IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	13.04.2023
Pronounced on	19.07.2023

CORAM

THE HONOURABLE MR.JUSTICE D.KRISHNAKUMAR
AND
THE HONOURABLE MRS.JUSTICE K.GOVINDARAJAN THILAKAVADI

C.M.A.No.1893 of 2020
and C.M.P.No.14018 of 2020

HDFC ERGO General Insurance Co. Ltd.,
New No.528, old No.559,
2nd Floor, Anna Salai,
Chennai-600 018 …Appellant

Vs.

1.Bhagya Rekha
2.Minor.Narendra,
3.Minor.Ramya
(2 &3 are minors rep by their
Mother and NF Bhagya Rekha)
4.Veeraswami
5.Obulamma

6.P.Eswaraiah

…Respondents

Prayer: This Civil Miscellaneous Appeal is filed under Section 173 of Motor Vehicles Act,1988, appeal against the award and decree dated 16.09.2019 made in M.C.O.P.No.4363 of 2015 on the file of the Motor Accidents Claims Tribunal II Court of Small Causes, Chennai.

For Appellant : M/s.S.Arunkumar
For RR1 to R3 : Mr.K.Varadha Kamaraj
For RR4 to R6 : Not ready notice

JUDGMENT

(Judgment of the Court was delivered by K.GOVINDARAJAN THILAKAVADI,J.)

The Insurance Company has filed this Civil Miscellaneous Appeal, aggrieved by the award, dated 16.09.2019 made in M.C.O.P.No.4363 of 2015 on the file of the Motor Accident Claims Tribunal II Court of Small Causes, Chennai, fastening liability on the appellant/Transport Corporation to pay compensation to the claimants.

2.The facts of the case in brief:

On 09.03.2015 at about 18.30 a.m, the deceased Sekhar was travelling as a cleaner cum load man in the Tractor and trailer bearing Registration No.AP-03-BA-0163 in the Shri Kalahasthi road, near Reppalapattu colony, Pichatur Mandal Chittoor District, Andhra pradesh. The driver of the tractor drove the vehicle in a rash and negligent manner. While so, to avoid hitting a cow, which was crossing the road, the driver turned the vehicle. In the impact, the Tractor/trailer was capsized. Due to this, the deceased, who travelled in the tractor, sustained fatal injuries and died on the spot. The claimants being the legal heirs of the deceased filed the above claim petition for compensation of Sum of Rs.35,00,000/- to be paid by the respondents.

3.The claim of the petitioners was resisted by the 2nd respondent stating that the accident was not occurred as stated in the petition. The deceased was sitting behind the driver of the tractor without wearing the safety belt and therefore, he could not balance when the tractor suddenly turned. Due to which, the deceased fell down and died on the spot. The deceased died due to his own negligence. It is further stated that as per the registration certificate, there is no seating capacity in the tractor. The deceased travelled only as an unauthorised passenger at the time of the accident. As per the policy and R.C the tractor and trailer should be used only for agriculture purposes. Where as, the vehicle at the time of the accident was used for commercial purpose for transporting sugar cane load. The driver of the tractor was not holding a valid license to drive the commercial usage tractor and trailer at the time of accident. Hence, the 2nd respondent is not liable to indemnify the 1st respondent, owner of the vehicle.

4.The learned Tribunal perused the oral and documentary evidence on record, heard the arguments advanced on both sides, directed the 2nd respondent to pay a sum of Rs.38,45,000/- at the rate of 7.5% per annum from the date of claim till the date of realization with cost as compensation for the death of the deceased/Sekhar.

5.Aggrieved by this, the 2nd respondent/Insurance Company is on appeal. The learned counsel appearing for the Appellant/Insurance Company vehemently argued that the Insurance Company is not liable to pay the compensation to the claimants for the reason that the deceased was not authorized to travel in the tractor at the time of the accident. He would submit that the said tractor is designed to carry only the driver and the vehicle is insured as miscellaneous type of vehicle for agricultural use.

6. The Insurance Company also challenged the quantum of compensation awarded by the Tribunal.

7.The respondents herein/claimants preferred a claim on the file of Motor Accident Claims Tribunal II Court of Small Causes, Chennai, in M.C.O.P.No.4363 of 2015 praying for an award against the appellant for the death of Sekhar who met with an accident on 09.03.2015 at about 18.30 a.m. The deceased Sekhar was travelling as a cleaner-loadman in the Tractor and trailer bearing Reg.No.AP-03-BA-0163 along with Pichatur to Sri Kalahasti Road, near Reppalapattu Colony, Pichatur Mandal Chittoor District, Andra Pradesh. The driver drove the vehicle in a very rash and negligent manner, endangering the public safety. At that time a cow was crossing the road and in order to avoid hitting the cow, the driver turned the vehicle. In the impact, the tractor-trailer was capsized. Due to which the deceased who travelled in the tractor fell down and sustained fatal injuries and died on the spot. The 1st petitioner/1st respondent is the wife and the 2nd and 3rd petitioners are the children and 4th and 5th petitioners are the parents of the deceased Sekhar. Therefore, the petitioners/claimants have filed this petition for compensation.

8.The Insurance Company resisted the claim contending that the deceased was sitting behind the driver of the tractor without wearing the safety belt and therefore, he could not balance when the tractor was suddenly turned to avoid from hitting on the cow which suddenly crossed the road. In the impact, the deceased fell down and died on the spot. There is no seating capacity in the tractor and the deceased has travelled as an unauthorised passenger at the time of the accident. As per the policy and R.C., the tractor and trailer should be used only for agricultural purposes. Where as the vehicle at the time of accident was used for commercial purpose by transporting sugarcane load. Hence, the respondent is not liable to indemnify the 1st respondent and therefore, the respondent/Insurance Company is not liable to pay any compensation to the petitioner.

9.The Tribunal on consideration of the material on record concluded that the accident occurred due to rash and negligent driving of the driver of the Tractor. In coming to such a conclusion, the Tribunal relied upon the FIR, Rough Sketch marked as Exs.P.1 & P.2.

10.On the question of liability of the Insurance Company, the Tribunal found that the deceased was not an unauthorised passenger. On the above conclusion, the Tribunal found that the Insurance Company is liable to pay compensation for the death of the deceased Sekhar and awarded compensation of Rs.38,45,000/- to be paid by the Insurance Company and recover the same from the 1st respondent/owner of the vehicle.

11.This award is challenged by the Insurance Company.

12.We have heard Mr.S.Arunkumar, learned counsel appearing for the appellant/Insurance Company and Mr.K.Varadha Kamaraj, learned counsel appearing for the respondents/claimants 1 to 3.

13.The learned counsel appearing for the appellant/Insurance Company would submit that in as much as there is violation of policy condition and no additional premium paid by the 1st respondent, the Insurance Company should not have been made liable to pay the compensation. The violations of policy condition, according to him are:-

1.The user of the vehicle for non-agricultural purpose;

2.Carrying passenger in a tractor which is normally not meant for the said purpose;

Elaborating on the above submissions, the learned counsel for the appellant would content that the tractor which is meant only for agricultural purposes, have been used for loading sugar cane. Hence, there is violation of a policy condition. As regards the 2nd contention of the learned counsel is that the deceased travelled as a passenger in the tractor. According to him, in the claim petition it is mentioned that the deceased has travelled in the tractor as a cleaner. But, in the evidence of P.W.1, it is stated that the deceased travelled as a loadman at the time of the accident. The further contention of the learned counsel is that even assuming that the deceased travelled in the tractor either as a cleaner or a loadman no premium has been collected as per the IMT 28 to cleaner/loadman. According to the learned counsel, as per the " Guidelines on rationalisation of provisions of erstwhile All India Motor Trariff dated 29.03.2012" the Authorities has decided that the revised premium for coverage of paid drivers, conductors and employees under the WC Act be increased from Rs.25/- per capita to Rs.50/- per capita. Therefore, IMT 28 provides for extra premium for driver or cleaner or conductor employed in connection with the operation of insured vehicle and the premium applicable is Rs.50/- per person. Whereas, in the present case only Rs.50/- is paid for IMT 28 which is only for one person. Hence, the learned counsel would contend that the deceased was unauthorised passenger and was travelling on the engine portion, seating capacity is only for driver and no additional premium paid to cover the alleged risk. The Tribunal based on the oral testimony and documents pertaining held that the driver of the said tractor and trailer was responsible for the accident and the insurance Company is liable to pay the compensation inspite of marking the policy copy and examining the witnesses explaining the type of cover offered under the policy. It is further submitted that the Tribunal without proof of alleged avocation fixed Rs.15,000/- as monthly income of the deceased and granted compensation contrary to the principles laid down in ***Prenay Sethi*** case. Further being a worker he is not entitled to claim under general damages.

14.The learned counsel would further submit that since the deceased travelled in tractor sitting on mudguard and the tractor being the goods vehicle, there has been breach of condition of policy and the insurance company is not liable. The Insurance Company is not liable in respect of unauthorised passenger. To support his contention he has relied upon the following decision cases:

1.***2008 ACJ 1741***

2.***2021(1) TN MAC 360***

15.On the other hand, the learned counsel appearing for the claimants would submit that it is seen from the policy that a premium of Rs.50/- has been collected as per the IMT 28 to paid driver/conductor/cleaner. Since the insured has paid extra premium for driver and employee, the insurance company cannot be absolved from its liability. To support his contention he has relied upon the following decision cases:

1.2017 (1) TN MAC 746 SC

> *" fact disclosed in policy of Insurance- Insurer, when specifically charged premium for covering three persons excluding Driver, cannot be absolved from its liability".*

16.Heard on both sides, records perused.

17.According to the claimants, the deceased was working as a cleaner cum loadman in the tractor owned by the 6th respondent and insured by the appellant/Insurance Company. On 09.03.2015 the driver of the tractor drove the vehicle in a rash and negligent manner and at that time in order to avoid hitting the cow which was crossing the road turned the vehicle. In the impact, the tractor-trailer was capsized in which the deceased sustained injuries and died on the spot. Contending that the accident had occurred due to the negligent driving of the driver of the tractor, the claimants sought for a compensation of Rs.35,00,000/- under various heads.

18.The Insurance Company resisted the claim contending that the deceased was travelling in the tractor as gratuituous passenger and hence there is a violation of the policy condition regarding the user of the vehicle. On the question of liability of the insurance company the further contention is that there is no policy coverage for the deceased.

19.On the question of the liability of the insurance company, it is seen from the policy marked as Ex.R.1 which discloses that the insurance company has collected premium of Rs.50/- for paid driver/conductor/cleaner under IMT 28. As rightly pointed out by the learned counsel for the Insurance Company as per the Guidelines dated 29.03.2012 IMT 28 provides for extra premium per capital to

Rs.50/- for driver or cleaner or conductor employed with the conductor with the operation of insured vehicle.Therefore, the deceased would not be covered by the policy. Moreover, the deceased at the time of the accident has travelled in the tractor sitting on mudguard and the tractor being goods vehicle there has been breach of condition of policy. In the Manager IFFCO-TOKYO GENERAL INSURANCE CO.lTD., V.G. RAMESH, 2012(1) TN MAC 820 this Court referring Asha Rani's case and other judgments, has held as follows:

> *"The question as to whether the Insurance Company is statutory liable to cover the liability in respect of risk of gratuitous passenger, is clearly laid down by the Hon'ble Apex Court in Asha Rani;s case by reversing the earlier decision in Saptal Singh's case and further question as to whether the doctrine of "pay and Recover" theory, which is applied till then, by directing the insurer to satisfy the award and to recover the amount from the insured even though the insurer was not statutorily required to cover the liability in respect of such passengers carried in goods vehicle, is clarified in Full Bench Judgment of our High Court. As per which, after the decision of Baljit Kaur's case rendered on 06.01.2004 no such direction can be issued by the Trial Court to the insurance Company on the principle of "Pay and Recover" relating to the liability in respect of risk of*

gratuitous passenger travelling in a goods vehicle and no Trial Court is expected to decide contrary to the decision made thereon"

20.Coming to the present case on hand, the deceased travelled in mudguard of the tractor, cannot be used for carrying passengers as transport vehicle. Therefore, owner of the vehicle, respondent No.6 herein is liable to pay compensation to the respondents1 to 5/claimants.Following the dictum laid down in the decided cases referred by the Insurance Company, the Insurance Company cannot not be made liable in respect of unauthorised passenger. Owner of the vehicle alone is liable to pay compensation to the claimants.

21.As regards the quantum the learned counsel for the appellant would contend that the tribunal in the absence of proof erred in fixing the monthly income of the deceased at Rs.15,000/- and also erred in adding 50% towards future prospects contrary to the judgment reported in ***2017 (2) TN MAC 609.***

22.According to the claimants, the deceased was a cleaner cum loadman and earned a sum of Rs.15,000/- per month. The Tribunal without any documentary evidence fixed the income of the deceased at Rs.15,000/- per month. Therefore, this Court fix the income of the deceased at Rs.10,000/- per month as notional income. Considering the age of the deceased as 34 years at the time of accident and as per the decision held in ***National Insurance Company Limited vs. Pranay Sethi*** and others, 50% is added for future prospects. The monthly income comes around Rs.15,000/-(10,000/- + 5000/-) Annual Income = 15,000x 12(Rs.1,80,000/-). As per Sarla Verma case 1/4th is deducted towards personal expenses and applying multiplier 15, total loss of income for the family has to be fixed Rs.1,80,000/- (1/4th =45,000; 1,80,000-45,000= Rs.1,35,000/-); (1,35,000x15= 20,25,000) loss of dependency= Rs. 20,25,000/-.

23.The Tribunal also awarded a sum of Rs.40,000/- for loss of consortium for wife namely, 1st claimant and the same is confirmed. Further a sum of Rs.2,50,000/- was awarded by the Tribunal for loss of love and affection, which in our view is not admissible. As per the decision in ***Magma General Insurance Company limited vs, Nanu Ram alias Chuhru Ram and others*** reported in ***(2018) 2 TN MAC 452*** a sum of Rs.1,60,000/- is awarded towards filial and parental consortium. Apart from that a sum of Rs.15,000/- can be awarded towards loss of estate, which was not awarded by the Tribunal. For funeral expenses, the Tribunal has awarded a sum of Rs.15,000/- and the same is confirmed.

24.In view of the dictum laid down by the Hon'ble Supreme Court and taking note of the judgments of this Court, the question involved in the present appeal is anwered in favour of the appelllant/Insurance Company.

25.In the result, this Civil Miscellaneous Appeal is partly allowed. The order passed by the Tribunal fastening the liability against the appellant/Insurance Company to pay compensation is set aside. There will an award only against the owner of the vehicle viz. 6th respondent. The quantum of compensation awarded by the Tribunal is reduced from Rs.38,45,000/- to Rs.22,50,000/-.

26. The owner of the vehicle is directed to deposit the above said sum as modified by this Court along with interest, at the rate of 7.5% within a period of twelve weeks from the date of receipt of a copy of this judgment if not already deposited. On such deposit, the respondents 1 to 5/Claimants are permitted to withdraw the compensation as modified by this Court along with interest, after adjusting the amount, if any, already withdrawn, as apportioned by the Tribunal. As far as the 2nd and 3rd respondents are concerned, the amount apportioned to the share of the respondents 2 and 3/minors shall be deposited in any one of the

Nationalized bank under the auto renewal clause in the concerned District of the claimants, till they attained majority as per the ratio of apportionment ordered by the Tribunal, through NEFT/RTGS within a period of 12 weeks from the date of receipt of a copy of this order. The mother of the minors are permitted to withdraw the accrued interest once in six months for the benefit of the minor. No costs. Consequently, connected miscellaneous petition is closed.

(D.K.K.,J.) **(K.G.T.,J.)**

19.07.2023

vsn

Internet:Yes/No
Index:Yes/No
Speaking/Non-speaking order

To:-
The Motor Accident Claims Tribunal,
II Court of Small Causes, Chennai.

D.KRISHNAKUMAR, J.
and
K.GOVINDARAJAN THILAKAVADI, J.

vsn

Pre-delivery judgment made in
C.M.A.No.1893 of 2020
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