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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 24.08.2020

Pronounced on : 01.09.2020

Coram:

THE HONOURABLE DR. JUSTICE G.JAYACHANDRAN

C.M.A.Nos.803 and 804 of 2016

C.M.A.Nos.803 of 2016

1.Maheswari
2.Minor.Dharshini
Daughter of Gopal @ Gopalakrishnan
minor rep.by next friend Maheswari

3.Minor.Mownika
Daughter of Gopal @ Gopalakrishnan
minor rep.by next friend Maheswari

4.Rajammal

5.Kaliyannan

... Appellants

/versus/

1.Boopathiraja

2.Bharti AXA General Insurance Company
Divya Trade Centre,
1st Floor, No.II,
Brinavan Road,
Fairlands,
Salem-16.

... Respondents

Prayer in C.M.A.No.803 of 2016: Civil Miscellaneous Appeal has been filed under Section 173 of Motor Vehicle Act, 1988, to set aside the judgment and decree dated 21.11.2015 made in M.C.O.P.No.1672 of 2014 on the file of the Motor Accident Claims Tribunal/I Additional District Court, Salem.

For Appellants :Mr.R.Shase for
Mr.M.Guruprasad

For R1 :Exparte

For R2 :Mr.K.Poomalai



C.M.A.No.804 of 2016

Kuppusamy

... Appellant

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/versus/

1.Boopathiraja

2.Bharti AXA General Insurance Company
Divya Trade Centre,
1st Floor, No.II,Brinavan Road,
Fairlands,Salem-16.

... Respondents

Prayer in C.M.A.No.804 of 2016: Civil Miscellaneous Appeal has been filed under Section 173 of Motor Vehicle Act, 1988, to set aside the judgment and decree dated 21.11.2015 made in M.C.O.P.No.1673 of 2014 on the file of the Motor Accident Claims Tribunal/I Additional District Court, Salem.

For Appellant :Mr.R.Shase for
Mr.M.Guruprasad

For R1 :Exparte

For R2 :Mr.K.Poomalai

COMMON JUDGMENT

(The case has been heard through Video conference)

The dependents of Gopalakrishnan (pillion rider), who died in the motor accident occurred on 03/09/2014 are the claimants in M.C.O.P.No.1672/2014 and the appellants in C.M.A.No.803/2016 herein. Thiru.Kuppusamy, who was the rider of the motorcycle and sustained injuries in that accident is the claimant in M.C.O.P.No.1673/2014 and the appellant in C.M.A.No.804/2016 herein.

2. Being aggrieved by the dismissal of their claim petitions in M.C.O.P.Nos. 1672 and 1673/2014 by the Motor Accidents Claims Tribunal, Salem in a common award, these two appeals are filed. Tribunal dismissed both the claim petitions with liberty to the claimants to file fresh petition impleading necessary parties.



3.The facts of the case in nutshell:

On 03/09/2014 at about 9.45 p.m on Veppadi to Kumarapalayam Main Road at Ranganoor near Kumaran Nagar Pirivu, Pallipalayam, while Kuppusamy (claimant in M.C.O.P.No.1673/2014) riding the motor cycle bearing Reg.No.TN 34 S 1444 with Gopalakrishnan on the pillion, came in collusion with the motorcycle bearing registration No.TN 34 U 6833 driven by one Boopathiraja. The riders of the two wheelers Kuppusamy and Boopthiraja sustained injuries. They both were admitted in the hospital and recovered on treatment. Gopalakrishnan died on his way to hospital.

4.First Information Report (Ex P-1) was lodged on the next day at 6.00 hrs by one K.Senthilkumar (PW-3) against Boopathiraja the rider of the motorcycle bearing Reg.No.TN 34 U 6833 alleging that the accident was due to his rash and negligence. However, the police on investigation found that the accident occurred due to the rash and negligence of Kuppusamy, who carelessly overtook a lorry that an unidentified lorry run over the two wheeler bearing Reg.No.TN 34 S 1444 driven by Kuppusamy. Hence, on completion of investigation closed the criminal complaint as "mistake of fact".

5.The Tribunal, on considering the facts elicited during the trial held that Kuppusamy the rider of the motorcycle bearing Reg.No.TN 34 S 1444 is the actual tort-feasor. The insurer of his vehicle is not arrayed as respondent. Non-joinder of necessary parties is fatal to the case of the claimants. With granting liberty to file fresh petition, the Tribunal exonerated the respondent Boopathiraja, the owner of the motorcycle bearing Reg.No.TN 34 U 6833 and its insurer.

6.The learned counsel for the claimants in both the appeals, contended that the closure report of the police reporting mistake of fact is not a conclusive proof for fixing negligence. The Tribunal erred in not accepting the testimony of PW-3, who was witness to the accident. Having accepted the involvement of the first respondent vehicle in the accident, the Tribunal ought not to have dismissed the claim in toto, particularly when the deceased Gopalakrishnan is a third party.

7.The learned counsel for the insurance company submitted that, the Tribunal on careful examination of the evidence has arrived at the right conclusion that the negligence is not on the part of the first respondent. Therefore, the insurer of the first respondent vehicle need not pay any compensation. The facts on record discloses it was a hit and run case. The claimants should have filed the claim petition on no fault liability either under Section 140 of the Motor Vehicles Act or under Section 163A of the Motor Vehicles Act. Instead they have



chosen to file the petition under Section 166 of the Motor Vehicles Act alleging entire negligence on the vehicle rider coming from the opposite side following the road rules properly. The fact that the lorry which the claimant in M.C.O.P.No.1673/2014 overtook, run over his vehicle and crashed him and the pillion rider was suppressed in the FIR emanated belatedly, Knowing well that being the tortfeasor, they will not get compensation.

8.On investigation, the real fact came to surface, hence, the police filed closure report. The claimants' vehicle bearing Reg.No.TN 34 S 1444, was not validly insured. If really insured, they should have impleaded the owner and the insurer of their vehicle. The Tribunal, having found that the first respondent is not the tort-feasor and his insurer not liable to pay compensation gave liberty to the claimant to file fresh petition impleading necessary parties. Without availing the liberty, they had filed appeals which are not sustainable.

9.The learned counsel appearing for the appellants would submit that the Tribunal has overlooked the content of the FIR and deposition of PW-2, who is the one of the motor accident victims. Further, the informant to the First Information Report was also examined as PW-3. While so, the Tribunal has exonerated the offending vehicle owner and the insurer relying upon the evidence of RW-4 who is the rider of the offending vehicle as per the First Information Report.

10.Referring the judgment of the Hon'ble Supreme Court in Archit Saini & Anr. v. The Oriental Insurance Company Limited & others, the counsel would submit that the Tribunal has acted like a criminal Court. When prima facie evidence of the occurrence has been established through oral and teltale evidence, the Tribunal erroneously rejected the claim in toto contrary to settled principle of law. Referring the judgment of the Hon'ble Supreme Court in Kusum Lata v. Satbir reported in [2011(2) RCR(C) 379(SC)] , the counsel would submit that the Hon'ble Supreme Court has held that "in a case relating to motor accident claims, the claimants are not required to rove the case as it is required to be done in a criminal trial. The Court must keep this distinction in mind. Strict proof of an accident caused by a particular bus in a particular manner may not be possible to be done by the claimants".

11.Regarding the closure of First Information Report as a mistake of fact after enquiry, the counsel would rely upon the judgment of Baskar v. The Superintendent of Police, Namakkal, Namakkal District and 2 others reported in [2015 ACJ 1395] and the Managing Director, Tamil Nadu State Transport Corporation Limited v. S.Yobu and another reported in [2014(1)TNMAC 295(DB)]



16. Now, looking at the injury sustained by Kuppusamy, we find, he has sustained right femur fracture with facial injury. The post mortem certificate of the deceased Gopalakrishnan reveals that he had sustained rib fracture on the right side from 4th to 7th rib, lung lacerated and liver lacerated. The vehicle of Kuppusamy, on inspection by the motor vehicle inspector found in the following condition as per the motor vehicle inspector report (Ex.P3): (1) Front head light, (2) speedometer accessories, (3) right rear view mirror, (4) fuel tank seat, (5) silencer, (6) pipechain guard, (7) rear wheel spokes and (8) rear wheel mud guard damaged. Such damages without involvement of another motor vehicle is impossible. The version of witnesses as found in the inquest report corroborates with the damages found in the claimant vehicle as well as the injury sustained by them. The police after due enquiry has rightly closed the case as mistake of fact since the accident was not due to Boopathiraja. The injury sustained by the Kuppusamy (rider) and death of Gopalakrishnan (pillion rider) were not due to the collusion of two wheeler.

17. PW-2 claims to be an eye witness to the occurrence. The reading of the First Information Report given by him goes to show that for reason best known he has suppressed the involvement of the lorry in the accident. This either indicates that he was not present in the scene of occurrence or has given a complaint, which is not full truth. Contrarily Boopathiraja who is the first respondent in the claim petition and also victim in the accident, but arrayed as an accused has come before this Tribunal and deposed as RW-4. He has explained how the accident has occurred. According to him, Kuppusamy overtook the lorry and while negotiating, hit him both of them fell down while Boopathiraja fell on the road-side margin, Kuppusamy and Gopalakrishnan fell on the middle of the road. The lorry which they over took soon before, ran over them and the vehicle and passed without halting.

18. The analysis of the evidence by the Tribunal on comparison of documents placed by the claimants and the version of RW-4 who is the injured witness as against the claimant PW-2 (Kuppusamy), the version of RW-4 (Boopathiraja) being more probable in favour of fixing negligence on Kuppusamy, the Tribunal has rejected the claim.

19. On appreciating the evidence this Court is not able to come to no other conclusion than what the Tribunal has arrived at regarding negligence. On considering the liability part as far as the claim of Kuppusamy against the insurer of the other vehicle is not sustainable since it is the case where the accident occurred due to rash and carelessness of Kuppusamy. He is the tort-feasor and he cannot sustain the claim petition



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against the respondent. Further more, his vehicle is not insured and he has not produced the insurance policy coverage of his vehicle. Hence, both on negligence and liability, this Court concurs with the view of the Tribunal in respect of the claim petition filed by Kuppusamy (M.C.O.P.No.1673 of 2014).

20. In the result, the Civil Miscellaneous Appeal C.M.A.No.804 of 2016 filed by the appellant(Kuppusamy) is dismissed.

21.Coming to the claim petition of the Legal representatives of Gopalakrishnan,who is the third party, the fact brought on record reveals that he died in the motor accident involving three motor vehicles viz., (1)hit and ran lorry which ran over him; (2)the two wheeler bearing Reg.No.TN34S1444 in which he was travelling as a pillion rider, but had no insurance coverage; and (3)the two wheeler bearing Reg.No.TN34U6833 driven by Boopathiraja which had insurance coverage under the 2nd respondent insurance company viz., Bharti AXA General Insurance Company Ltd., Divya Trade Centre, 1st Floor, No.II, Brindavan Road, Fairlands, Salem-16, but not cause for the death of Gopalakrishnan.

22. The claim petition is filed under Section 166 of the Motor Vehicles Act, 1994 alleging negligence against the 2nd respondent. The claimants in this case have stated that the deceased Gopalakrishnan was a load man, earning Rs.25,000/- per month. They have not produced any document to substantiate the claim except identity card issued by the Association of Loadman. It is not a proof of income. Unfortunately, the vehicle in which he was travelling has also not been insured. Though Kuppusamy the rider of the vehicle has mounted the witness box and given evidence as PW-2, he has not produced his driving license or insurance policy of his vehicle, inspite of specific question put to him. In the said circumstances of the facts, the unfortunate claimants who lost the sole breadwinner of the family are not entitled to claim compensation from the respondents herein.

23. Without attributing negligence had the claim petition been filed under Section 163A of the Motor Vehicles Act, being a road accident the Tribunal would have resorted to Schedule II of Motor Vehicles Act and awarded compensation on structured formula basis. But, the claimants have filed petition under Section 166 of the Motor Vehicles Act, stating the income of the deceased as Rs.25,000/- p.m in the year 2014. It may be noted that it is common knowledge that in case of claimant's compensation, inflated claim is generally made in order to get higher compensation. The fault cannot be attributed to the claimants but the person who advise them to say so.



24. Since the rider of the vehicle in which the deceased travel was the tort-feasor and that rider had no driving license or insurance coverage to his vehicle, the claimants, who are the widow aged 24 years, 2 minor daughters aged 3 and 2 and the parents aged 50 years and 60 years respectively are left with no remedy, Considering the above pathetic condition, this Court suo moto converts the claim petition filed by the legal representatives of the third party deceased from Section 166 MV Act to Section 163 A MV Act. Apply the structured formula to award compensation to the claimants in M.C.O.P.NO.1672 of 2014.

25. Since there is no proof of income, the maximum limit of Rs.40,000/- per annum as prescribed in Schedule II is taken as the annual income of the deceased. As per the claim petition, at the time of accident, Gopalakrishnan was 26 years old. For the person age between 26 and 30 earning Rs.40,000/- per annum, the compensation for the 3rd party fatal accident under II Schedule is fixed as Rs.6,80,000/-. Since there are 5 dependants, after deducting 1/4th for personal expenditure the loss of dependency is Rs.5,10,000/-. On general damages, the following additional compensation is granted.

1.Loss of dependency	Rs.5,10,000/-
2.Funeral expenses	Rs. 2,000/-
3.Loss of consortium to the 1 st claimant	Rs. 5,000/-
4.Loss of estate	Rs. 2,500/-
Totally	Rs.5,19,500/-

26.As pointed out earlier, three vehicles were involved in the accident. There is no information about the lorry which has hit and ran. There is no evidence to show that the vehicle of Kuppasamy was duly covered under the insurance. The evidence placed before this Court establishes that the vehicle of Boopathiraja was not the offending vehicle. Therefore, to provide some solance to the claimants, who have lost their breadwinner, the insurer of the vehicle bearing Reg.No.TN34U 6833 shall bear 50% of the award amount (i.e. Rs.2,59,750) with interest at the rate of 7.5.% p.a from the date of petition till the date of deposit. The balance 50% of the award amount i.e. Rs.2,59,750/- shall be recovered from the tort-feasor Kuppursamy who is incidentally the appellant in C.M.A.No.804 of 2016.

27.The 50% of the award amount Rs.2,59,750/- to be deposited by the 2nd respondent/Bharti AXA General Insurance Company along with interest at the rate of 7.5% from the date of petition till the date of deposit and shall be apportioned by the claimants as below:-



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1 st claimant (wife)	Rs.1,00,000-00
2 nd and 3 rd claimants (minor daughters) (each Rs.50,000/-)	Rs.1,00,000-00
4 th and 5 th claimants (parents) (each Rs.29,875/-)	Rs. 59,750-00 (equally)

The share of the minors claimants shall be deposited in to a Nationalized bank in the name of the minor claimants till they attain majority. The 1st claimant/mother is permitted to withdraw the interest amount from the minors deposit spend for the welfare of the children.

28. In the result, C.M.A.No.804 of 2016 is dismissed. No costs. C.M.A.No.803 of 2016 is partly allowed. No costs.

Sd/-
Assistant Registrar(CS V)

//True Copy//

Sub Assistant Registrar

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To

The Motor Accidents Claims Tribunal,
I Additional District Judge, Salem.

Copy to

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

+2cc to Mr.M.Guruprasad, Advocate Sr.28606, 28607
+1cc to Mr.K.Poomalai, Advocate Sr.27704

C.M.A.Nos.803 and 804 of 2016

ks[co]
srg 24/08/2021