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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 27.01.2022

CORAM:

THE HON'BLE MR. JUSTICE R.SUBRAMANIAN

C.M.A.No.2726 of 2021

- 1.Nandhini
- 2.Minor Aswanth
(Rep by Mother of Next friend 1st Appellant)
- 3.Chinnaponnu
- 4.Jayamoorthy

...Appellants/Petitioners

Vs.

- 1.J.J.P. Oil Trade,
No.60, T.T.K. Road,
Alwarpet,
Chennai - 600 018.
- 2.National Insurance Co. Ltd.,
K.K.Road,
Villupuram.
- 3.T.Palanivel
(R1 & R3 were set exparte in the Trial Court)

... Respondents/Respondents

Prayer: Civil Miscellaneous Appeal filed under Section 173 of Motor Vehicles Act, 1988, against the Judgment and decree dated 18.03.2020 and made in M.C.O.P.No.84 of 2018 on the file of the Special District Judge (Motor Accident Claims Tribunal), Villupuram.

For Appellants : Mr.C.Munusamy

For Respondents: Mr.J.Michael Visuvasam for R2

J U D G M E N T

Challenge is to the order of the Motor Accident Claims Tribunal dismissing the claim petition filed by the wife, the minor son and the parents of one Jayakumar who died in a motor accident that occurred on 18.06.2017.



2.The claimants sought for compensation of a sum of Rs.30,00,000/- contending that the accident occurred due to the rash and negligent driving by the driver of the car bearing Registration No.TN-07-AB-3839 owned by the first respondent and insured with the second respondent. The third respondent is the driver of the vehicle at that time of the accident.

3.According to the claimants, while the deceased was riding the two wheeler bearing Registration No.TN-32-AF-6576 on the Kumbakonam - Chennai Road on the extreme left side of the road, the car bearing Registration No.TN-07-AB-3839 which was coming in the opposite direction driven by the third respondent in a rash and negligent manner dashed against the two wheeler. As a result of the impact, the rider of the two wheeler sustained grievous injuries and died the next day. Contending that the claimants 1 and 2 viz., the wife and the minor son have lost the sole breadwinner of the family and hence, they have to be compensated, the claimants sought for compensation as above. The claimants 3 and 4 who are the parents of the deceased also joined the claim.

4.The Insurance company restricted the claim petition contending that the accident had occurred due to the negligence of the deceased and not the driver of the car viz., the third respondent. Citing the fact that an FIR was lodged by the driver of the car on the same day at about 7 p.m. against the rider of the two wheeler viz., the deceased and the fact that the investigation into the accident was closed on the ground that abated due to the death of the rider of the two wheeler, the Insurance company would contend that since there was no negligence on the part of the driver of the vehicle insured with it, it is not under an obligation to pay compensation.

5.Before the Tribunal, the first claimant/wife of the deceased was examined as PW1 and one Moorthy who claimed to be the eyewitness was examined as PW2 and Exs.P1 to P12 were marked. On the side of the Insurance company, RW1 to RW4 were examined as witnesses and Exs.R1 to R4 were marked. Exs.X1 to X12 were marked as third party documents.

6.The Tribunal on the appreciation of the evidence disbelieved the evidence of PW2 who claimed to be the eyewitness. It accepted the contention of the Insurance company that the accident had occurred due to the rash and negligent driving on the part of the deceased relying upon the FIR, the case diary and the Final Report which were produced. The



Tribunal also pointed out that the pillion rider of the two wheeler which was driven by the deceased at that time of the accident viz., Kolanjiyappan had given a statement before the Police blaming the deceased for the accident. On the said conclusion, the Tribunal dismissed the claim petition.

7.Mr.C.Munusamy, learned counsel appearing for the appellants would vehemently contend that the Tribunal erred in dismissing the claim petition in its entirety. It should have apportioned the negligence and should have held that the car driver was liable at least to some extent. He would further contend that the records produced by the Police, which have been heavily relied upon by the Tribunal, are not at all reliable and RW3/the Police Officer who was examined has admitted that there was correction in the case diary which were marked as Exs.X8 and X10.

8.Mr.C.Munusamy would also point out that the respondent Insurance company has not chosen to examine the said Kolanjiyappan who was the pillion rider. He would also contend that the Tribunal ought to have seen that the deceased was very seriously injured and he was hospitalized and taking advantage of the situation, the driver of the car had lodged the FIR against the rider of the two wheeler. Learned counsel would also invoke what he would termed as the common phenomena of blaming the driver of the bigger vehicle for the accident.

9.Mr.C.Munusamy would further point out that the third respondent who was impleaded had remained exparte before the Tribunal. Non-examination of the third respondent by the Insurance company is also made a ground, by the learned counsel, to contend that the claimants have proved that the accident occurred because of the negligence of the car driver and the Tribunal was therefore not justified in dismissing the claim petition.

10.Learned counsel would also rely upon by a judgment of the Hon'ble Supreme Court in the case of National Insurance Company Ltd., vs. Chamundeswari & Ors. rendered in Civil Appeal No.6151 of 2021 wherein the Hon'ble Supreme Court had confirmed the judgment of the High Court which had reversed the findings of the Tribunal on negligence and held that the High Court was right in fixing the liability on the bigger vehicle despite the fact that the FIR filed against the rider of the two wheeler.

11.Contending contra, Mr.J.Michael Visuvasam, learned counsel appearing for the Insurance company would submit that



having filed the claim petition under Section 166 of the Motor Vehicles Act, it is incumbent on the claimants to prove negligence on the part of the driver of the offending vehicle according to them. He would also point out that the arguments of the learned counsel for the appellants proceed on a premise the burden of proving absence of negligence is on the Insurance company.

12.Mr.J.Michael Visuvasam would further submit that the FIR was lodged on the same day after about 5 hours of the accident, the driver of the car has given an exact statement of what happened at that time of the accident and the Police after investigation and after recording the statement of witnesses including the pillion rider Kolanjiyappan under Section 161 of the Code of Criminal Procedure had reached the conclusion that the accident occurred due to the negligence of the rider of the two wheeler and filed a Final Report stating that the case has abated because of the death of the rider of the two wheeler. He would also point out that the evidence of Moorthy who was examined as PW2 to establish negligence on the part of the driver of the car is far from convincing and the Tribunal was right in rejecting the same. The accident Reports of both the injured as well as the deceased are also not helpful in deciding the question of negligence.

13.Mr.J.Michael Visuvasam would also drew the attention of this Court to the following judgments of the Hon'ble Supreme Court, wherein it was held that in a claim under Section 166 of the Motor Vehicles Act, it is for the claimant to establish negligence on the part of the offending vehicle and if they do not establish negligence, they would not be entitled to compensation under Section 166.

(a)In Surendra Kumar Arora and another vs. Dr.Manoj Bisla and Others reported in 2012 ACJ 1305, the Hon'ble Supreme Court has pointed out that in Oriental Insurance Co. Ltd., vs. Meena Variyal reported in 2007 ACJ Page 1284, the Hon'ble Supreme Court has held that if the claimants choose to approach the Tribunal under Section 166 of the Motor Vehicles Act, they are bound to prove negligence.

(b)In Reshma Kumar and Others vs. Madan Mohan and another reported in 2013 ACJ 1253, the Hon'ble Supreme Court again pointed out the difference between the claim under Section 166 and the claim under Section 163A and concluded that if the claimants want compensation under Section 166, they will have to prove negligence. Mr.J.Michael Visuvasam would also rely upon a judgment of the three bench of the Hon'ble Supreme Court in Lachoo Ram and Ors. vs. Himachal Road Transport Corpn. reported



in 2014 (1) CTC 893, wherein the Supreme Court again has considered the question of negligence and held that if the deceased is guilty of rash and negligent driving, he would not be entitled to compensation under Section 166.

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14. I have considered the submissions of the counsel for the parties. The necessary question that has to be addressed in this appeal is as to whether the Tribunal was right in concluding that there was no negligence on the part of the car driver. Adverting to the evidence on record, the evidence of PW2/Moorthy who claims to be the eyewitness, as rightly pointed out by the Tribunal, is far from convincing. The proof affidavit filed by him does not disclose how the accident took place except to say that the car was driven in a rash and negligent manner. In his cross-examination, he has deposed that he saw the car from 100 meters distance. A wholesome reading of the evidence of the PW2 does not inspire the confidence of the Court. At the same time, the evidence which is available on the side of the respondents namely the FIR and the observation magazar has been produced which shows that the accident had occurred on the Eastern side of the North-South Road. It is also in evidence that the car was going towards South and the two wheeler which was driven by the deceased was proceeding towards North. In such a situation, if the accident occurs on the Eastern side of the road, it is the wrong side for the two wheeler and the right side for the car. The very situation depicted by the observation magazar shows that the two wheeler was on the wrong side. The Police had inquired about 4 persons and they have recorded a finding that the deceased was negligent.

15. A statement given by the pillion rider Kolanjiyappan has been produced by the police, but the claimants did not choose to examine the said Kolanjiyappan as a witness and no explanation was offered for his non-examination. It is admitted that Kolanjiyappan was the pillion rider at the time of the accident. Therefore, he would have been the best person to speak about the accident. No reason has been assigned for his non-examination. The claimants would fault the Insurance company for non-examination of the driver of the car. As has been repeatedly pointed out by the Hon'ble Supreme Court, the burden of proving negligence in a claim under Section 166 of the Motor Vehicles Act is on the claimants and unless the claimants discharge the initial burden, the Insurance company cannot be faulted for non-examination of the driver of the car. From the evidence that is let in, the fact that the accident had occurred alone had been proved. The negligence part of it which would enable the Tribunal to fasten the liability on the Insurance company has



16.Mr.C.Munusamy would, however, attempt to contend that the non-examination of the driver of the car and the pillion rider viz., Kolanjiyappan by the Insurance company is fatal to the defence of the Insurance company. I am unable to agree with the said contention of the learned counsel.

18. However, considering the fact that the accident took place in the year 2017, I am of the opinion that the claim petition could be treated as one under Section 163A and the compensation can be awarded as provided in the schedule by taking the annual income at Rs.40,000/- and adopting the appropriate multiplier. It is stated that the deceased was about 28 years old at that time of the accident and therefore, multiplier applicable as per Sarla Verma (Smt.) & Ors vs. Delhi Transport Corporation & Another reported in 2009 6 SCC 121 is 17. If Rs.40,000/- is taken as annual income and 17 multiplier is adopted, the compensation payable would be Rs.6,80,000/-. The wife/first claimant would be entitled to Rs.40,000/- towards loss of consortium, the minor son would be entitled to Rs.40,000/- towards loss of love and affection and the parents would be entitled to Rs.25,000/- each towards loss of love and affection and a sum of Rs.15,000/- each is awarded towards loss of estate and funeral expenses. Thus, the total compensation would be Rs.8,40,000/-. The claimants would be entitled to interest at 7.5% per annum from the date of claim petition i.e. on 08.01.2018 till date of payment. The compensation is apportioned as follows:

(iii) The parents would be entitled to Rs.1,20,000/- each with proportionate interest.



19.It is seen that the driving license of the driver of the car had expired. This fact has been established by examining the officials from the RTO Office. The driver of the car though impleaded has remained exparte. Therefore, there is a violation of the policy condition which would entitle the Insurance company to recover the award amount from the owner of the vehicle. Hence, liberty is granted to the Insurance company to recover the amount awarded from the owner of the vehicle by launching execution proceedings.

20.In fine, the appeal is partly allowed. The Insurance company is directed to deposit the award amount as per the modified award, less the amount, if any, already deposited, with interest as above to the credit of M.C.O.P.No.84 of 2018, within a period of eight (8) weeks from the date of receipt of a copy of the judgment. On such deposit, the major claimants, viz., the appellants 1, 3 and 4 would be entitled to withdraw their respective share. The share of the minor shall be kept in an interest bearing fixed deposit in any of the nationalised banks till such time, the minor attains majority. The mother, the first claimant is permitted to withdraw the interest once in 6 months for the maintenance of the minor. There shall be no order as to costs.

SD/-
ASSISTANT REGISTRAR

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SUB ASSISTANT REGISTRAR

pam
To

The Motor Accident Claims Tribunal,
Special District Judge,
Villupuram.

Copy to
The Section Officer,
V.R.Section, High Court of Madras.

+1cc to Mr.J.Michael Visuvasam, Advocate Sr.5105

C.M.A.No.2726 of 2021

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srg 19/04/2022