IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 28.02.2019

CORAM:

THE HONOURABLE MS.JUSTICE V.M.VELUMANI

C.M.A.No.2898 of 2018
and Cross Objection No.5 of 2019
and C.M.P.No.22069 of 2018

M/s.Bajaj Allianz General Insurance Co. Ltd.,
T.T.K. Complex,
Door No.84/1, First Floor,
Perundurai Road,
Opp. To Collector Office,
Erode 638 011. .. Appellant/2nd Respondent

Vs.

1.Sellammal
2.Selvaraju
3.Arunpradeep .. Respondents 1 to 3/Petitioners

4.E.Umashankar .. 4th Respondent/1st Respondent
(R3 & R4 remained exparte before the Tribunal)

Prayer: This Civil Miscellaneous Appeal is filed under Section 173 of Motor Vehicles Act, 1988, against the award dated 18.04.2018, made in M.C.O.P.No.1165 of 2014, on the file of the Principal District Court, (Motor Accident Claims Tribunal), Namakkal.

For Appellant : Mr.M.B.Raghavan

For R1 to R3 : Mr.S.Sankar
for Ms.B.Manimekalai

For R4 : No appearance

Cross Objection No.5 of 2019

1.Sellammal
2.Selvaraju
3.Arunpradeep .. Cross objectors

Vs.

1.M/s.Bajaj Allianz General Insurance Co. Ltd.,
T.T.K. Complex,
Door No.84/1, First Floor,
Perundurai Road,
Opp. To Collector Office,
Erode 638 011.
2.E.Umashankar .. Respondents

Prayer: This Cross Appeal is filed under Order XLI Rule 22 of C.P.C against the Decree and Judgment dated 18.04.2018, made in M.C.O.P.No.1165 of 2014, on the file of the Principal District Court, (Motor Accident Claims Tribunal), Namakkal.

For Cross Appellants : Mr.S.Sankar for Ms.B.Manimekalai

COMMON JUDGMENT

This Civil Miscellaneous Appeal has been filed by the appellant-Insurance Company, challenging the award dated 18.04.2018, made in M.C.O.P.No.1165 of 2014, on the file of the Principal District Court, (Motor Accident Claims Tribunal), Namakkal.

2.Both the appeal and cross objection arise out of the same accident and same award. Hence, they are disposed of by this common judgment.

3.The parties are referred to as per their rank in the claim petition.

4.The Insurance Company is 2nd respondent in M.C.O.P.No.1165 of 2014, on the file of the Principal District Court, (Motor Accident Claims Tribunal), Namakkal. The claimants filed the said claim petition, claiming a sum of Rs.25,00,000/- as compensation for the death of one Kamalakannan, who died in the accident that took place on 08.10.2014.

5.The Tribunal considering the pleadings, oral and documentary evidence, held that the accident occurred due to rash and negligent driving by the driver of the unknown tipper lorry which hit the motor cycle from behind and FIR is registered only against the unknown tipper lorry and further held that the motor cycle belonging to the 1st respondent in which the deceased travelled in pillion was insured with the 2nd respondent at the time of accident and therefore, both the respondents 1 and 2 are liable to pay compensation and directed the 2nd respondent-Insurance Company to pay a sum of Rs.9,81,048/- as compensation to the claimants.

6.Against the said award of the Tribunal, the 2nd respondent-Insurance Company has filed C.M.A.No.2898/2018, questioning the liability as well as the quantum of compensation. The claimants have filed Cross Objection No.5 of 2019 for enhancement of compensation.

7.The learned counsel appearing for the 2nd respondent-Insurance Company contended that the Tribunal erred in holding that the 2nd respondent is liable to pay compensation as the motorcycle was insured with them. The Tribunal failed to appreciate that the fault was entirely on the part of the driver of the unknown tipper lorry as evidenced by FIR. The claimants themselves have stated in the claim petition that accident occurred due to rash and negligent driving by the driver of the unknown tipper lorry. The Tribunal has not applied its mind properly. The Tribunal ought to have dismissed the claim petition against the respondents 1 and 2, as 1st respondent was not at fault. In any event, the quantum of compensation awarded by the Tribunal is excessive and relied on the following judgments in support of his contentions:

(i).(2009) 5 SCC 112 [New India Assurance Company Ltd., Vs. Bismillah Bai and others]:

> "6.The question as to whether the driver of the jeep or the truck and/or both of them were responsible for negligence in driving their respective vehicles, which led to the said accident is essentially a question of fact. While reversing the said finding of fact, so as to fasten the liability on the insurance company, the High Court was required to assign sufficient and cogent reasons. No such finding to the effect that both driver as also the jeep contributed to the negligence having been recorded by the High Court, the question of fastening the joint liability by the insurance company did not arise.
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> 7.Only because the truck was not insured, the same by itself did not mean that the appellant-insurance company can be held liable to reimburse the claim to the claimants wherefor liability had been incurred by the owner and driver of the truck and, thereofore, no liability has been incurred by the driver and owner of the jeep is concerned.
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> 8.The Tribunal has categorically recorded a finding that the driver of the jeep was not driving his jeep rashly and negligently and he was not at fault and that the accident occurred due to rash and negligent driving of truck by its driver. Since, the High Court has not reversed this

finding of the Tribunal, fastening of the liability on the insurance company which is the insurer of the jeep did not arise."

(ii)2012 (2) TN MAC 155 (SC) [Surender Kumar Arora and another Vs. Dr.Manoj Bisla and others]:

"9. Admittedly, the petition filed by the claimants was under Section 166 of the Act and not under Section 163-A of the Act. This is not in dispute. Therefore, it was the entire responsibility of the parents of the deceased to have established that respondent no.1 drew the vehicle in a rash and negligent manner which resulted in the fatal accident. Maybe, in order to help respondent no.1, the claimants had not taken up that plea before the Tribunal. Therefore, High Court was justified in sustaining the judgment and order passed by the Tribunal. We make it clear that if for any reason, the claimants had filed the petition under Section 163-A of the Act, then the dicta of this Court in the case of Kaushnuma Begum (Smt.) & Ors. (supra) would have come to the assistance of the claimants.

10. In our view the issue that we have raised for our consideration is squarely covered by the decision of this Court in the case of Oriental Insurance Co. Ltd. (supra). In the said decision the Court stated :

"....Therefore, the victim of an accident or his dependants have an option either to proceed under Section 166 of the Act or under Section 163-A of the Act. Once they approach the Tribunal under Section 166 of the Act, they have necessarily to take upon themselves the burden of establishing the negligence of the driver or owner of the vehicle concerned. But if they proceed under Section 163-A of the Act, the compensation will be awarded in terms of the Schedule without calling upon the victim or his dependants to establish any negligence or default on the part of the owner of the vehicle or the driver of the vehicle.""

8.The claimants filed Cross-Objection for enhancement of the compensation. The learned counsel appearing for the claimants contended that the Tribunal after properly appreciating the evidence on record, has held that both the respondents are liable to pay compensation. There is no dispute that vehicle belonging to the 1st respondent involved in the accident was insured with the 2nd respondent at the time of accident. The Tribunal without properly appreciating the nature of work, income earned by the deceased, awarded lesser amount. The claimants have filed Cross-Objection for enhancement of compensation and prayed for dismissal of the appeal. The learned counsel for the claimants relied on the following judgments in support of his contentions:

(i)(2015) 9 SCC 273 [Khenyei Vs. New India Assurance Company Ltd., and others]:

> "3.It is a case of composite negligence where injuries have been caused to the claimants by combined wrongful act of joint torfeasors. In a case of accident caused by negligence of joint tortfeasors, all the persons who aid or counsel or direct or join in committal of a wrongful act, are liable. In such case, the liability is always joint and several. The extent of negligence of joint tortfeasors in such a case is immaterial for satisfaction of the claim of the plaintiff/claimant and need not be determined by the Court. However, in case all the joint tortfeasors are before the Court, it may determine the extent of their liability for the purpose of adjusting inter se equities between them at an appropriate stage. The liability of each and every joint tortfeasor vis-a-vis to the plaintiff/claimant cannot be bifurcated as it is joint and several liability. In the case of composite negligence, apportionment of compensation between tortfeasors for making payment to the plaintiff is not permissible as the plaintiff/claimant has the right to recover the entire amount from the easiest targets/solvent defendant."

(ii)2014 (1) TN MAC 321 (SC) [Pawan Kumar and another etc., Vs. Harkishan Dass Mohan Lal and others]:

> "6.The distinction between the principles of composite and contributory negligence has been dealt with in Winfield & Jolowicz on Tort (Chapter 21) (15th Edition, 1998). It would be appropriate to notice the following passage from the said work:-
>
> "WHERE two or more people by their independent breaches of duty to the plaintiff cause him to suffer distinct injuries, no special rules are required, for each tortfeasor is liable for the damage which he caused and only for that

damage. Where, however, two or more breaches of duty by different persons cause the plaintiff to suffer a single injury the position is more complicated. The law in such a case is that the plaintiff is entitled to sue all or any of them for the full amount of his loss, and each is said to be jointly and severally liable for it. This means that special rules are necessary to deal with the possibilities of successive actions in respect of that loss and of claims for contribution or indemnity by one tortfeasor against the others. It is greatly to the plaintiff's advantage to show that that he has suffered the same, indivisible harm at the hands of a number of defendants for he thereby avoids the risk, inherent in cases where there are different injuries, of finding that one defendant is insolvent (or uninsured) and being unable to execute judgment against him. The same picture is not, of course, so attractive from the point of view of the solvent defendant, who may end up carrying full responsibility for a loss in the causing of which he played only a partial, even secondary role.

……………………………………………………………..

The question of whether there is one injury can be a difficult one. The simplest case is that of two virtually simultaneous acts of negligence, as where two drivers behave negligently and collide, injuring a passenger in one of the cars or a pedestrian, but there is no requirement that the acts be simultaneous. ……………..”

8. In the present case, neither the driver/owner nor the insurer has filed any appeal or cross objection against the findings of the High Court that both the vehicles were responsible for the accident. In the absence of any challenge to the aforesaid part of the order of the High Court, we ought to proceed in the matter by accepting the said finding of the High Court. From the discussions that have preceded, it is clear that the High Court was not correct in apportioning the liability for the accident between drivers/owners of the two vehicles."

9.Heard the learned counsel appearing for the claimants as well as the 2nd respondent and perused the materials available on record.

10.From the materials on record, it is seen that the claimants in the claim petition itself have stated that while the deceased was travelling in the motor cycle belonging to the 1st respondent as pillion rider, an unknown tipper lorry driven in a rash and negligent manner coming in the same direction, dashed behind the motorcycle and caused accident. Due to the injuries suffered in the accident, the victim died. The very same stand was taken by the claimants before the Tribunal also. They marked Ex.P1-FIR, in which it has been stated that the accident occurred only due to rash and negligent driving by the driver of the unknown tipper lorry. The 2nd respondent filed Ex.R1, the final report dated 21.01.2015. The relevant portion of the final report was extracted by the Tribunal which shows that as and when the driver of the tipper lorry is found out, the case would be reopened and proceeded with. In the final report, it has been mentioned that the accident occurred only due to rash and negligent driving by the driver of the tipper lorry. The Tribunal accepted the contents of FIR and final report and also the evidence of P.W.1, the 2nd claimant and one Shanmugam, P.W.2, eye-witness. Considering the above materials, the Tribunal held that accident occurred only due to rash and negligent driving by the driver of the the unknown tipper lorry. Having held so, the Tribunal erroneously held that both the respondents 1 and 2 are liable to pay compensation to the claimants. The Tribunal has come to the said conclusion on the ground that vehicle of the 1st respondent was insured with 2nd respondent at the time of accident and deceased who was a pillion rider was a third party. The said reasoning is erroneous. The second respondent/Insurance Company cannot be fastened with the liability only on the ground that motorcycle in which the deceased was travelling in pillion was insured with him.

11.The claimants filed the said claim petition under Section 166 of the Motor Vehicles Act (hereinafter referred to as 'the Act'). It is well settled that when a claimant has come out with the claim petition under Section 166 of the Act, they have to plead and prove the negligence on the part of the offending vehicle insured with the Insurance Company. Unless the claimant proves the negligence on the part of the driver of the vehicle insured with the Insurance Company, the Insurance Company is not liable to pay any compensation. The principle of Insurance Policy is that the Insurance Company has to indemnify the insured owner of the vehicle for the claim made by the third parties against the owner of the vehicle. The liability will arise when the driver of the vehicle is negligent and caused accident and then the owner becomes vicariously liable for the negligent act of his driver. In the present case, no negligence is alleged on the part of the 1st respondent, rider of the motor cycle insured with the 2nd respondent. In view of the same, the Tribunal erred in fastening the liability on the 2nd respondent on the ground that the deceased was a third party, when insured was not liable to pay any compensation to the claimants. The judgments relied on by the learned counsel appearing for the 2nd respondent are squarely applicable to the facts of the present case. The judgments relied on by the learned counsel appearing for the claimants are not relevant to the facts of the present case.

12.Further, there is a specific provision under Section 161 of the Motor Vehicles Act for payment of compensation in the case of 'hit and run'. As per Section 161-3a, in a case of death, the Insurance Company is liable to pay only a sum of Rs.25,000/- as compensation. The Government has power to frame a scheme authorizing the officers to consider the claim of injured person or legal heirs of the deceased in a hit and run case and pay the compensation.

13.In view of Section 161-(3)(a) of the Act, the finding of the Tribunal fastening liability on the 2nd respondent-Insurance Company and directing the 2nd respondent-Insurance Company to pay compensation of Rs.9,81,048/- is set aside. The 2nd respondent-Insurance Company is directed to pay a sum of Rs.25,000/- together with interest at the rate of 7.5% p.a to the claimants as compensation.

14.In the result, the Civil Miscellaneous Appeal is allowed. In view of the order passed in the appeal, Cross Objection No.5 of 2019 is dismissed. The 2nd respondent is directed to deposit the award amount now determined by this Court along with interest and costs, less the amount already deposited, if any, 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.1165 of 2014. On such deposit, the claimants are permitted to withdraw the award amount along with interest and costs, as per the ratio of apportionment fixed by the Tribunal, less the amount already withdrawn if any, by filing necessary applications before the Tribunal. No costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar(Insp.Cell)

//True Copy//

Sub Assistant Registrar

gsa

To

1.The Principal District Judge,
(Motor Accident Claims Tribunal),
Namakkal.

+1 cc to M/s.M.B.Gopalan Associates, Advocate, Sr.No. 20048
+1 cc to M/s.B.Manimekalai, Advocate, Sr.No. 19058

C.M.A.No.2898 of 2018
and Cross Objection No.5 of 2019
and C.M.P.No.22069 of 2018

NRJK(CO)
CSL/23.07.2019