IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 08.07.2021	DELIVERED ON: 21.09.2021

CORAM :

THE HONOURABLE TMT.JUSTICE S.KANNAMMAL

C.M.A.NO.4050 OF 2019
AND
C.M.P.NO.22930 OF 2019

M/s.Bharti AXA General Insurance Company Limited,
Coimbatore. ...Appellant / 2^{nd} Respondent

Vs.

1.N.Durgadevi

*2.Minor. **K.Swedhan**

(Minor 2^{nd} respondent represented by his
Mother, N.Durgadevi, 1^{st} respondent herein)

3.L.Micheal ...Respondents 1 to 3 / Petitioners

M.Muthulakshmi (deceased)

(Amended as per I.A.No.280/2018,
dated 25.07.2018)

4.M/s.Coimbatore Urban Peoples Transport,
At 54D, Jayavardhan Velu Nagar,
Peelamedu Post, Coimbatore - 641 004,
Coimbatore District. ...4^{th} Respondent / 1^{st} Respondent

5.R.Shanmuganandhan ...5^{th} Respondent / 3^{rd} Respondent

6.The Managing Director,
State Express Transport Corporation
(Tamilnadu) Limited,
At Head Office, Pallavan Salai,
Chennai Post,
Chennai District. ...6^{th} Respondent / 4^{th} Respondent

Prayer : This Civil Miscellaneous Appeal is filed under Section 173 of the Motor Vehicles Act, 1988, against the Judgment and Decree dated 26.11.2018 made in M.C.O.P.No.47 of 2018 on the file of the Motor Accidents Claims Tribunal, Sub Court, Kangayam.

For Appellant : Mr.S.Arunkumar

For RR 1 to 3 : Mr.M.Sathish Kumar

For RR 4 to 6 : No appearance

J U D G M E N T

The matter is heard through “Video Conferencing/Hybrid mode”.

This Civil Miscellaneous Appeal has been filed against the award of the Tribunal dated 26.11.2018 made in M.C.O.P.No.47 of 2018 on the file of the Motor Accidents Claims Tribunal, Sub Court, Kangayam.

2.The appellant is the 2nd respondent in M.C.O.P.No.47 of 2018 on the file of the Motor Accidents Claims Tribunal, Sub Court, Kangayam. The respondents 1 to 3 and one M.Muthulakshmi filed the above said claim petition, claiming a sum of Rs.17,00,000/- as compensation for the death of one M.Kumar, who died in the accident that took place on 05.04.2012. Pending claim petition, the 4th claimant viz., M.Muthulakshmi died and the legal heirs of the 4th claimant were impleaded as respective parties in the claim petition as per the order dated 25.07.2018 made in I.A.No.280 of 2018.

3.According to respondents 1 to 3 and 4th claimant, on 05.04.2012 at about 04.00 a.m., while the said M.Kumar was driving the van bearing Registration No.TN 37 BR 1929 from East to West direction on the Kangayam to Coimbatore main road near Ramesh cars, he lost the control over the van, came to the southern edge of the road and dashed against the bus bearing Registration No.TN 01 N 8043, which was coming in the opposite direction in a great force and caused the accident. In the accident, the front portion of the van got badly damaged and the said M.Kumar sustained multiple injuries all over the body. Immediately after the accident, the said M.Kumar was taken to Government Hospital at Kangayam by the people who gathered near the scene of accident. Thereafter he was taken to Ganga Hospital, Coimbatore for further treatment. Inspite of treatment given to the said M.Kumar, he succumbed to injuries on the same day. Therefore, the respondents 1 to 3 and one M.Muthulakshmi filed the above said claim petition claiming a sum of Rs.17,00,000/- as compensation for the death of the said M.Kumar against the respondents 4 to 6 and appellant-Insurance Company.

4.The respondents 4 and 5, being the owner of the van and driver of the bus belonging to 6th respondent-Transport Corporation remained exparte before the Tribunal.

5.The appellant-Insurance Company, being the insurer of the van belonging to 4th respondent filed counter statement and denied all the averments made by the respondents 1 to 3 and 4th claimant. The appellant denied the manner of accident as alleged by the respondents 1 to 3 and 4th claimant. According to the appellant, the 5th respondent-driver of the bus belonging to 6th respondent-Transport Corporation only drove the bus without minding the van, which was coming in the opposite direction, suddenly came into the middle of the road in a rash and negligent manner and caused the accident that happened as head on collision in the middle of the road. Further, the 5th respondent-driver of the bus was not possessing valid driving license to drive the bus at the time of accident. Therefore, the respondents 1 to 3 and 4th claimant are entitled to claim compensation only against the respondents 5 and 6. The claim petition filed under Section 166 of the Motor Vehicles Act by the respondents 1 to 3 and 4th claimant is not maintainable as the said M.Kumar, driver of the van belonging to 4th respondent is a tort feasor and he is not a third party. The deceased being the driver of the van at the time of accident, steps into the shoes of owner of the said vehicle. The Criminal Case in Cr.No.230 of 2012 was registered only against the deceased and hence, the respondents 1 to 3 and 4th claimant are not entitled for any compensation. The deceased was not possessing valid driving license at the time of accident and also there is no permit for the van belonging to 4th respondent at the time of accident. Hence, the appellant is not liable to pay any compensation to the respondents 1 to 3 and 4th claimant. The 4th respondent failed to furnish the particulars of policy, date, time and place of accident, particulars of injured, name of driver, particulars of driving license as per Section 134(C) of the Motor Vehicles Act, 1988. Hence, the appellant is not liable to pay any compensation to the respondents 1 to 3 and 4th claimant. The Kangayam Police Station failed to forward the relevant documents within 30 days from the date of information and not complied with the statutory demand as per Section 158(6) of the Motor Vehicles Act, 1988. The appellant denied the age, avocation and income of the deceased. In any event, the quantum of compensation claimed by the respondents 1 to 3 and 4th claimant are highly excessive and prayed for dismissal of the claim petition as against the appellant-Insurance Company.

6.The 6th respondent-Transport Corporation filed separate counter statement and denied all the averments made by the claimants. According to 6th respondent, the deceased only drove the van in a rash and negligent manner and caused the accident and there is no negligence on the part of the driver of the bus belonging to 6th respondent-Transport Corporation. At the time of accident, the deceased was not possessing valid driving license to drive the van and also there was no valid permit for the van driven by the deceased at the time of accident. Hence, the 6th respondent is not liable to pay any compensation to the respondents 1 to 3 and 4th claimant. The 6th respondent denied the age, avocation, nature of injuries sustained and income of the deceased. The quantum of compensation claimed by the cliamants is highly excessive and prayed for dismissal of claim petition as against the 6th respondent-Transport Corporation.

7.Before the Tribunal, the claimant in M.C.O.P.No.46 of 2018 was examined as P.W.1 and the 1st respondent was examined as P.W.2 and 11 documents were marked as Exs.P1 to P11. On behalf of the 6th respondent and appellant, three witnesses were examined as R.W.1 to R.W.3 and copy of Insurance Policy of the van bearing Registration No.TN 37 BR 1929 was marked as Ex.R1. Exs.X1 to X3 were marked as Court documents.

8.The Tribunal considering the pleadings, oral and documentary evidence held that the accident has occurred due to negligence on the part of the deceased as well as on the part of the 5th respondent-driver of the bus belonging to 6th respondent-Transport Corporation, awarded a sum of Rs.15,43,000/- as compensation to the respondents 1 to 3 and directed the appellant-Insurance Company and 6th respondent-Transport Corporation to pay 50% of the compensation each.

9.To set aside the award dated 26.11.2018 made in M.C.O.P.No.47 of 2018, the appellant-Insurance Company has come out with the present appeal.

10.The learned counsel appearing for the appellant contended that the Tribunal having held that deceased also contributed to the accident equally, failed to note that the respondents 1 to 3 are not entitled to maintain the claim petition under Section 166 of the Motor Vehicles Act. The deceased was a tort feasor and the claimants are entitled to claim compensation only against the respondents 5 and 6. The Tribunal failed to properly appreciate the evidence of R.W.1, Ex.R1 and Exs.X1 to X3. The Tribunal ought to have followed the judgment of the Hon'ble Apex Court reported in 2008 ACJ 1165, [T.O.Anthony Vs. Karvarnan and others] and dismissed the claim petition and prayed for setting aside the award passed by the Tribunal.

11.Per contra, the learned counsel appearing for the respondents 1 to 3 contended that the Tribunal considering the fact that deceased also contributed to the accident, rightly fastened 50% liability each on the part of the appellant as well as on the part of the 6th respondent. The Tribunal considering the entire materials on record, has awarded a sum of Rs.15,43,000/- as compensation to the respondents 1 to 3 and the same is not excessive and prayed for dismissal of the appeal.

12.Though notice has been served on the respondents 4 to 6 and their names are printed in the cause list, there is no representation for them, either in person or through counsel.

13.Heard the learned counsel appearing for the appellant-Insurance Company as well as the learned counsel appearing for the respondents 1 to 3 and perused the entire materials on record.

14.It is the case of the respondents 1 to 3 and 4th claimant that on 05.04.2012 at about 04.00 a.m., while the said M.Kumar was driving the van bearing Registration No.TN 37 BR 1929 from East to West direction on the Kangayam to Coimbatore main road near Ramesh cars, he lost the control over the van, came to the southern edge of the road and dashed against the bus bearing Registration No.TN 01 N 8043, which was coming in the opposite direction in a great force and caused the accident. In the accident, the front portion of the van got badly damaged and the said M.Kumar sustained multiple injuries all over the body and succumbed to injuries on the same day. Further, it is the case of the appellant that the 5th respondent-driver of the bus belonging to 6th respondent-Transport Corporation only drove the bus without minding the van, which was coming in the opposite direction, suddenly came into the middle of the road in a rash and negligent manner and caused the accident that happened as head on collision in the middle of the road. It is the case of the 6th respondent-Transport Corporation that the deceased only drove the van in a rash and negligent manner and caused the accident and there is no negligence on the part of the driver of the bus. From the materials available on record, it is seen that the F.I.R. was registered against the deceased based on the complaint given by the 5th respondent-driver of the bus. P.W.1 is the claimant in M.C.O.P.No.46 of 2018, who travelled as one of the passengers in the bus belonging to 6th respondent-Transport Corporation at the time of accident. The 1st respondent examined herself as P.W.2 and deposed as per the averments made in the claim petition and she was not an eyewitness to the accident. The respondents 1 to 3 and 4th claimant themselves admitted in the claim petition that the deceased only lost his control over the van and dashed against the bus and caused the accident. The appellant in the counter statement contended that the accident has occurred only due to the negligence on the part of the driver of the bus belonging to 6th respondent-Transport Corporation. To prove the same, the appellant examined one Rajkumar, Legal Advisor of the appellant as R.W.3. R.W.3 was not an eyewitness to the accident. Further, the 6th respondent-Transport Corporation has stated that the accident has occurred only due to the negligence on the part of the deceased. To prove the said contention, the driver of the bus was not examined. Further, P.W.1 in her cross examination has deposed that she travelled in the bus at the time of accident by sitting behind the driver of the bus and after hearing the sound only she saw the accident and there is no Final Report or Rough Sketch to prove the manner of accident. The Tribunal considering the claim made by the claimants in the claim petition, counter affidavits filed by the appellant and 6th respondent, evidence of P.W.1, P.W.2, R.W.1 to R.W.3 and contents of Ex.P1/F.I.R., held that the deceased as well as the 5th respondent-driver of the bus are responsible for the accident and fixed 50% liability each on the part of the appellant as well as on the part of the 6th respondent-Transport Corporation. There is no error in the said finding of the Tribunal.

15.The main contention of the learned counsel appearing for the appellant-Insurance Company is that the Tribunal having come to the conclusion that the deceased also contributed equally to the accident, erroneously directed the appellant to pay 50% of the compensation. The further contention of the learned counsel appearing for the appellant that the deceased was a tort feasor and hence, the claimants are entitled to claim compensation only from the respondents 5 and 6. The Hon'ble Apex Court in the judgment reported in 2009 (2) TNMAC 169 (SC) [Ningamma & another Vs. United India Insurance Co. Ltd.], held that a borrower of the vehicle steps into the shoes of the owner and the tort-feasor or his legal representatives are not entitled to claim compensation against the insurer of the vehicle. In the present case, the vehicle driven by the deceased is a Van and the 4th respondent is the owner of the van. The said ratio was reiterated by the Hon'ble Apex Court in the following judgment reported in 2020 (1) TN MAC 1 (SC) [Ramkhiladi and another Vs. United India Insurance Co. Ltd., and another]:

> "5.4 An identical question came to be considered by this Court in the case of Ningamma (supra). In that case, the deceased was driving a motorcycle which was borrowed from its real owner and met with an accident by dashing against a bullock cart i.e. without involving any other vehicle. The claim petition was filed under Section 163A of the Act by the legal representatives of the deceased against the real owner of the motorcycle which was being driven by the deceased. To that, this Court has observed and held that since the deceased has stepped into the shoes of the owner of the vehicle, Section 163A of the Act cannot apply wherein the owner of the vehicle himself is involved. Consequently, it was held that the legal representatives of the deceased could not have claimed the

compensation under Section 163A of the Act. Therefore, as such, in the present case, the claimants could have even claimed the compensation and/or filed the claim petition under Section 163A of the Act against the driver, owner and insurance company of the offending vehicle i.e. motorcycle bearing registration No. RJ 29 2M 9223, being a third party with respect to the offending vehicle. However, no claim under Section 163A was filed against the driver, owner and/or insurance company of the motorcycle bearing registration No. RJ 29 2M 9223. It is an admitted position that the claim under Section 163A of the Act was only against the owner and the insurance company of the motorcycle bearing registration No. RJ 02 SA 7811 which was borrowed by the deceased from the opponent-owner Bhagwan Sahay. Therefore, applying the law laid down by this Court in the case of Ningamma (supra), and as the deceased has stepped into the shoes of the owner of the vehicle bearing registration No. RJ 02 SA 7811, as rightly held by the High Court, the claim petition under Section 163A of the Act against the owner and insurance company of the vehicle bearing registration No. RJ 02 SA 7811 shall not be maintainable.

5.5 It is true that, in a claim under Section 163A of the Act, there is no need for the claimants to plead or establish the negligence and/or that the death in respect of which the claim petition is sought to be established was due to wrongful act, neglect or default of the owner of the vehicle concerned. It is also true that the claim petition under Section 163A of the Act is based on the principle of no fault liability. However, at the same time, the deceased has to be a third party and cannot maintain a claim under Section 163A of the Act against the owner/insurer of the vehicle which is borrowed by him as he will be in the shoes of the owner and he cannot maintain a claim under Section 163A of the Act against the owner and insurer of the vehicle bearing registration No. RJ 02 SA

7811. In the present case, the parties are governed by the contract of insurance and under the contract of insurance the liability of the insurance company would be qua third party only. In the present case, as observed hereinabove, the deceased cannot be said to be a third party with respect to the insured vehicle bearing registration No. RJ 02 SA 7811. There cannot be any dispute that the liability of the insurance company would be as per the terms and conditions of the contract of insurance. As held by this Court in the case of Dhanraj (supra), an insurance policy covers the liability incurred by the insured in respect of death of or bodily injury to any person (including an owner of the goods or his authorized representative) carried in the vehicle or damage to any property of a third party caused by or arising out of the use of the vehicle. In the said decision, it is further held by this Court that Section 147 does not require an insurance company to assume risk for death or bodily injury to the owner of the vehicle.

5.6 In view of the above and for the reasons stated above, in the present case, as the claim under Section 163A of the Act was made only against the owner and insurance company of the vehicle which was being driven by the deceased himself as borrower of the vehicle from the owner of the vehicle and he would be in the shoes of the owner, the High Court has rightly observed and held that such a claim was not maintainable and the claimants ought to have joined and/or ought to have made the claim under Section 163A of the Act against the driver, owner and/or the insurance company of the offending vehicle i.e. RJ 29 2M 9223 being a third party to the said vehicle.”

16.In view of the judgment of the Hon'ble Apex Court, 2020 (1) TN MAC 1 (SC) cited supra, the contention of the learned counsel appearing for the appellant is acceptable. The respondents 1 to 3 who are the legal representatives of the deceased tort-feasor are not entitled to claim compensation from the appellant, who is the insurer of the van which the deceased was driving at the time of accident. For the above reason, the award of the Tribunal directing the appellant to pay 50% of the compensation awarded to the claimants is liable to be set aside and it is hereby set aside. The claimants are entitled to only 50% of the compensation awarded from the 6th respondent-Transport Corporation.

17.In the result, this Civil Miscellaneous Appeal is allowed and the compensation awarded by the Tribunal at Rs.15,43,000/- is hereby confirmed together with interest at the rate of 7.5% per annum from the date of petition till the date of deposit. The 6th respondent-Transport Corporation is directed to deposit 50% of the award amount, i.e., Rs.7,71,500/- along with interest and costs, less the amount already deposited, if any, within a period of twelve weeks from the date of receipt of a copy of this judgment, to the credit of M.C.O.P.No.47 of 2018 on the file of the Motor Accidents Claims Tribunal, Sub Court, Kangayam. On such deposit, the respondents 1 & 3 are permitted to withdraw their respective share of the award amount now determined by this Court, as per the ratio of apportionment fixed by the Tribunal, along with proportionate interest and costs, less the amount if any, already withdrawn by making necessary applications before the Tribunal. The share of the minor 2nd respondent is directed to be deposited in any one of the Nationalized Banks, till the minor 2nd respondent attains majority. On such deposit, the 1st respondent, being the Mother of the minor 2nd respondent is permitted to withdraw the accrued interest once in three months for the welfare of the minor 2nd respondent. The appellant-Insurance Company is permitted to withdraw the award amount lying in the credit of M.C.O.P.No.47 of 2018, if the award amount has already been deposited by them. Consequently the connected Miscellaneous Petition is closed. No costs.

Sd/-
Assistant Registrar(CS-IV)
dated : 28.10.2021

//True Copy//

***Amended as per order of this Court, dated 08.07.2021 made in CMP No.4276 of 2021 in CMA No.4050 of 2019**
Sd/-
Assistant Registrar(CS-IV)
dated : 22.12.2021

Sub Assistant Registrar

krk

To

The Subordinate Judge,
Motor Accidents Claims Tribunal,
Kangayam.

Copy To

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

+1cc to Mr.S.Arunkumar, Advocate,
S.R.No.48653

***To be substituted in the place of order despatched on 08.12.2021**

C.M.A.No.4050 of 2019

GJ(CO)
RVM(19/11/2021)
SU(22/12/2021)