IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 27.02.2018

CORAM:

THE HONOURABLE MR.JUSTICE S.BASKARAN

C.M.A.No.1407 of 2015
and M.P.No.1 of 2015
and CMP.No.17839 of 2017

M/s.Iffco Tokio General Insurance Co.Ltd.,
Sahas Embassy No.145/131
Ground Floor, Nelson Manickam Road
Mehta Nagar, Chennai-600 029 ..Appellant/Respondent-2.

vs

1.R.Nagaraj ..1st respondent/petitioner

2.Susil Kumar ..2nd respondent/ 1st respondent

Civil Miscellaneous Appeal under section 173 of Motor Vehicle Act 1988, filed against the judgment and decree dated 27.03.2014 passed in M.C.O.P.No.1910 of 2008 by the Motor Accident Claims Tribunal (II court of Small Causes, Chennai).

For appellant : : Mr.N.Vijayaraghavan
For Respondents : :
for R1 : : Mr.K.Varadhakamraj

J U D G M E N T

This Civil Miscellaneous Appeal has been filed by the 2nd respondent before the Tribunal viz., the Insurance Company, against the judgment and decree dated 27.03.2014 passed in M.C.O.P.No.1910 of 2008 by the Motor Accident Claims Tribunal (II court of Small Causes, Chennai).

2. For convenience sake, the parties are referred to hereunder according to their litigative status before the Tribunal. The case of the petitioner is that on 10.03.2008, at 1.00 a.m., while the petitioner was riding his two wheeler from Mahabalipuram to Chennai along with his friend as Pillion rider, near Brittania Park, Nemmeli, at ECT Road, an unknown vehicle driven by its driver from opposite direction came at high speed, dashed against the right side of the two wheeler which the petitioner was riding, thereby, causing grievous injuries to the

petitioner on his right leg. The accident occurred only due to rash and negligent driving of the unknown vehicle driver. The vehicle which the petitioner was driving belongs to the 1st respondent and the same was insured with the 2nd respondent. Thus, the petitioner claiming himself to be a third party in respect of the 1st respondent vehicle seeks a sum of Rs.5,01,000/- from the respondents who are the owner and insurer of the vehicle driven by the petitioner himself.

3. On the other hand, opposing the petition, by filing counter, the 2nd respondent-Insurance company contends that the petitioner has to prove the nature of accident as claimed by him. the claim of the petitioner that he is a third party in respect of first respondent owned vehicle and entitled to claim compensation from the 2nd respondent is not sustainable. As the petitioner himself was the rider of the two wheeler and the accident occurred due to his negligence, the petitioner is not entitled to seek compensation from the 2nd respondent. The claim of the petitioner about the nature of injuries suffered by him is disputed. The petitioner has to prove that he had valid driving licence. Thus, the 2nd respondent-Insurance Company contends that the petitioner himself being a tortfeasor and driven the 1st respondent vehicle, he is not entitled to seek compensation from the 2nd respondent-Insurance company. Hence the 2nd respondent sought for dismissal of the petition.

4. Before the Tribunal, the petitioner examined himself as P.W.1 and the medical expert who assessed the disability suffered by the petitioner as P.W.2. The petitioner also produced Ex.P.1 to Ex.P.6 documents to prove his claim. On the 2nd respondent side, R.W.1 was examined and Ex.R.1-Copy of Final report was filed. The Tribunal on the basis of the available materials on record found that the negligence of the unknown vehicle driver alone caused the accident and held that the 2nd respondent-Insurance Company is liable to pay compensation of Rs.4,66,150/- to the Petitioner. Aggrieved over the said finding of the Tribunal, the 2nd respondent Insurance Company has come forward with the present appeal.

5. The learned counsel for the Appellant/2nd respondent-Insurance company contends that the Tribunal erred in fixing liability on the 2nd respondent-insurer, while the petitioner/claimant himself being driver of the two wheeler and the accident occurred due to his negligence. Further it is pointed out that the Petitioner who is the tortfeasor was riding the two wheeler owned by the 1st respondent, admittedly, the employer of the petitioner. As the petitioner was riding the vehicle of his employer as part of his employment, his claim as 3rd party cannot be sustained against the 2nd respondent-

Insurance company and is not entitled to seek compensation. Hence, the 2nd respondent seeks to entertain the appeal and to set aside the award passed by the Tribunal.

6. Per contra, the learned counsel for the 1st respondent herein/Petitioner claimant contends that the Tribunal, after taking into consideration the entire materials available on record, held that due to the negligence of the unknown vehicle driver, the accident occurred and thereby, held that the 2nd respondent-Insurance company is liable to pay compensation to the Petitioner, who is the insurer of the vehicle owned by the 1st respondent. It is further contended that since the findings of the Tribunal in respect of negligence, liability and quantum issues are well founded, there is no need for interference. The learned counsel for the Petitioner, thus seeks for dismissal of the appeal filed by the Insurance Company.

7. Heard both sides and perused the records carefully.

8. The main contention of the 2nd respondent-Insurance company /Appellant herein is that the petitioner who was employed with the 1st respondent was riding his employer's two wheeler in his official capacity and the accident occurred due to the negligence of the petitioner himself and being a tortfeasor, the petitioner is not entitled to seek compensation from the 2nd respondent.

9. However refuting the same, the learned counsel for the petitioner/1st respondent herein, contended that there is no evidence available on record to show that the vehicle was used by the petitioner in his official capacity to attend to any office work of the 1st respondent. The learned counsel for the petitioner pointed out that in the oral evidence, P.W.1 clearly stated that at the time of the accident, he was returning from a function and the same has not been contradicted with any material by the respondents. It is also pointed out that not even a suggestion was put to P.W.1 denying the said claim of the petitioner. As such, it is clear that the accident took place while the petitioner was using his employer's vehicle otherwise than on official capacity. Hence, the claim of the petitioner that he is a third party as far as 1st respondent vehicle is concerned is to be accepted.

10. In the present case, Ex.P.1-FIR as well as Ex.R.1-Copy of Final report clearly established the involvement of another vehicle which dashed against the petitioner's two wheeler and went away. It is a clear case of hit and run. In such circumstances, going by the evidence available on record, the

petitioner, who is to be considered as a third party in respect of 1st respondent vehicle and the accident was caused by another unknown vehicle, he is entitled to seek compensation from the respondents who are the owner and insurer of the vehicle, in which the petitioner was proceeding.

11. Further, the learned counsel for the petitioner, while disputing the claim of the 2nd respondent/Insurance company relied upon the Ruling of another Bench of this court reported in 2018 (1) TNMAC 135 [Cholamandalam M.S.General Insurance Co.Ltd., Vs. Amutha and others] to contend that even if the victim himself was the tortfeasor, the same cannot be a ground for the insurance company to avoid paying compensation when there is proper valid insurance coverage. In the said Ruling it is held as follows:-

> "2.The learned counsel appearing for the appellant insurance company placed reliance on the decision of the Hon'ble Supreme Court reported in (2012) 2 SCC 356 (National Insurance Company Ltd., V. Sinitha). But, I am not inclined to agree with the said contention for the reason that the Larger Bench of the Supreme Court of India in the decision reported in 2004 ACJ 934 (SC), (Deepal Girishbhai Soni v. United India Insurance Co. Ltd) has held that Section 163 A of the Motor Vehicles Act can be invoked even in cases when negligence is on the part of the victim. This decision by a three Judges Bench has been followed in United India Insurance Company Limited Vs. Sunil Kumar and another (2013 (6) CTC 891). The Hon'ble Supreme Court has held that the claim under Section 163 (A) of the Act shall not be defeated by the insurance company or the vehicle owner for the reason of any wrongful act, neglect or default of the victim. Though an authoritative pronouncement is awaited from a Larger Bench as on date, this Court feels bound by the decision rendered in Deepal Girishbhai Soni 's case. The questions of law raised in this appeal have already been answered against the appellant in these two decisions. I find no merit in this appeal. The award dated 28.03.2013 made in M.C.O.P No.551 of 2010 on the file of the Motor Accident Claims Tribunal, (Addl. District & Sessions Judge), Dindigul is confirmed."

12. Similarly the learned counsel for the Petitioner also relied upon the Ruling of the Apex Court reported in 2017 2 TNMAC 753 SC [United India Insurance Co.Ltd., Sunil Kumar and another] to point out that the claim of the petitioner under Section 163 of the Motor Vehicles Act cannot be denied on the

ground of negligence on the part of the petitioner himself.

13. In the light of the above said discussion, it is clear that the challenge made by the 2nd respondent/Insurance Company against the order of the Tribunal in respect of liability issue, on the ground of the petitioner himself being a tortfeasor is unsustainable. Further the tribunal has held on the basis of available evidence that as per Ex.P.1-FIR and Ex.R.1-Copy of Final Report, the accident is the result of hit and run case involving an unknown vehicle. In such circumstances, the contention of the 2nd respondent Insurance company has no legs to stand. Further the 2nd respondent/Insurance Company has not agitated the issue of quantum of award passed by the Tribunal in serious manner. In such circumstances, this court finds no merit in the appeal. Accordingly, the Civil Miscellaneous Appeal filed by the Insurance Company is dismissed. The Award dated 27.03.2014 passed in M.C.O.P.No.1910 of 2008 is confirmed. The Appellant/2nd respondent/Insurance Company is directed to deposit the Award amount passed by the tribunal as already directed by this Court by order dated 03.08.2016, along with proportionate interest and cost within a period of six weeks from the date of receipt of a copy of this order. On such deposit, the Petitioner/Claimant/1st respondent herein, is entitled to withdraw the same along with accrued interest, on filing appropriate petition before the tribunal. No costs. Consequently, connected MPs are closed.

Sd/-
Assistant Registrar(CS V)

//True Copy//

Sub Assistant Registrar

nvsri
To
1. The Motor Accidents Claims Tribunal,
II-nd Small Causes Court, Chennai.

2. The Section Officer,
V.R.Section, High Court, Madras. (2 Copies)

+1cc to Mr.N.Vijayaraghavan, Advocate, S.R.No.15014
+1cc to Mr.K.Varadhakamraj, Advocate, S.R.No.14816

C.M.A.No.1407 of 2015

NRJK(CO)
CS/19/04/18