

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 11.09.2017

CORAM:

THE HON'BLE Dr. JUSTICE S.VIMALA

Civil Miscellaneous Appeal No.2150 of 2017

Madhumathi (Minor)

Rep. by her father, Raman as

Natural guardian and next friend ... Appellant / claimant

...vs..

1. N.Sampath

2. The National Insurance Company Limited,
No.66 Greams Road,
Thousand Lights, Chennai - 6 ... Respondents/Respondents

Appeal filed under Section 173 of Motor Vehicles Act 1988, against the Judgment and Decree, dated 04.01.2006 made in M.C.O.P.No.331 of 2001 on the file of the Motor Accident Claims Tribunal, II Small Causes Court, Chennai.

For Appellants : Mr. A.Muthu

For Respondents: Mr. S.Vadivel, for R-2

J U D G M E N T

The minor claimant has filed this appeal, challenging the dismissal of her claim petition by the Motor Accident Claims Tribunal, Chennai, in M.C.O.P.No.331 of 2001.

2. Madhumathi minor, aged 10, is represented by her father, Raman, who filed the claim petition on behalf of the minor.

3. The accident had taken place in the year 1999, i.e., on 26.12.1999, at 01.30 pm, at East Coast Road, Marakkanam, Dindivanam Taluk. It is the case of the minor claimant that on account of the rash and negligent driving on the part of the vehicle, belonging to the first respondent / the owner of the vehicle, she met with the accident and therefore, the first respondent, as the owner and the second respondent as the Insurance Company are jointly and severally liable to pay the compensation.

4. In order to prove the claim, before the Motor Accident Claims Tribunal, the only witness examined to speak about the negligence was the father, who was admittedly not an eye-witness to the occurrence. Another witness examined was the Doctor, who has spoken about the permanent disablement of the claimant. The Tribunal relied upon the evidence of the father, who has spoken about the fact that on 26.12.1999, at about 01.30 pm, the car belonging to the first respondent, which was driven in a rash and negligent manner from Chennai to Pondicherry, hit against his daughter and he preferred the First Information Report, Ex.P-1. During cross-examination, the father has admitted that he had did not see the occurrence and only based on an information, he preferred the First Information Report. Observing that there is no other independent witness to speak about the rash and negligent driving, the Claims Tribunal has chosen to dismiss the claim petition. This dismissal is under challenge, in this Appeal.

5. The main contention raised by the learned counsel appearing for the appellant / claimant is that the burden of proof is on the part of the owner or the insured to prove that there was no negligence on their part, when there are prima facie materials to show the rash and negligent driving on the part of the first respondent herein. It is the contention of the learned counsel appearing for the appellant / claimant that when a plea was raised in the claim petition that the accident had taken place only on account of the rash and negligent driving on the part of the driver of the offending vehicle, it is for its owner to disprove that there was no rash and negligent driving on the part of the driver of the car. It is the further contention of the learned counsel for the appellant / claimant that, when the injured is a minor, no negligence can be attributed against the minor and the concept of res ipsa loquitur has to be invoked and if that is done, there is no chance of claim petition being dismissed for want of proof.

6. A perusal of the counter affidavit filed by the Transport Corporation would go to show that, in paragraph 6 of the counter, the specific defence taken is that, when the claimant was walking on the road, she was walking without following the traffic rules and that she suddenly crossed the road due to which the accident had taken place. When there is a specific defence that the accident had taken place only on account of the sudden crossing of the minor claimant, it is for the first respondent to show that the accident was on account of the conduct of the minor claimant.

7. Nobody has been examined on the side of the first respondent. No explanation has been offered as to why the best evidence available was not brought before the Court or in fact, it is suppressed before the Court. It is for the first respondent to have adduced evidence, by examining the driver of the first respondent and for the non-examination, this Court or the Tribunal should have drawn adverse inference that, if the evidence has been let in on behalf of the first respondent, it could have been against the interest of the first respondent and therefore, no evidence has been adduced. Admittedly, no negligence can be attributed on behalf of the minor. In other words, there is a presumption that the child would not possess the attribute of taking care by virtue of the infancy. Therefore, whenever there is an accident involving minors, there is an initial presumption, which is rebuttable that the negligence is on the part of the offending vehicle.

8. The learned counsel appearing for the minor claimant / appellant relied upon a decision reported in 1998 ACJ 568 (Santhi v. Managing Director, Cholan Roadways Corporation and another), wherein the Court has held that the driver failed to visualize the mind of the child and therefore, the driver was rash and negligent.

8.1. In the case on hand also, if the theory of minor attempting to cross the road, is accepted, even then, it is the duty of the driver to visualize the mind of the child (minor claimant) and to take care of the crossing child.

9. Another decision relied upon by the learned counsel for the claimant / appellant is the one reported in 1994 ACJ 700 (Bhagwati Prasad and another v. Teermal Borla) where it was held that, every driver of the motor vehicle or any fast vehicle is required to take care of children found on the road and ultimately, it was held that the driver was negligent.

10. Under the circumstances, even though no eye witness has been examined, from the cumulative circumstances established in this case, the Court can safely come to the conclusion that the negligence must be on the part of the driver of the car and the probabilities only indicate that the driver of the car should have been negligent and not the minor claimant and therefore, the second respondent / Insurance Company is liable to answer the claim of the minor claimant.

11. The remaining issue to be considered is only the quantum of compensation. On behalf of the minor, father has claimed a sum of Rs.3,00,000/-, but restricted the claim for a sum of Rs.1,50,000/-.

12. A perusal of the documents, which are called for and produced before this Court, would go to show that the minor claimant has been admitted in the hospital on 26.12.1999 at 11.05 pm and discharged on 27.01.2000. It is stated in evidence that the original of the discharge summary has been lost in Tsunami and therefore, xerox copy of the same is filed. The fact that the minor claimant sustained injury is not in dispute, only the nature and extent of the injury are under dispute.

13. A perusal of the Casualty Information form issued by the Causality Officer would go to show that, X-rays on skull of the minor claimant has been taken and the opinion expressed is that, there is compound fracture and the injury has been classified as grievous injury. When there had been admission for a period of more than one month, the pain and sufferings, medical expenses and the impact of disablement upon the future life of the injured minor have to be considered.

14. A perusal of the evidence would go to show that the Doctor has certified the disablement at 30%. The complications complained of was giddiness, headache and even vertigo and considering these complications, the Doctor expressed that there will be 5% marginal difference in the disablement assessed and ultimately, has certified the disability at 25%.

15. So far as the quantum of compensation is concerned, it is not possible to quantify the compensation by application of multiplier method, as future impact upon the earning capacity cannot be predicted at this stage. Therefore, disablement compensation is granted at the rate of Rs.2,000/- per percentage for 25% disablement compensation, which is quantified at Rs.50,000/-. Awarding a sum of Rs.2,000/- towards transport expenses, Rs.3,000/- towards extra nourishment, Rs.5,000/- towards medical expenses, Rs.5,000/- towards cost of attendant and Rs.20,000/- towards pain and sufferings (for more than one month hospitalization), the total amount is quantified at Rs.85,000/-.

16. It is not a case where originally there was an award, which was not satisfied by the second respondent. It is a case where the claim petition itself has been dismissed and thereafter, the second respondent is facing the liability component. The case is pending for nearly 17 years, on account of nobody's fault. It is the failure on the part of the system itself, in not giving priority for these kinds of cases, which are dismissed by the Tribunal on merits.

17. Under the circumstances, considering the special facts and circumstances, the rate of interest is awarded at 6% per annum, from the date of petition till the date of deposit.

Hence, the second respondent / Insurance Company is directed to deposit the compensation amount of Rs.85,000/-, along with interest at the rate of 6% per annum, from the date of petition till the date of deposit, within a period of six weeks from the date of receipt of a copy of this judgment. The claimant is not entitled to any interest for the default (condone delay) period. The claimant shall pay the court fee for the compensation awarded (if not paid already) before receiving the copy of this judgment. On such deposit made, the entire amount shall be kept in a fixed deposit, in anyone of the Nationalized Banks, till the Minor claimant attains majority and the interest accrued thereon shall be withdrawn by the guardian of the Minor Claimant / father, once in three months, directly from the Bank.

18. In the result, the Civil Miscellaneous Appeal is allowed. No costs.

Sd/-

Assistant Registrar (CS-V)

//True Copy//

Sub Assistant Registrar

srk

To

1. Motor Accident Claims Tribunal,
II Small Causes Court, Chennai.

2. The Section Officer, V.R.Section,
Madras High Court, Chennai 104 (2 copies)

+1cc to Mr.S.PARTHASARATHY, Advocate, S.R.No.65681

+1cc to Mr.S.VADIVEL, Advocate, S.R.No. 65589

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C.M.A.No.2150 of 2017

PA (CO)

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