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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 17.02.2022

CORAM:

THE HONOURABLE MR.JUSTICE C.V.KARTHIKEYAN

CMA No. 3328 of 2017

1. Mansoorabegum

2. Sulyim (Minor)

3. Hanasharoon (Minor)
(Petitioners 2 & 3 rep by their Mother
Natural Friend the 1st Petitioner herein)

4. Zeenathbegum ...Appellants/Petitioners

Vs

1. N.Malik Maddani

2. Bharti AXA General Insurance Company Limited.,
Metro plaza, 2nd Floor, 162, Anna Salai,
Chennai - 600 002. ...Respondents/Respondents

Prayer: Civil Miscellaneous Appeal filed under Section 173 of the M.V. Act, 1988 against the Judgment and Decree dated 18.08.2017 made in M.C.O.P.No. 2443 of 2014 on the file of the Motor Accidents Claims Tribunal, Chennai, (In the II Court of Small Causes, Chennai).

For Appellants : Mr. K.Suryanarayanan

For 1st Respondent: No appearance

For 2nd Respondent: Mr. S.Arun Kumar

J U D G M E N T

The present Appeal had been filed by the petitioners in M.C.O.P.No. 2443 of 2014 on the file of II Court of Small Causes, Chennai/ Motor Accident Claims Tribunal, aggrieved by the Judgment dated 18.08.2017 whereby the Tribunal had dismissed the claim petition filed under Section 166 of the Motor Vehicles

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Act and Rule 3 of the Motor Accident Claims Tribunal, relating to the death of one J. Harron Basha, who unfortunately died in a road accident on 29.12.2013.

2. The deceased was travelling as pillion rider in a two wheeler bearing Registration No. TN-19-H-7088, in GST Road, Chengelpet travelling towards Tambaram.

3. Mr. S.Arun Kumar, learned counsel appearing for the second respondent/Insurance Company pointed out this particular fact in view of the discussions which arose during the course of argument, and stated that the said road is a National Highway and was a broad road. When the two wheeler was thus proceeding, a TATA ACE Tempo van over took it. At that time, the side mirror of the TATA ACE Tempo van, the Registration number of which could not be determined even after police investigation, brushed the pillion rider / deceased/ J.Haroon Basha and as a result of that force applied, the driver of the two wheeler lost control and the vehicle was dragged towards the center of the median and the pillion rider fell down and suffered head injuries and was declared dead when brought to the hospital.

4. The claim petition was filed under Section 166 of the Motor Vehicles Act, 1988 and this naturally meant that the petitioners/legal representatives of the deceased had to discharge the burden of establishing that it was the rash and negligent driving of the two wheeler which caused the accident. They had consciously decided that they would not take recourse to file the petition under Section 163A of the Motor Vehicles Act, 1988.

5. The second respondent/Insurance Company joined issue with the averments made in the petition wherein, it had naturally been stated that the accident occurred only owing to the rash and negligent driving of the driver of the two wheeler, one Prabhu. The respondent on the other hand, insisted that the accident did not take place owing to the rash and negligent driving of the two wheeler / Prabhu and rather it was owing to the fact that the mirror of the side TATA ACE Tempo van dased against the pillion rider and therefore the driver lost control and the accident was not caused by rash and negligent driving.

6. The Tribunal had framed a specific issue whether the accident had happened due to the rash and negligent driving of the rider of the two wheeler.

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7. Even before examining further, it must be pointed out that the best witness to speak about such rash and negligent driving would have been the driver, namely, Prabhu, who should have come forward to graze the witness box and should have stated the speed in which he was driving the vehicle, the speed at which the van over took his motorcycle, and whether it was to the left of his vehicle or to the right side of his vehicle and whether he lost control because he was driving speedily or due to the impact of the side mirror of the van brushing the pillion rider. These are all crucial aspects.

8. It must be kept in mind that in a witness box, every witness should also speak about facts which incriminate him and there could be no excuse for not grazing the witness box on that particular ground. To a little extent, Section 132 of the Indian Evidence Act can be referred to on this particular aspect.

9. During the course of trial, the first petitioner before the Claims Tribunal /widow of the deceased examined herself as PW-1. She also examined as PW-2, an eye witness. Exs.P-1 to P-8 were marked. On the side of the respondent, RW-1 was examined, who was the Investigating Officer, and he marked Exs. R-1 and R-2. An official from the Insurance Company was examined as RW-2.

10. The Tribunal to a large extent had analyzed the evidence and had also extracted the relevant portion of the FIR, which was marked as Ex.P-1. It must be kept in mind that the informant of the driver of the motor vehicle, namely, Prabhu was not examined as a witness during the trial.

11. RW-1 the Investigating Officer also filed Ex.R-1 the final report and Ex.R-2 Investigation Report. Inspite of diligent investigation, the FIR was closed since the vehicle TATA ACE Tempo van was untraceble. Thus, left with only the two wheeler motor vehicle and its insurer, the claim petition was filed as against the owner and as against the Insurance Company.

12. Heard arguments advanced by Mr. K.Suryanarayanan, learned counsel for the appellant and Mr. S.Arun Kumar, learned counsel for the respondent.

13. Mr. K. Suryanarayanan, learned counsel appearing for the petitioners stated that the accident occurred owing to the rash and negligent driving of the two wheeler vehicle and

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therefore, stated that the Tribunal had erred in dismissing the claim petition. Learned counsel was insisted that the Tribunal should have answered issue No.1 in the affirmative and should have proceeded to examine the compensation to be granted for the death of Haroon Basha to his family members.

14. On the other hand, Mr.S.Arun Kumar, learned counsel appearing for the second respondent pointed out the FIR and stated that the informant had only stated that a vehicle came from behind and the side mirror brushed the pillion rider/Harron Basha/deceased and owing to that fact, the two wheeler driver lost control and hit the median and the pillion rider fell down and suffered head injuries.

15. I would hold that this accident could not have occurred if the van had not overtaken the two wheeler and if the side mirror of the van had not brushed the pillion rider/deceased. Thus, that was the proximate cause of the accident and it can never be presumed or concluded that the accident occurred otherwise due to the rash and negligent driving of the two wheeler.

16. Mr.K.Suryanarayanan, learned counsel then made an effort to urge the Court to treat the claim petition as one under Section 163A of the Motor Vehicles Act, 1988, and grant compensation on that ground.

17. The difference between 163A and 166 of the Motor Vehicles Act, 1988, which are mutually exclusive petitions has to be touched by me. Under Section 163A even without discharging the burden of establishing negligence, a lumpsum amount is granted, in accordance with schedule II of the Act. Under Section 166, there is a responsibility to lead evidence, to examine witnesses, and thereafter, if the Court had reached a conclusion that the petitioners have failed to prove the negligence or the fact which they asserted, the claim petition has to be dismissed.

18. In this case, it was the stand of the claimants that the two wheeler was being driven in a rash and negligent manner. The claimants failed to prove that fact which automatically means that the two wheeler was not driven rashly or negligently and was not the direct cause of the accident leading to the the death of Haroon Basha. Once the claimants had failed to prove that fact, the insurer of the two wheeler cannot be held liable or cannot be called upon to pay the compensation for the loss suffered. If they failed to prove that fact as they did in this

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case, then they have to suffer only one consequential order, namely the order of dismissal.

19. This Court cannot go round and try to presume that inspite of such fact having been failed to be proved, still the petition could be considered as filed under Section 163A of the Motor Vehicles Act, 1988 and grant compensation. That would be stretching the law, a little to far. That is not at all the object of the Motor Vehicles Act, 1988. The claimants had the option to choose either one provision. Once they have taken upon themselves the task to discharge the burden under Section 166 of the Motor Vehicles Act, then they cannot turn around and seek indulgence under Section 163A of the Motor Vehicles Act.

20. In my view, that is impermissible and against the principles as laid down in the Motor Vehicles Act, 1988.

21. Mr. S. Arun Kumar, learned counsel appearing for the second respondent also pointed out a decision in 2004 ACJ 934 [(Deepal Girishbhai Soni Vs. United India Insurance], wherein the Hon'ble Supreme Court had also frowned on the practice of converting an application under Section 166 of the Motor Vehicles Act, 1988, to an application under Section 163A of the Motor Vehicles Act, after finding that rash and negligent driving had not been established by the claimant.

22. This option to so consider an application under Section 166 Motor Vehicles Act, 1988 to one under Section 163-A Motor Vehicles Act, 1988 may be exercised before the trial commenced. But once trial has started and witnesses have grazed the witness box, then it remains an application under Section 166 of the Motor Vehicles Act, 1988. The facts asserted have to be proved,failing which the petition is dismissed.

23. In view of these reasons, I do not concur with the submissions of Mr. K.Suryanarayanan.

24. Hence, this Civil Miscellaneous Appeal is dismissed. No costs.

Sd/-
Assistant Registrar(CO)

//True copy//

Sub Assistant Registrar

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To

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

Copy to
  The Section Officer,
  VR Section,
  Madras High Court, Chennai.

+1 CC to Mr.K.Suryanarayanan, Advocate sr 10839
+1 CC to Mr.S.Arun Kumar, Advocate sr 10669.

CMA No. 3328 of 2017

GPL(CO)
SP(04/03/2022)

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