

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved On : 03.03.2023

Delivered On : 31.03.2023

CORAM

THE HONOURABLE MRS. JUSTICE R. THARANI

C.M.A.(MD)No.101 of 2019

Iffco – Tokio General Insurance Company Limited,

Through its Branch Manager,

Thiripura Arcade, 3rd Floor,

No.75, Trivandrum Road,

Palayamkottai, Tirunelveli.

.. Appellant / 2nd Respondent

Vs.

1.Arumugathammal

.. 1st Respondent / Petitioner

2. Muthu Sundari

.. 2nd Respondent / 1st Respondent

Prayer: This Civil Miscellaneous Appeal is filed under Section 173 of Motor Vehicles Act, 1988, against the judgment and decree made in M.C.O.P.No. 1271 of 2016, dated 28.08.2018, on the file of the Principal District Judge, Tirunelveli.

For Appellant

: Mr.V.Sakthivel

For Respondents

: No appearance

JUDGMENT

This Civil Miscellaneous Appeal has been filed against the award, made in in M.C.O.P.No.1271 of 2016, dated 28.08.2018, on the file of the Principal District Judge, Tirunelveli. The appellant herein is the second respondent, the first respondent herein is the claimant and the second respondent herein is the first respondent in the original M.C.O.P. Petition.

2. A Brief substance of the claim petition, in M.C.O.P.No. 1271 of 2016, is as follows:

On 20.08.2016, at about 11.20 pm, when the deceased - Esakkiappan was travelling in a TATA Ace vehicle, bearing Registration No.TN – 07 – BK - 6123 that belonged to the first respondent along the Virudhunagar - Sattur road, the driver of the vehicle drove the vehicle in a rash and negligent manner, hit against the Mediation wall and the vehicle capsized on the road. The deceased sustained injuries, he was taken to TVMC Hospital, Palayamkottai, there he succumbed to the injuries and died on 23.08.2016. The deceased was aged about 25 years, he was a student of B.C.A and he was working as marketing staff and a computer operator in Idhayam Oil Company and was earning Rs.10,000/- per month. The petitioner is his dependant and she claimed a sum of Rs.20,00,000/- as compensation.

3. A brief substance of the counter filed by the first respondent, in M.C.O.P.No. 1271 of 2016, is as follows:-

The manner of accident as stated in petition is not correct. The deceased was a part time load man, working with the first respondent. The vehicle was insured with the second respondent at the time of accident. The respondent is not liable to pay compensation.

4. A brief substance of the counter filed by the second respondent in M.C.O.P.No. 1271 of 2016 is as follows:-

The age, income, occupation of the deceased are to be proved. At the time of accident, the deceased and four others travelled in the TATA Ace vehicle. The seating capacity of the vehicle is only for two persons. Only one person, excluding the driver can travel in the vehicle. The deceased and others travelled as unauthorized passengers. As per Section 147 of M.V.Act, the passenger in a goods vehicle is not entitled to claim compensation, the principle of pay and recover, under Sections 149(4) and 149(5) is not applicable. The owner alone is liable to pay compensation. Fitness certificate for the vehicle was not valid. There is violation of M.V.Rules.

5. Three (3) witnesses were examined, 2 documents were marked on the side of the petitioners. Two (2) witnesses were examined and 2 documents were marked on the side of the respondents. After considering both sides, the Tribunal has awarded a sum of Rs.6,73,000/- as compensation to be paid by the second respondent.

6. Against the award, the second respondent -appellant has preferred the appeal on the following grounds:-

The Tribunal has failed to consider that the vehicle was a goods vehicle, meant only for transporting goods. As per the F.I.R, the deceased and others, travelled in the backside portion of the vehicle. As per the pleadings in the claim petition, the deceased was working as a marketing staff and a computer operator in Idhayam Oil Company. The contention of the first respondent is that the deceased was a load man engaged by the owners of the goods. The deceased was the brother of the owner of the vehicle. The driver was the brother-in-law of the deceased. Even as per the F.I.R, the deceased and others travelled in the vehicle to attend the Kumbabishekam of their Kulatheivan at Kalapatti, Tirunelveli. Admittedly, there was no goods at the time of accident. The deceased was a gratuitous passenger. There is no policy coverage for the gratuitous passenger. The appellant is to be exonerated from the liability. The evidence of P.W.3 was created for the purpose of this case.

7. On the side of the appellant, it is stated that the deceased travelled only as an unauthorized passenger in a goods vehicle. In the counter of the first respondent, it was mentioned that the deceased was working as a load man, but, the purpose of travel was to attend the Kumbabishekam and the appellant is not liable to pay compensation.

8. On the side of the appellant, a judgment of this Court reported in 2017-2-TNMAC-261 (United India Insurance Co.Ltd., V. Sheela) is cited, wherein, it is stated as follows:-

“Unauthorized/paid passengers travelling in goods vehicle, the liability of insurer in respect of – The Tribunal directing the Insurer to pay and recover- Legality – Admittedly 60 persons travelled in goods vehicle / mini lorry as unauthorized /paid passengers – violation of permit and policy conditions – The Insurer is not liable in respect of such gratuitous passengers – Tribunal /Court has no discretionary power to direct the Insurer to pay and recover - Order directing insurer to pay and recover set aside- Insurer entitled to withdraw award amount ”

9. On the side of the appellant, another judgment of this Court reported in **2018-2-TNMAC-731 (Bharati AXA General Insurance Co. Ltd., V. Aandi)** is cited, wherein, it is stated as follows:-

“Unauthorized passengers / Gratuitous passengers in goods vehicle – Liability of insurer in respect of - whether insurer can be directed to pay and recover – Insurance policy, a mandatory statutory requirement, required to cover only certain classes of persons.”

10. On the side of the appellant, another judgment of this Court reported in 2017-2-TNMAC-214 (Branch Manager V. Diwan Ali) is cited, wherein, it is stated as follows:-

“The Tribunal, has on facts, found that the injured travelled in the Goods Vehicle as a Gratuitous Passenger and not as a Loadman as claimed by him. The said finding is not under challenge.”

11. On the side of the appellant, another judgment of this Court in C.M.A.No.496 of 2022 (Branch Manager V. Muthu), dated 12.09.2022 is cited, wherein, it is stated as follows:-

“ 11. There was no goods available in the goods vehicle at the time of accident. The vehicle is a load auto. Admittedly, the claimant and his wife travelled along with the driver. Only driver is entitled to travel in the goods auto. The judgments cited on the side of the first respondent are not applicable to the facts of this case. The first respondent was not travelling as a owner of the goods or as the representative of the owner of the goods. The claimant travelled in the auto for purchasing onion saplings. Hence, the claimant cannot be treated as the owner of the goods. The claimant was travelling only as a gratuitous passenger and hence the insurance company cannot be fastened with the liability to pay compensation. The appellant herein/ insurance company, is exonerated from the liability. “

12. P.W.2 was examined as an eye witness. P.W.2 has deposed that the driver of the auto was rash and negligent. Ex.P1 was the F.I.R. and the alteration report, wherein, the driver of the auto was mentioned as an accused. R.W.1 an official from the R.T.O office has deposed that, from 18.08.2016 till 19.09.2016, the vehicle was not having fitness certificate and the copy of the report was marked as Ex.R1. R.W.2 an official from the Insurance company has deposed that the policy does not cover the risk of an unauthorized passenger and that only two passengers were permitted to travel in the vehicle.

13. A perusal of the F.I.R reveals that the deceased travelled in the back side of the TATA Ace vehicle that was meant for carrying the goods and in the F.I.R, it was clearly stated that the deceased and others travelled in the TATA Ace vehicle, to attend a Kumbabishekam. It is clear that at the time of accident, the deceased was not travelling in the cabin of the vehicle.

14. In the F.I.R, it was mentioned that the deceased helped his brother-in-law to unload snacks load. In the claim petition, it was mentioned that the deceased was doing B.C.A and that as a part time job, he was doing marketing and computer operator. In the evidence of P.W.1 and P.W.3, it is stated that the deceased was working as a load man. Since the deceased travelled in the backside portion of the vehicle and since the deceased was not mentioned as a load man in the claim petition, it is decided that the deceased travelled as a gratuitous passenger / unauthorized passenger in a goods carrier. Even if the deceased was a load man, it is his duty to sit the cabin and not on the back side of the vehicle.

15. A perusal of the records reveals that no premium was paid for load man. In the above circumstances, it is decided that the insurance company is not liable to pay compensation and the insurance company is exonerated from the liability and the liability is fixed on the owner of the vehicle.

16. There is no dispute regarding the quantum. There is no appeal or cross objection filed on the side of the claimants, hence, it is decided that the quantum fixed by the Tribunal is reasonable.

17. This appeal is **allowed and the appellant is exonerated from the liability**. No costs.

(i) The second respondent herein - owner of the vehicle, is directed to deposit the entire compensation of **Rs.6,73,000/-** together with interest at the rate of 7.5% per annum from the date of claim petition till the date of deposit and with costs, within a period of eight weeks from the date of receipt of a copy of this order.

(ii) The deposited amount, if any, shall be refunded to the appellant – Insurance Company.

(iii) On such deposit being made, the first respondent herein / claimant is permitted to withdraw the entire award amount with accrued interest and costs, on filing proper petition before the Tribunal, less any amount, if already withdrawn by her. The claimant is not entitled for interest for the default period, if there is any.

31.03.2023

NCC : Yes/No
Index : Yes/No
Internet : Yes/No
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To

1.The Principal District Judge,
Tirunelveli.

2.The Section Officer,
V.R. Section,
Madurai Bench of Madras High Court,
Madurai.

C.M.A.(MD)No.101 of 2019

R. THARANI, J.

Ls

Pre-delivery Judgment made in
C.M.A.(MD)No.101 of 2019

31.03.2023