

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 11.03.2020

CORAM:

THE HONOURABLE MR.JUSTICE S.M.SUBRAMANIAM

C.M.A. No. 3446 of 2017

A.Ponnusamy .. Appellant/Petitioner
Vs.

1. C.R.Sathish

2. United India Insurance Co. Ltd.

No.38, Anna Salai

Chennai - 2.

Now at Siling Building

New No. 134, Old No. 40-45

Greens Road

Chennai - 600 006.

... Respondents/Respondents

Civil Miscellaneous Appeal is filed under Section 173 of the Motor Vehicles Act, 1988, against the judgment and decree in M.C.O.P. No. 6928 of 2013 dated 22.09.2017 on the file of the Motor Accidents Claims Tribunal, II Judge, Small Causes Court, Chennai.

For Appellant : Ms. Ramya V.Rao

For Respondents : Mr. D.Bhaskaran (For R2)

O R D E R

The appeal is preferred by the appellant /claimant, challenging the judgment and decree dated 22.09.2017 passed in M.C.O.P. No. 6928 of 2013.

2. The facts of the case in brief:

On 23.09.2012 at about 05.00 hours while the petitioner was travelling as a passenger in a Auto-rickshaw bearing Registration No. TN-05-P-3278 from his house to Koyambedu market at Poonamallee high road, near HP petrol bunk, Nerkundram, the driver of the same drove the said auto-rickshaw in a very rash and negligent manner endangering the public safety and suddenly, applied break, in view of the same the unknown lorry, which was proceeding in the same direction dashed against the said auto-rickshaw and hence, it was capsized and the driver of the same caused grievous injuries to the appellant /claimant herein. The above accident occurred only due to the rash and negligent

driving of the driver of the first respondent's vehicle and he was solely responsible for the accident.

3. The second respondent /insurance company disputed the liability mainly on the ground that it is a case of hit and run and therefore, the passenger in the auto is not entitled to claim compensation against the insurance company. Such a claim is entertainable only when a vicarious liability of the insurance company is established by the claimant. The Tribunal adjudicated the issues and arrived at the conclusion that the vicarious liability has not been established by the claimant and therefore, the second respondent /insurance company is not liable to pay any compensation. The findings in this regard are very much relevant, wherein the Tribunal found that there is a delay in registering an FIR and except the statement of PW1 claimant there is no documentary evidence to prove the fact that the accident occurred due to the rash and negligent manner of the driver of the auto. In other words, a specific finding has been arrived by the Tribunal that in the absence of any material evidence to establish the negligence on the part of the auto driver then the second respondent /insurance company cannot be held to be liable to pay the compensation to the passengers, who were travelling in that auto

4. The learned counsel appearing on behalf of the appellant / claimant mainly contended that in respect of joint tortfeasor the claimant can choose any one of the persons for the purpose of claiming compensation under Section 166 of the Motor Vehicles Act.

5. The learned counsel for the appellant /claimant reiterated that the case of joint tortfeasor are well enumerated by the courts including the apex court. Therefore, the claimant in the present case has chosen to claim compensation against the auto driver and the claim petition is maintainable. In order to substantiate the said contention the learned counsel appearing on behalf of the appellant/claimant relied upon the first information report, wherein an observation was made that the case was registered by the Poonamallee Traffic investigation, Chennai in Crime No. 1424/PH1/2012 against the driver, namely, Ramesh, of the vehicle bearing registration No. TN-05-S-3278 and the case was still under investigation. In view of the fact that the case was under investigation and even the police officials are not filed final report in this regard, mere FIR cannot be a ground to arrive a conclusion that the auto driver was at negligent. Admittedly, the FIR was registered at the instance of the appellant /claimant's relative and the FIR was registered after the lapse of 19 days from the date of accident. For all these reasons mere FIR cannot be a conclusive evidence for the purpose of arriving a conclusion that the auto driver has

committed an act of negligent so as to fix the vicarious liability on the insurance company. Beyond the FIR the appellant /claimant has to establish the facts and other circumstances with reference to the accident. Except the FIR all other circumstances establishes that the vicarious liability is unable to be fixed against the second respondent /insurance company and the findings in this regard by the Tribunal is also clear.

6. The learned counsel for the appellant /claimant made a submission that the auto passenger is a victim and because of the technical aspects the rightful claim of such innocent passenger cannot be denied.

7. The learned counsel appearing on behalf of the second respondent /insurance company made a submission that under Section 163 solatium can be granted. However, the quantum of solatium fixed under the Act is very minimum, which would not be sufficient, even to meet out the medical expenses.

8. This Court is of the opinion that in such circumstances where there is no proof to establish the negligence then in a case of hit and run solatium can be granted by approaching the competent forum. However, the claim petition under Section 166 cannot be entertained, in the absence of establishing any negligence on the part of the insured vehicle.

9. In the event of granting compensation in such cases the same would create a wrong precedent with reference to the provisions of the Act as well as the contractual obligations between the insurance companies as well as the policy holders.

10. The concept of compensation under the Motor Vehicles Act is a contractual one and compensations are to be settled strictly in accordance with the provisions of the Act, more specifically, with reference to the terms and conditions of the contract agreed between the parties. The second respondent /insurance company is liable to pay compensation in accordance with the agreed conditions and in the event of violations of the policy condition then the liability cannot be fixed against the second respondent /insurance company. In all such cases, the parties aggrieved are at liberty to invoke the common law and claim damages against the persons, who have committed any offence, tort or otherwise. In other words, damages can be claimed by such persons under the common law and the Motor Vehicles Act being a special enactment and the policy with the insurance company is restricted to the extend of coverage then the scope of the compensation cannot be expanded by the courts only based on certain misplaced sympathy. Any leniency or misplaced sympathy will result in dealing with the public money in a wrongful manner. Courts are not supposed to exercise certain

discretionary power based on certain misplaced sympathy.

10. This Court is of the considered opinion that in every case of accident there is a pain, mental agony, medical expenses, suffering and so many other consequences. This Court can understand the plight of the accident victims in this country. Adequate care is to be taken by the law enforcing authority to ensure that the number of accidents are minimized by strictly enforcing the traffic regulations and other road rules in a scrupulous manner. However, the facts remain that the number of accidents are in ascending mode year by year, which causes greatest concern to the public at large, more specifically, to innocent persons. Traffic violations are to be viewed seriously. But the authority concerned are not sensitive at the expected level so as to curb such traffic violations.

11. The courts while dealing with such matters sometimes moves with emotions or based on the untold agonies of these victims. The courts are mostly deciding certain cases on emotional basis by extending sympathy.

12. Undoubtedly, such victims deserve an effective assistance and support from the State and the State being the welfare State is bound to ensure safety, security and health of the citizen at large. Therefore, all these aspects can never be countenanced. Contrarily, the offenders are to be prosecuted properly in accordance with law in force. In the absence of lack of enforcement of law would also a reason for many number of accidents in this country.

13. Under these circumstances, this Court is of the considered opinion that the liability cannot be fixed merely on the ground of misplaced sympathy. The Courts are bound to consider the provisions of the Act, terms and conditions of the policy and the liability aspects and accordingly, grant just compensation based on the documents, nature of the injuries sustained and all other future consequences and other connected aspects of the matter. The just compensation though cannot be denied, the Courts are bound to exercise its wisdom to ascertain the current day atmosphere in the society and accordingly take a decision in a fair and reasonable manner.

14. As far as the case on hand is concerned, the lorry is unknown therefore, there is no other person as contemplated so as to fix a joint tortfeasor theory. In the present case, the claimant could not able to establish that the auto driver committed an act of negligent. Thus, the liability cannot be fixed on the insurance company.

15. However, taking note of the facts that the police officials not completed the investigation in this case and after filing of the charge sheet, if the auto driver is found committed negligence then the claimant is entitled to fix liability on the second respondent /insurance company. At that point of time the appellant/ claimant is at liberty to file fresh claim petition claiming compensation against the second respondent /insurance company by producing all required evidences.

16. With this liberty, the appeal stands disposed of. No costs.

Sd/-

Assistant Registrar

//True Copy//

Sub Assistant Registrar

may

To

1.The II Small Causes Judge
Motor Accidents Claims Tribunal
Chennai.

Copy To:

The Section Officer,
V.R.Section, High Court, Madras.

+1 cc to M/s.Mr.D.Baskaran, Advocate Sr.No. 22194

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