed the appeal preferred by the respondent No.2. Appellant may, therefore, succeed in getting relief of direction to respondent No.1 insurance company to pay the compensation amount to the appellant with liberty to recover the same from the tractor owner (respondent No.1)."

10. Per contra, the learned counsel for the respondent/insurance company submitted that the claimants examined two witnesses PW-2 and PW-4, who are the supposed to have witnessed the occurrence. The material contradictions between the evidence of PW-2 and PW-4 and the final report of the police marked as Ex.R1, disproves the allegation of the claimants about the negligence of the tractor driver. Further, in Ex.R-3, the word 'moving' before the word 'tractor' found inserted written in different ink. Though PW-6-Doctor, who wrote the Accident Register Ex.R-3, had deposed it was written by him, whether it was written contemporaneously (or) later is doubtful. Even if the accident occurred when the tractor was in move, the claimants are not entitled for any compensation, since the deceased is not an authorised passenger or covered under the insurance policy as employee.

11. In support of his arguments, the learned counsel for the respondents relied upon the following judgments :-

- 1) *National Insurance Co. Ltd -vs- Chinnamma and others*: 2004(8) SCC 697
- 2) *United India Assurance Co Ltd -vs- Nagammal* : 2009(1) TN MAC 1 (FB)



3) Oriental Insurance Co Ltd -vs- Brij Mohan and others  
: 2007 (2) TN MAC 66 (SC)

4) Oriental Insurance Co. Ltd -vs- Pauldurai: 2012 (1)  
TN MAC 545

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12. This Court, after considering the rival submissions, holds the appeal not sustained for the following reasons.

The death of Thamilarasan was while he was unloading hay from the trailer. This fact is spoken by witnesses without any contradictions and the documentary evidence also vouchsafe this fact. The dispute is only regarding the liability. To assert that the accident occurred due to the negligence of the tractor driver, the claimants rely upon the oral evidence of PW-2 and PW-4 and the documentary evidence such as FIR marked as Ex P-1 and the Accident Register marked as Ex.R-3. Contrarily, to prove the tractor driver was not at fault, the 2nd respondent rely upon the final report of the police marked as Ex.R-1 and the contradictions in the ocular evidence of PW-2 and PW-4, which belies the claimants case.

13. The contradictions between the evidence of PW-2 and PW-4 are the number of persons travelled in the tractor, while PW-2 had deposed two persons travelled in the tractor as passengers and the deceased Thamilarasan was one among them, PW-4 had deposed that 4 persons travelled in the tractor, Thamilarasan was one among them. In the proof affidavit, PW-2 had stated that the tractor was attached to a two wheel tyre cart loaded with hay. Whereas during the cross examination he had stated that it was a tipper. PW-4 in the cross examination admit that he did not saw Thamilarasan falling from the vehicle. The First information Report Ex.P1 given by one Sethuraman who is not the witness to the accident. The examination of Ex.R-3, it is obviously seen the word 'நகரும்' in tamil, meaning 'moving' inserted before the word Tractor. It is an afterthought manipulation.

14. Therefore, the finding of the Tribunal that the accident did not occur due to the negligence of the tractor driver is based on evidence and need no interference. Assuming, even if it is held that the victim fell down from the moving vehicle and died, the insurance company cannot be held liable to compensate or to pay and recover from the tractor owner, since the tractor does not have permit to carry passengers. The seating capacity is only one ie for the driver. The insurance coverage as per Ex.P-3 is only for third party claims and additional premium is paid only for driver/cleaner/conductor. No premium paid for Workmen Compensation employee.

15. Therefore, the submission of the learned counsel for the appellants that being a beneficial legislation, the claim petition under MV Act to be converted into claim under WC Act



will no way help the claimants, when the insurance company is not liable to pay employee since no insurance coverage provided to the employee under Ex.P-3. Particularly the terms and condition as found in Ex.P-3, this Court finds that the tractor cannot be used for any other purpose than for agricultural purpose, cannot be used to draw trailer except in case of towing any disabled mechanically propelled vehicle. In view of the serious policy violation, the insurance company is not liable to indemnify the vehicle owner.

16.Had there been any evidence to prove that the deceased was engaged by the tractor owner to unload the hay, then the owner of the tractor viz the first respondent could have been held liable personally as employer for the employee's death during the course of the employment. In this case, there is no pleadings or evidence that the deceased accompanied the hay and tried to unload the hay as employee of the tractor owner. Who engaged the deceased, whether it is the owner of the goods (hay) or the owner of the vehicle not stated in the claim petition or spoken by the witnesses. Therefore, even to convert the petition as a claim under Workmen Compensation Act, the petition lacks details.

17.Under the above said facts and circumstances, the order of the Tribunal viz., the Sub Court, Neyveli, passed in M.C.O.P.No.84/2012 dated 19.09.2016 is confirmed. The Civil Miscellaneous Appeal No.180/2017 dismissed as devoid of merits. No order as to costs.

Sd/-  
Assistant Registrar

//True Copy//

Sub Assistant Registrar

ari  
To:

The Subordinate Judge,  
The Motor Accident Claims Tribunal, Neyveli.

Copy To:  
The Section Officer, VR Section, High Court, Madras - 600 104.

+1cc to Mr.S.Udayakumar, Advocate, S.R.No.9858

C.M.A.No.180 of 2017

EV(CO)  
RGA(06/09/2021)