IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 28.11.2023

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THE HONOURABLE MR.JUSTICE M.DHANDAPANI

C.M.A.No.4585 of 2019 and
C.M.P.No.26035 of 2019

HDFC ERGO General Insurance Company Limited,
First Floor, City Tower, Gayathri Nagar,
100 Feet Road,
Pondicherry. ... Appellant / 2nd Respondent

Vs.

1. S.Rajendran ... 1st Respondent / Petitioner

2. P.Muthaiyan ... 2nd Respondent / 1st Respondent

PRAYER : Civil Miscellaneous Appeal filed under Section 173 of the Motor Vehicles Act, 1988, against the judgment and decree dated 12.12.2017 made in M.C.O.P.No.21 of 2012 on the file of the Motor Accidents Claims Tribunal, Sub Court, Kallakurichi.

For Appellant : Mr.K.Vinod

For Respondents : Mr.T.Dhanasekaran for R2
No appearance for R1

JUDGMENT

The second respondent in M.C.O.P.No.21 of 2012 on the file of the Motor Accident Claims Tribunal, Sub Court, Kallakurichi is the appellant herein. They are the insurers of the offending vehicle and claimed that liability to pay compensation should not have been mulcted on them.

2. M.C.O.P.No.21 of 2012 had been filed by the claimant for the death of his son Venkatesan in a road accident which took place on 22.09.2011. It was stated that on that particular date at around 17.30 hrs, Venkatesan was travelling as a Loadman in a Tractor bearing Registration No.TN-32-AZ-4442 belonging to the first respondent and insured with the second respondent therein. The vehicle was driven by the driver of the first respondent. The deceased was working as agricultural coolie. While driving the tractor, the driver without due caution drove the vehicle in a rash and negligent manner and as a result, the deceased Venkatesan was thrown out of the tractor and fell down in between the wheels and was run over and died on the spot. It was claimed that the accident occurred due to the rash

and negligent driving of the driver. Claiming compensation in a sum of Rs.5,00,000/-, the claimant, viz., father of the deceased filed the aforementioned claim petition seeking compensation under Section 166 of the Motor Vehicles Act, 1988.

3. A counter had been filed by the Insurance Company stating that the deceased was sitting in a casual manner and fell down from the tractor and the accident occurred only owing to the carelessness of the deceased. He also stated that it was used for commercial purpose. He further stated that the deceased as a gratuitous passenger and the vehicle being a goods vehicle and the deceased not being a third party and since premium was not paid to cover such accident, they are not liable to pay any compensation.

4. Before the Tribunal, on the side of the claimant, P.W.1 and P.W.2 were examined and Exs.P1 to P3 were marked. On the side of the respondents, R.W.1 and R.W.2 were examined and Exs.R1 to R7 were marked. The Tribunal after considering the oral and documentary evidences

had come to the conclusion that the accident occurred due to the rash and negligent driving of the driver of the vehicle and that the driver of the first respondent had no valid driving license and that the policy was in existence at the time of the accident, i.e., from 13.07.2011 to 12.07.2012. Insofar as the liability of the second respondent / Insurance Company is concerned, the Tribunal by relying upon Ex.R3 - Insurance Policy, wherein, it was specifically stated that the policy does not cover use for carrying passengers in the vehicle and that the sitting capacity was only one and that the deceased travelled in the trailer, which was a violation of a policy condition came to the conclusion that there was a breach in policy conditions. Thereafter, it was held that the insurer must pay the compensation and then take a decision to proceed against the owner. Challenging the same, the second respondent Insurance Company has preferred the present civil miscellaneous appeal.

5. The learned counsel for the appellant Insurance Company submitted that the Tribunal had erred in directing the compensation to be

paid by the appellant / Insurance Company. It was pointed out that the deceased was travelling as a gratuitous passenger and that the tractor had only one seat for the driver and insurance cover was also limited to that fact did not cover injuries suffered by any gratuitous passenger. It had been contended that the policy should be viewed in stricto sensu and there cannot be any deviation from the terms as agreed between the insured and insurer.

6. The learned counsel pointed out that the Hon'ble Supreme Court had laid down the law that the insurance company is not liable to pay the compensation for a gratuitous passenger and as a matter of fact did not also uphold the concept of pay and recovery. Learned counsel therefore stated that the appeal should be allowed and the judgment of the Tribunal should be interfered with and set aside.

7. The learned counsel for the second respondent on the other hand affirmed the reasoning of the Tribunal and pointed out that the deceased was actually travelling on the tractor, not as a gratuitous

passenger, because he was a Loadman and therefore, was a necessary passenger. Hence, the learned counsel stated that the judgment under appeal, does not require any interference. It was also pointed out that the vehicle was insured for agriculture purposes.

8. This Court gave its careful consideration to the submissions advanced by the learned counsel appearing on either side and perused the materials available on record.

9. The facts are not in dispute. The vehicle insured namely, the Tractor bearing registration No.TN-32-AZ-4442 consists only one seat which is meant for the driver and there is no provision in the vehicle for any other person to travel as a gratuitous passenger or even as a worker working under the owner of the tractor. That apart, the insurance cover was only for the tractor alone.

10. Ex.R3 is the policy of the insurance, which was subsisting as on the date of accident i.e., from 13.07.2011 to 12.07.2012. The third party premium had been paid. But the policy does not cover injuries suffered by a gratuitous passenger. A third party would include any authorized person or a stranger walking across the road or somebody travelling in the another vehicle injured in a collusion with the tractor.

11. In the instant case, the deceased was travelling in the tractor, which had no provision for another passenger to even be seated. This is a point which is stressed by the learned counsel appearing on behalf of the appellant, who claimed that the policy of insurance did not cover injuries for any accident occurring to that particular individual who travelled as a gratuitous passenger.

12. The issue involved in the present case is no longer *res integra* as this Court as well as other High Courts have time and again held that the Insurance Company cannot be made liable to pay compensation for

gratuitous passengers who were neither contemplated at the time when the contract of insurance was entered into nor any premium was paid to the extent to extend the insurance to such category of people.

13. A Division Bench of this Court has dealt with this issue in detail in the case of ***Bharathi Axa General Insurance Company Ltd vs. Aandi and others*** reported in ***2018 (2) TNMAC 731*** wherein the Division Bench of this Court has held as follows:

> *"48. Coming to the latest judgment viz.,* ***Shivaraj Vs. Rajendra and another*** *dated* ***05.09.2018****, made in* ***Civil Appeal Nos.8278 and 8279 of 2018****, there again the Hon'ble Supreme Court affirmed the conclusion of the High Court to the effect that the Insurance Company was not liable for the loss or injuries suffered by the appellant or to indemnify the owner of the tractor. However, the Hon'ble Supreme Court taking note of the peculiar circumstances of the case directed the Insurance Company to pay the compensation with liberty to recover the same. Unfortunately, the decisions of the*

*larger bench in **New India Assurance Company Vs. Asha Rani and others or National Insurance Company Ltd., Vs. Baljit Kaur and others** were not brought to the notice of the two Judge Bench which decided **Shivaraj Vs. Rajendra and another** referred to supra.*

*49. We find that the judgments relied upon by the Hon'ble Supreme Court in **Shivaraj Vs. 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.*

*50. In fact, we find that in none of the judgments referred to viz., **National Insurance Co. Ltd. Vs. Swarn Singh & Ors.** reported in **(2004) 3 SCC 297, Mangla Ram Vs. Oriental Insurance Co. Ltd.** reported in **(2018) 5 SCC 656, Rani & Ors. Vs. National Insurance Co. Ltd. & Ors.** reported in **2018 (9) Scale 310 and Manuara Khatun and Others Vs. Rajesh Kumar Singh And Others** reported in **(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 Vs. 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 Vs. Asha Rani and others*** *and* ***National Insurance Company Ltd., Vs. 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.*

51. No doubt true that in many cases the claimants may not be able to realise the award amount from the owners of the vehicles involved in the accident. But, the said factual situation alone *cannot impel us to do something against the provisions of the statute and the decisions of the larger benches of the Honble Supreme Court of India. "*

14. This Court respectfully follows the decision arrived at by the Division Bench in the aforesaid decision. It is no doubt true that in many cases, the claimants may not be able to realise the award amount from the owners of the vehicles involved in the accident. However, the facts of the present case alone cannot impel me to do something against the provisions of the statute and the decision of the larger benches of the Hon'ble Supreme Court of India.

15. For the aforestated reason, the Civil Miscellaneous Appeal is allowed and the award insofar as it pertains to the liability of the Insurance Company to pay and recover the compensation alone is set aside. The quantum of compensation awarded by the Tribunal is affirmed and there will be an award only against the owner of the vehicle, i.e., first respondent

therein. This Court by order dated 06.12.2019 granted interim stay on condition that the appellant / Insurance Company shall deposit entire award amount with accrued interests and costs to the credit of M.C.O.P.No.21 of 2012, now since the present Civil Miscellaneous Appeal is allowed, the appellant / Insurance Company is entitled to withdraw the amount deposited by them. No costs. Consequently, connected miscellaneous petition is closed.

28.11.2023

NCC : Yes / No
Index : Yes / No
Speaking Order : Yes / No

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To

1. The Motor Accidents Claims Tribunal,
   Sub Court,
   Kallakurichi.

2. The Section Officer,
   V.R. Section,
   High Court, Chennai.

M.DHANDAPANI, J.

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