IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 21.07.2023

CORAM:

THE HONOURABLE MR.JUSTICE K.RAJASEKAR

C.M.A.No.629 of 2014
andM.P.No.1 of 2014

The New India Assurance Company Limited,
Rep by its Divisional Manager,
Premier Complex, No.102, Yercaud Road,
Alagapuram, Salem 636 016. ...Appellant

Vs.

1.Kodila
2.G.Rajavel ...Respondents

PRAYER : The Civil Miscellaneous Appeal is filed under Section 173 of Motor Vehicles Act, 1988, against the judgment and decree dated 31.07.2013 in M.C.O.P.No.190 of 2009 on the file of the Motor Accident Claims Tribunal, Additional Special Judge, Krishnagiri.

For Appellant : M/s.A.Salomi
For Respondents : No appearance

J U D G M E N T

This Civil Miscellaneous Appeal has been filed by the appellant/Insurance Company challenging the award dated 31.07.2013 in M.C.O.P.No.190 of 2009 on the file of the Motor Accident Claims Tribunal, Additional Special Judge, Krishnagiri.

2.The first respondent herein filed the claim petition claiming a sum of Rs.3,00,000/- as compensation for the injuries sustained by her in the accident that took place on 27.07.2008. According to the first respondent, on the date of accident i.e., on 27.07.2008 at 4.00 a.m., when she along with 9 others were travelled in Tata Ace Van bearing registration No.TN 24 D 2203 belonging to the 2nd respondent by carrying goods, the driver of the said vehicle drove the same in a rash and negligent manner with great speed in Erode – Kangeyam road, dashed against the rode side neem tree and caused the accident. In the accident, the first respondent sustained grievous injuries. Hence, he was entitled to a claim of Rs.3,00,000/-.

3.The second respondent, owner of the vehicle remained exparte before the Tribunal.

4.The appellant/Insurance Company filed a counter statement and denied all the averments made by the first respondent. According to the appellant, the second respondent has violated the policy conditions by permitting more than 10 passengers to travel unauthorizedly in the goods vehicle and the driver of the said vehicle, drove with great speed and dashed against the neem tree. The passengers did not carry any goods to travel as owner of the goods in the said van. For the violation of policy conditions by the driver and owner of the van/second respondent, the appellant is not liable to indemnify the second respondent. In any event, the first respondent also has to prove his age, avocation and income, disability suffered and treatment taken to claim compensation. The total compensation claimed by the first respondent is excessive and prayed for dismissal of the claim petition.

5. Before the Tribunal, the first respondent examined herself as P.W.1 and marked six documents as Exs.P1 to P6. On the side of the appellant, one G.Sundararaj was examined as R.W.1 and did not let in any documentary evidence.

6. The Tribunal after considering the objections raised by the Insurance Company relating to the violation of policy conditions has held that there is a violation of policy conditions, the first respondent has not travelled in the vehicle as the owner of the goods, she has travelled only as a passenger by relying on the judgment of the Hon'ble Supreme Court in United India Insurance Company Vs. K.M.Poonam and others reported in 2011 (1) TNMAC 441 SC.

7. Against the award dated 31.07.2013 in M.C.O.P.No.190 of 2009, the appellant/Insurance Company has come out with the present appeal.

8. Heard the learned counsel for the appellant/ Insurance Company and perused the entire materials available on record.

9.Though notice has been served on the second respondent, owner of the vehicle, none has entered appearance on behalf of him. The first respondent/claimant died during pendency of the appeal and the Insurance Company has not impleaded the legal heirs of the deceased first respondent/claimant.

10.The compensation was also awarded in M.C.O.P.No.474 of 2009 on the file of the Additional Special Judge, Krishnagiri, to another claimant namely Kullachi @ Unnamalai, who has injured in this accident and the same was challenged by the Insurance company in C.M.A.No.2146 of 2012 before this Court and as per the judgment dated 14.10.2020, this Court has exonerated the Insurance Company from payment of compensation and the learned counsel has relied on the above judgment for seeking the same relief in the present appeal also.

11.The case of the first respondent is that she has travelled as owner of the goods in the Tata Ace goods van from Kangeyam to Palani and totally 10 persons were travelled in the van. Due to the rash and negligent driving of the driver of the van, the vehicle was met with an accident, resulting which, causing injuries to her. This aspect was disbelieved by the Tribunal and has held that 10 persons along with the children traveled in the goods vehicle is sufficient to hold that they had not traveled along with the goods and they traveled as gratuitous passengers. After having held that the first respondent herein is a gratuitous passenger, since more than the permitted capacity in a van is travelled, they are entitled to compensation only from the owner of the vehicle. However it is ordered that they shall be paid compensation by the insurer, who could recover later from the owner, as per dictum laid down in United India Insurance Company Vs. K.M.Poonam and others cites supra.

12. This Court in C.M.A.No.2146 of 2014, which is arising out of the very same accident and had held in paragraph 12 as follows:

> *"12.It is the contention of the first respondent that she traveled as labourer of the second respondent in the goods vehicle belonging to the second respondent. She deposed as P.W.1 to that effect and marked FIR as Ex.P1. The FIR was registered based on the complaint given by one Velu, who traveled along with the first respondent at the time of accident. In his complaint, he has given the names of the persons who traveled in the goods vehicle. He has also stated that they were going in the vehicle to Palani to worship Lord Muruga. There is no mention of the goods being carried at the time of accident. The Tribunal considering the contents of FIR and in the absence of any material placed before the Tribunal to prove that the first respondent traveled along with the goods or as labourer of the second respondent, did not accept the evidence of P.W.1 and held that the first respondent and others traveled at the time of*

accident only as a gratuitous passenger and exonerated the appellant from its liability to indemnify the second respondent. Having held so, the Tribunal erred in directing the appellant to pay the compensation to the first respondent at the first instance and recover the same from the owner of the vehicle. The order of pay and recovery is erroneous. It is well settled that Insurance Company is not liable to pay any compensation to any gratuitous passenger traveling in the goods vehicle. In view of the same, the award of the Tribunal ordering pay and recovery is liable to be set aside and it is hereby set aside."

13.In united India Insurance Company Vs. K.M.Poonam and others, the Hon'ble Apex Court has considered the case of payment of compensation to passengers traveling in public transport in breach of condition of permit and the principle laid down therein is wrongly applied in this case.

14. In this case, except the oral evidence that the claimant has travelled in the vehicle along with other carrying some goods, no other corroborative evidence produced by the claimant that they traveled as owner of goods. The Tribunal has rightly held that the claimant is only a gratuitous passenger. Having held so, the Tribunal has adopted principle of "pay and recover" which

is erroneous, as held is catena of judgment of the Hon'ble Apex Court and this Court in the case of ***New India Assurance Company Limited Vs. Asha Rani and others*** reported in ***2003 ACJ 1 (SC)***, **National Insurance Company Limited Vs. Baljit Kaur** reported in **(2004 (1) CTC 210)** and **Bharati Axa General Insurance Company Limited Vs. Aandi and others** reported in **2018 (2) TNMAC 731 DB.**

15. As far as the quantum of compensation granted by the Tribunal is concerned, the Tribunal considering all the materials on record in proper perspective, granted compensation under the different heads, which are not excessive, warranting interference by this Court.

16. In the result, this Civil Miscellaneous Appeal is allowed and the amount awarded by the Tribunal at Rs.1,38,500/- together with interest at the rate of 6% per annum from the date of petition till the date of deposit is confirmed. The second respondent herein, owner of the vehicle, is directed to deposit the award amount along with interest and costs, within a period of six weeks from the date of receipt of a copy of this judgment, to the credit of

M.C.O.P.No.190 of 2009. On such deposit, the first respondent is permitted to withdraw the award amount along with interest and costs, after adjusting the amount, if any already withdrawn, by filing necessary applications before the Tribunal. It is made clear that if any amount is deposited by the appellant/ Insurance Company, the same is permitted to be withdrawn by the appellant/ Insurance Company. If any amount is already withdrawn by the claimant, the same shall not be recovered since it now reported that the claimant is not alive and the Insurance Company is also not able to find legal heirs of the claimant. Consequently, connected Miscellaneous Petition is closed. No costs.

21.07.2023

Index: Yes/No
Internet: Yes/No
vkr

To

1.The Motor Accident Claims Tribunal,
Additional Special Judge, Krishnagiri.

2.The Section Officer
VR Section, High Court of Madras.

K.RAJASEKAR,J.

Vkr

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21.07.2023

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K.RAJASEKAR, J.,

Today, the matter was listed under the caption “For Clarification”.

2. The learned counsel appearing for the insurance company submitted that the claimant herein was died prior to filing of this appeal and the insurance company could not implead the legal heirs of the deceased.

3. In such view of the matter, the Order passed by this Court dated 21.07.2023 is against the dead person and the same is nullity on the eye of law. This Court is hereby recall the Order dated 21.07.2023 passed in this appeal.

4. Accordingly, this Civil Miscellaneous Appeal is dismissed for default.

13.02.2024

stn

K.RAJASEKAR, J.,

stn

C.M.A. No.629 of 2014

13.02.2024