

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 14.08.2020
PRONOUNCED ON : 21.08.2020

CORAM

THE HON'BLE DR.JUSTICE G.JAYACHANDRAN

Civil Miscellaneous Appeal No.327 of 2015
and
Cross Objection No.9 of 2020

C.M.A.No.327 of 2015

M/s.United India Insurance Company Ltd.,
No.44, GST Road,
Guindy, Chennai-32. ...Appellant/2nd Respondent

vs

1.J.D.Prema Bharathi, 37 years,
W/o.J.Devasubramani (Late)

2.J.D.Devaraja (Minor), 14 years,
S/o.J.Devasubramani (Late)

3.J.D.Moulambika (minor), 10 years,
D/o.J.Devasubramani (Late)

Minors are rep by their mother and next
Friend J.D.Prema Bharathi,
All are residing at No.66/6,
New Street, Devigapuram,
Arani, Thiruvannamalai District.

...Respondents 1 to 3/Claimants

4.S.Madhavan,
S/o.K.R.Subramaniam,
No.26/98, R.K.Nagar, 5th Street,
Chennai - 77. ...4th Respondent/1st Respondent

Prayer:- Civil Miscellaneous Appeal is filed under Section 173 of the Motor Vehicles Act, against the award and decree dated 12.10.2011 made in M.C.O.P.No.3874 of 2007, on the file of the Motor Accidents Claims Tribunal, Chief Judge, Court of Small Causes, Chennai.

For Appellant : Mr.S.Arun Kumar
For R.1 to R.3 : Mr.A.A.Venkatesan
For R.4 : unclaimed

Cross Objection No.9 of 2020:-

1.J.D.Prema Bharathi,

2.J.D.Devaraja (Minor),

3.J.D.Moulambika (minor),

Minor petitioners are rep by their mother and next
Friend J.D.Prema Bharathi,
All are residing at No.66/6,
New Street, Devigapuram,
Arani, Thiruvannamalai District.

...Cross Objectors/Petitioners in M.C.O.P

vs

1.S.Madhavan,
S/o.K.R.Subramaniyan,
No.26/98, R.K.Nagar, 5th Street,
Chennai - 77.

2.M/s.United India Insurance Company Ltd.,
Now at No.134, Silingi Building,
Greens Road, Chennai 600 006.

...Respondents/Respondent 1 & 2 in M.C.O.P.

Prayer:- This Cross objection is filed against the judgment and
decree dated 12.10.2011, made in MACT.O.P.No.3874 of 2007 on the
file of the Chief Court of Small Causes, Chennai.

For Cross Objectors : Mr.A.A.Venkatesan
For R.1 : unclaimed
For R.2 : Mr.S.Arunkumar

COMMON JUDGMENT

CMA 327 of 2015 and cross objection 9 of 2020

The subject matter of the appeal and cross objection is the
award passed by the Motor Accident Claims Tribunal, Chennai in
MCOP 3874/2007 dated 12/10/2011.

2. The case of the cross objectors / claimants is that, On
26/07/2007, at about 00.30 hrs, Devasubramani who is the husband
of the first claimant and father of the claimants 2 and 3, was
travelling in a motor cycle bearing registration No. TN 20 AA

2929 as a pillion rider along the Mount Poonamallee Road. Near Krishna Bhavan, Nadambakkam. The rider of the motor cycle in which he was sitting on the pillion, rash and negligently drove the vehicle and without minding the traffic flow, applied break abruptly. An unknown van which was coming behind the motor cycle hit the motor cycle and fled. The said Devasubramani was thrown out from the vehicle and sustained head injury. He was admitted in the hospital for treatment but succumbed to the injuries on 01/08/2007.

3. With the above narration of accident, petition was filed against the owner of the two wheeler TN 20 AA 2929 and the insurance company under which, the said vehicle was insured claiming Rs.10 lakhs as compensation. The basis for the claim are:

- a) The accident occurred due to the negligence of the two wheeler rider in which the deceased was travelling on the pillion.
- b) The deceased was 43 years old, working as Assistant Secretary in Devikapuram Primary Agriculture Co-operative Bank, Arani earning Rs.7,000/- per month. Hence, compensation sought under the heads loss of pecuniary benefit, loss of estate, loss of love and affection to the minor children, loss of consortium to the wife, mental agony and funeral expenses.

4. The insurance company which is the appellant herein and the 2nd respondent in the cross object has filed counter stating that, the death of Devasubramani is a case of hit and run. Complaint about the accident was given by the first respondent (owner cum rider of the motor cycle). The FIR registered based on his complaint is against the unknown van which rash and negligently hit the motor cycle. While so, cause of action if any, can only be against the van and its insurer and not against them, the insurer of the motor cycle in which the deceased was travelling on the pillion. Thus, denying the liability sought for dismissal of the claim petition on the ground that being a petition filed under section 166 of the MV Act and the negligence happens to be on the part of the van driver, only the owner and insurer of the van are liable to pay the compensation. Being a hit and run case, the claimants are entitled for the compensation payable under the scheme for fatal accident in a hit and run case.

5. The tribunal framed the following points for consideration:

- a) Whether the accident happened due to the rash and negligent riding of first respondent's vehicle rider?
- b) Whether the second respondent is liable to pay compensation ?

c) Whether the petitioners are entitled to get compensation? If so, to what amount ?

6. On behalf of the claimants, 3 witnesses were examined. They are: Mrs. Prema Bharathi, the first claimant, S.Kuppan, the Secretary of the PACB, where the deceased working as Senior Grade II Assistant and Dhanasekar, the witness purported to have been present at the scene of accident. 12 documents were marked in support of the claimants.

7. The Tribunal relying upon the evidence of PW-3 held that the accident occurred due to the rash and negligent driving of the first respondent who is the owner cum rider of the motor cycle. Fixed the age of the victim as 41 years and income as Rs 81,720/- per annum based on the gazette notification Ex P-11 and Service Register extract Ex P-12. Arrived at a total compensation of Rs 8,25,000/- The break up compensation under different head is tabulated under:

Loss of income: $6810 \times 12 \times 14 \times \frac{2}{3}$	Rs.7,62,720/-
Loss of consortium (for first claimant-wife)	Rs.10,000/-
Loss of love and affection (for claimants 2 and 3 - minor children)	Rs.10,000/-
Funeral expenses, transport charges and hospital expenses	Rs.11,617/-
Medical expenses	Rs.30,663/-
Total	Rs.8,25,000/-

8. The learned counsel for the insurance company/ appellant herein submitted that, the Tribunal erred in holding that the rider of the motorcycle was responsible for the accident ignoring the fact that the same has occurred due to the rash and negligent driving of an unknown van. The tribunal erred in relying the evidence of PW-3, whose presence at the scene of accident at 00.30 hrs not probablized by the claimants. The rider of the motor cycle had in his first information to the police which is the basis of the FIR had categorically stated that the accident was caused by the unknown van. The FIR is relied by the claimant and marked as Ex P-1. Being an admitted fact, the tribunal erred in drawing adverse inference for not examining the rider cum owner of the vehicle who is a close relative of the deceased.

9. In the cross objection filed 9 years after the award, the claimant relying upon the judgment in Pranay's Sethi seek enhanced compensation under the head future prospects of the deceased who was on fixed salary.

10. Heard the counsels. Records perused.

11. The negligence for the cause of the accident is the key issue in this case. The accident occurred on 26/07/2007 at about 00.30 hrs. The FIR was given by Madhavan on 28/07/2007 at 13.00 hrs. In his complaint, Madhavan, the owner of the motorcycle has specifically stated that on 26/07/2007 at about 11.30 p.m., he the rider, his co-brother (sagalai) Devasubramani on the pillion and his 5 years son Yogaraj on the petrol tank were travelling towards Porur in his Bajaj CT 100 motorcycle bearing registration No. TN-20-AA - 2929. Near Krishna Bhavan, Nandambakkam, a van from behind came rash and negligently hit the motorcycle and proceeded without stopping. His son Yogaraj sustained injuries on his forehead and cheek. Devasubramani sustained severe injury on his head. With the help of others, Devasubramani was taken to MIOT hospital and then shifted to Government General Hospital at Chennai. Since he was taking care of the injured, he was not able to give the complaint immediately. He has requested the police to trace the offending van driver who has hit and run and take action.

12. The Tribunal ignoring the content of the FIR marked by the claimants as Ex P-1, had accepted the evidence of PW-3 to fix the negligence on the motorist. Proof affidavit of PW-3 is filed in lieu of his chief examination and he was cross examined by the counsel for the insurance company. This witness in his proof affidavit asserts that he was witness to the accident. While he was proceeding to Chinnamalai, Guindy to attend a religious congregation, he saw the rider of the motorcycle bearing registration No. TN 20 AA 2929 suddenly stopped in the middle of the road. A van coming behind the motorcycle brushed the motor cycle and proceeded without halting. He, with the help of others, took the injured to MIOT hospital and admitted him. In the cross examination, he admits his name is not found in the records of the MIOT hospital. He did not give any complaint to the police about the accident. Police enquired him 4 days after the accident. He did not give evidence in the criminal case. He did not notice the colour, model or registration number of the van which brushed the motorcycle. For the first time, 4 years after the accident, this witness has surfaced before the tribunal without any summon and had deposed that he witnessed the accident. This version is quite contrary to the content of the FIR given by the person who was undoubtedly present at the scene of accident.

13. In this case, FIR came into existence after 2 days of the accident and the informant has explained the reason for delay in his FIR itself. The informant is not a stranger, he is one of the respondent before the tribunal. He has chosen to remain exparte, however his FIR is relied by the claimants and marked as Ex P-1. The version of accident as found in the FIR and the version of the accident as narrated by the claimants

though not identical, the fact of involvement of another motor vehicle is common, and it is a fact that, the accident could not have happened if the van not hit the Motorcycle.

14. The tribunal ought to have taken note of the fact that the first respondent who drove the motorcycle carrying the deceased on the pillion, is the relative of the deceased. If he sustain his version in the FIR, it will be detrimental to the case of the claimants. So he has remained exparte. Non examination of the first respondent by the other respondent namely the insurance company, cannot be a reason to draw adverse inference against the insurance company. It is the burden of the claimants who had propounded a version different from what found in the FIR to prove their version. The Tribunal has failed to note that the idea of shifting the negligence from the unknown van to the motorcyclist was a later thought entertained on advice.

15. This court is not oblivious of the fact that, the accident took place on 26/07/2007. The Tribunal passed its award on 12/10/2011. The insurance company has preferred the appeal on 04/07/2012 with deficit court fees and got it numbered only in the year 2015. On the part of the claimants, they have filed their cross objection very recently i.e on 9th January 2020 seeking enhanced compensation.

16. Ignoring the content of the FIR and the admitted fact of involvement of the van, which brushed the motor cycle and knocked down the motorcycle rider, the man who was on the pillion and the 5 years old boy seated front on the petrol tank, the tribunal had erroneously fixed the liability wholly on the insurer of the motor cycle. When the negligence apparently on the hit and run van, the award ought to have been under the Scheme or under the provisions of no fault liability.

17. However taking note of the fact that the benefit vested on the claimants under the welfare legislation need not be deprived after lapse of nine years, this court pointing out the error in appreciation of evidence by the Tribunal, dismiss the appeal and the cross objection without costs.

s/d-

Assistant Registrar(CS VIII)

True Copy

Sub-Assistant Registrar

gsk

To

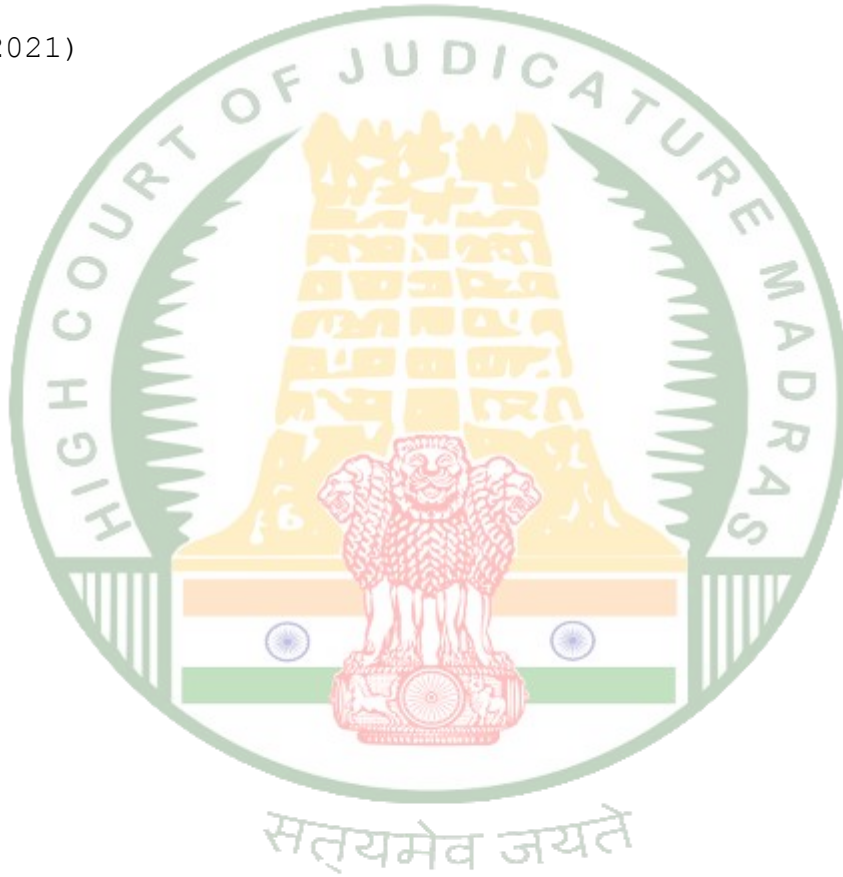
1. The Motor Accident Claims Tribunal,
Small Causes Court, Chennai

2.The Section Officer
VR Section
High Court, Madras 104.

+1 CC to Mr.S.Arun Kumar, Advocate sr 27471.
+1 CC to Mr.A.A.Venkatesan, Advocate sr 27436.

C.M.A.No.327of 2015 and
Cross Objection No.9 of 2020

AK (CO)
SP (22/04/2021)



WEB COPY