IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 27.01.2021

CORAM:

THE HONOURABLE DR. JUSTICE G.JAYACHANDRAN

C.M.A.No.421 of 2017

Ramesh @ Ramesh Kumar ...Appellant/Petitioner

Vs

1.Karthikeyan

2.A.Somasundaram

3.National Insurance Co. Ltd.,
Cifco, Extension Counter,
Tiam House Annexe,
No.28, Rajaji Salai,
Chennai 600 001. ...Respondents/Respondents

PRAYER: Civil Miscellaneous Appeal filed under Section 173 of Motor Vehicles Act, 1988, against the judgment and decree dated 16.12.2011 made in M.A.C.T.O.P.No.1047 of 2001 on the file of the Motor Accidents Claims Tribunal, Fast Track Court No.IV, Coimbatore at Tirupur.

For Appellant : No Appearance

For Respondents : R1, R2 exparte
Mr.N.Aruk Kumar for R3

J U D G M E N T

No representation for the appellant. The matter is adjourned nearly eight occasions at the request of the learned counsel for the appellant. Despite accommodation, the learned counsel for the appellant is not ready to pursue the appeal. Learned counsel for the third respondent is present.

2. The appeal is filed against the order passed by the Tribunal fastening the liability on the owner of the vehicle and exonerated the insurance company on the ground that the claimant was a gratuitous passenger in a goods vehicle.

3. The facts of the case is that on 29.07/2001 at about

08.30 a.m., when the petitioner was traveling in a Mini van bearing Registration No. TN 41 H 6280, the vehicle capsized due to the rash and negligent driving of the van driver. The claimant was traveling in the said vehicle as a gratuitous passenger sustained fractured wound over the left middle ring and little finger with deformity, fracture of three fingers, wound over the left knee joint and loss of tibia muscle. His left leg got amputated. Being an Auto driver, the claimant has filed petition seeking Rs.10,00,000/- compensation on the ground that his monthly income was Rs.5,000/- which he has lost due to the amputation of left leg.

4. The Insurance Company filed counter stating that the burden of proof is on the claimant to prove the negligence on the part of the van driver. The possession of driving license has to be proved by the claimant. Further, it was specifically contended by the Insurance Company that the claimant was a gratuitous passenger traveling in the goods vehicle meant for carrying goods. The insurance coverage provided by the Company was against the third party claim alone. By accommodating passenger in a goods vehicle, the vehicle owner has violated the policy condition. Hence, the claim of compensation against the Insurance Company is not maintainable.

5. Before the Tribunal, the claimant examined himself as P.W.1 and two other witnesses were examined in support of his claim petition. 9 exhibits were marked on the side of the claimant. To substantiate the defense, the Insurance Company has examined one witness and the Insurance policy copy was marked as Ex.R1.

6. The Tribunal, on considering the evidence placed before it, held that as per the F.I.R, the petitioner had traveled along with one Karthikeyan, who was riding the auto and it was taken for test driving after being repaired whereas in his deposition, the claimant has stated that he traveled in the goods auto carrying his auto engine. While the claimant has taken umbrage on the category of owner of the goods traveling in a goods vehicle, the fact as recorded by the police in the F.I.R. based on the information given by the brother of the claimant indicates the claimant travelled in the van as gratuitous passenger. When there is no evidence to show that he traveled in the vehicle as the owner of goods, he has to be considered as gratuitous passenger traveled in the goods auto and therefore, the Insurance Company cannot be held liable to pay compensation and accordingly, awarded a sum of Rs.7,03,554/- with 7.5% interest payable by the owner of the vehicle.

7.The appeal is filed by the claimant on the ground that the Tribunal has failed to follow the dictum laid in 2010(4) L.W.742 and the judgments of the Hon'ble Supreme Court rendered in 2008(1) TNMAC 115 and 2013 ACJ 554 to the effect that the compensation amount to the third party irrespective of violation of policy condition should be paid by the Insurance Company and if law permits, the right to recovery should be given to the Insurance Company. Precisely, it is contended that the Tribunal ought to have ordered pay and recovery, if it is convinced that it is case of policy violation. Further, the appellant has stated that in the said accident, the claimant has lost his left leg. Therefore, the compensation of Rs.7,03,554/- is very less, considering the gravity of the injury and the loss of earning capacity. Therefore, it is also pleaded that the quantum of compensation should be enhanced further.

8. Learned counsel for the Insurance Company would submit that the Tribunal on considering the facts of the case has held that the claimant is a gratuitous passenger and not authorized to travel in a goods vehicle. Based on the evidence produced by the claimant, the compensation has been awarded taking note of his notional income as Rs.3,500/- per month and disability of 81.6% as per the disability certificate.

9.This Court on perusing the records finds that the claimant has not proved that he traveled in the goods vehicle as owner of the goods. There is no evidence to show that he was carrying engine in the said vehicle. Contrarily, the F.I.R. given by the brother of the claimant clearly indicates that the vehicle got capsized when the claimant was traveling along with one Karthikeyan, who was riding the auto and it was taken for test drive and no goods was carried. It is also pertinent to note that the injured himself an auto driver by profession and his left leg amputated.

10.The policy copy marked as Ex.B1 indicates that the vehicle got capsized in which the claimant has sustained injury. As a goods vehicle, no seat to accommodate passenger provided in the vehicle. The insurance premium was also paid only against the third party claimant. Since the claimant had traveled in the goods vehicle, as per the judgment of the Division Bench of this Court rendered in 2018 (2) TNMAC 731, Bharathi AXA General Insurance Co. Ltd. vs. Aandi, gratuitous passenger in a goods vehicle cannot claim compensation from the insurance company or insist upon application of principle of pay and recovery on the ground that it is difficult for the claimant to recover money from the vehicle owner. In the said judgment, it is observed that the application of the principle of pay and recovery exercised by the Hon'ble Supreme Court invoking its power under Article 142 of the Indian Constitution cannot be uniformly and universally apply to in all cases where there is a grave policy violation. Parties are bound by terms of contract and no additional liability beyond the terms of contract can be levied upon the Insurance Company. The Division Bench of this Court after considering the submissions made for and against in respect of compensation for gratuitous passenger in a goods vehicle and application of principles of pay and recovery, on considering the judgments relied by the respective counsels has finally concluded as below:

> "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 unauthorized 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. Swaran Singh and others, 2004 (1) TNMAC 104(SC): 2004(3) SCC 297; Mangla Ram v. Oriental Insurance Co. Ltd., 2018(1) TNMAC 681 (SC); 2018(5) SCC 656; Rani & ors. v. National Insurance Co. Ltd. & ors., 2018(2) TNMAC 278 (SC); 2018 (9) Scale 310; and Mannuara Khatun and others v. Rajesh Kumar Singh and others, 2017(1) TNMAC 289 (SC); 2017(4) SCC 796, the question regarding the liability of the Insurance Company to pay the compensation in respect of an unauthorized 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 unauthorized 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 Co. 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."

11. Therefore, this Court finds that the liability fastened on the vehicle owner and exonerating the insurance company is correct. The Insurance Company cannot be called upon to pay the claimant and thereafter, recover it from the vehicle owner, when there is no contractual obligation on the part of the insurance company to indemnify the vehicle owner.

12. As far as the quantum of compensation is concerned,

since there is no adequate evidence to show that the claimant is making his livelihood as Auto Driver and earning Rs.5000 per month during the year 2001, the Tribunal has taken the notional income of the claimant as Rs.3,500/- and after applying the multiplier and percentage of disability as 81.6% awarded compensation accordingly. However, there is no compensation as against future prospects. Since the age of the claimant at the time of accident was ascertained as 30 years and multiplier 17 been applied, 40% towards future prospects ought to have been added to the notional income of Rs.3,500/-, this Court is of the view that a sum of Rs.1400/- to be added for future prospects along with the notional income of Rs.3500/- fixed by the Tribunal. By adding the said amount, the loss of earning for the claimant be enhanced to Rs.4,900/- per month. The physical disability of 81.6% is taken as functional disability by the Tribunal and multiplier method has been applied. Taking note of the fact that the left leg of the claimant is amputated in the accident, being an auto driver, after losing his left leg, it is very difficult for him to make his livelihood and pursue his avocation.

Therefore, the Court fix the functional disability as 100% and compute the compensation for loss of income as 4900X17X12X100% =9,99,600/-.

Compensation under Various Heads	Award passed by this Court
Loss of income due to 100% functional disability (4900X17X12X100/100)	Rs.9,99,600/-
Pain and Suffering	Rs. 50,000/-
Nutrition	Rs. 5,000/-
Transport to hospital	Rs. 1,500/-
Loss of amenities	Rs. 20,000/-
Medical expenses as per Ex.A8	Rs. 39,430/-
Total	Rs.11,15,530/-

13. Accordingly, the award is enhanced from Rs.7,03,554/- to Rs.11,15,530/- payable with interest at the rate of 7.5% p.a. from the date of petition till the date of realisation. The money shall be payable jointly and severally by the respondents 1 and 2 being the owner and driver of the vehicle.

14. Accordingly, the Civil Miscellaneous Appeal is partly allowed. No order as to costs.

Sd/-

Assistant Registrar (CS-V)

//True Copy//

Sub Assistant Registrar

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To

Motor Accidents Claims Tribunal
Fast Track Court No.IV,
Coimbatore at Tirupur.

Copy To

The Section Officer,
V.R. Section, High Court,
Madras.

CMA NO.421 OF 2017

MG(CO)
GN(24/03/2021)