IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 20.03.2023

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THE HON'BLE MRS.JUSTICE N.MALA

C.M.A.No.563 of 2020
and CMP.No.3449 of 2020

The Divisional Manager,
New India Assurance Co. Ltd.,
Motor Third Party Claim Office,
No.1, Officer Line,
C.S.I. Building,
IInd Floor, Vellore. ...Appellant

vs.

1.J.Sivasankari

2.M.Ragupathy

3.D.Mothilal … Respondents

Prayer: Civil Miscellaneous Appeal is filed under Section 173 of Motor Vehicles Act, 1988, to set aside the decree and Judgment passed in M.C.O.P.No.886 of 2017 on 29.04.2019 on the file of the learned Motor Accident Claims Tribunal (District Judge, District Court-II, Kanchipuram) and be pleased to dismiss the above claim and allow the CMA.

For Appellant : Mr.J.Chandran

For R1 : Mr.C.Prabakaran

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J U D G M E N T

This appeal is filed to set aside the decree and Judgment passed in M.C.O.P.No.886 of 2017 on 29.04.2019 on the file of the learned Motor Accident Claims Tribunal (District Judge, District Court-II, Kanchipuram) and to dismiss the above claim and to allow the CMA.

2.The gist of the case is that on 22.04.2017 at about 10.00 p.m. the deceased was driving the auto belonging to the first respondent (previous owner) and the second respondent (present owner), while proceeding from Kanchipuram towards Akoor Village on the extreme left side of the road, one buffalo suddenly crossed the road and on seeing it, the deceased applied sudden break due to which he lost control of the auto which capsized resulting in his death on the spot.

3.The heirs of the deceased filed the claim petition stating that the deceased was aged 36 years at the time of the accident and as an auto-driver he was earning an income of Rs.15,000/- per month along with a batta of Rs.200/- per day. The claimants therefore sought for compensation of

Rs.25 lakhs.

4.The first and second respondents remained exparte in the Tribunal. The third respondent insurance company filed the counter denying all the averments raised in the claim petition. In the counter, it was stated that as the deceased himself was driving the auto and as the accident occurred only due to his own negligence, the third respondent was not liable to pay the compensation.

5.In the Tribunal, the claimant examined herself as PW1 and marked Ex.P1 to P6 in support of her case. The respondent examined one Loganathan as RW1, an Assistant attached to the Regional Transport Office, Kancheepuram and marked Ex.R1.

6.The Claims Tribunal on a assessment of the entire evidence on record awarded a sum of Rs.11,20,000/-, as compensation along with interest at the rate of 7.5%, with a direction to the third respondent to pay the entire award amount to the claimant and to recover the same from the respondent Nos.1 and 2. Aggrieved by the Judgment and Decree of the

Claims Tribunal, the Insurance Company has filed the appeal challenging the same on the ground of liability.

7.The learned counsel for the appellant/insurance company submitted that as the deceased's own negligence resulted in the accident, the appellant was not liable to compensate the claimants. The learned counsel further submitted that as the claim petition was filed under Section 166 of the Motor Vehicle Act the claimant was bound to prove negligence.

8.The learned counsel for the claimants on the other hand submitted that the Tribunal rightly held that the claimants were entitled to compensation and in order to secure the interest of the appellant ordered to pay and recover. The learned counsel therefore submitted that there was no infirmity in the Judgment and Decree of the Tribunal.

9.I have heard both the learned counsel and have perused the materials placed on record.

10.In the claim petition, the claimant has admitted that the accident occurred only due to the negligence of the driver of the Auto-rickshaw, who was none other than the deceased himself. It is to be noted that the petition is filed under Section 166 of the Motor Vehicles Act, and therefore, the claimant can succeed only on proof of negligence. The liability under the M.V.Act is based on the law of torts. It is therefore incumbent on the claimant to prove negligence, before the owner or the insured are made liable to pay the compensation. If the actionable negligence is found against the deceased, the claimant cannot be compensated under the M.V.Act. The finding of the Tribunal on the issue of negligence is that, the accident occurred solely due to rash and negligent driving of the Auto-rickshaw by the deceased. In the light of the finding of the Tribunal, that the deceased was himself a tortfeasor, the claim petition should have been dismissed.

11.The Tribunal inspite of its finding on negligence held that, as there was valid subsisting policy covering the offending vehicle, the claimant was entitled to compensation. The Tribunal further on its finding that the deceased, driver of the Auto-rickshaw did not have valid license, held that the third respondent/Insurance company was liable to pay the compensation in the first instance and thereafter recover the same from the owners of the vehicle.

12.In my view, the finding of the Tribunal is totally misconceived. The Tribunal having found that the deceased Auto-rickshaw driver himself was the tortfeasor, ought to have rejected the claim petition at the threshold, as the claim petition is one filed under Section 166 of the Motor Vehicles Act.

13.The learned counsel for the claimants then submitted that the compensation could be paid under Workmen's Compensation Act. The said plea is without any basis because, it is seen from the policy marked as Ex.P.4 that it is only an act policy and no additional premium was paid covering liability to paid employees and driver of the insurer. Therefore, in my view, as no additional premium was paid covering the driver, the plea of the respondent counsel cannot be accepted.

14.In the light of the said discussions, the Judgment and Decree of the claims Tribunal is set aside and appeal is allowed.

15.It is submitted by the learned counsel appearing for the appellant/insurance company that 50% of the award amount has already been deposited in pursuance to the interim order of this Court, as the appeal is allowed, the appellant/Insurance Company is permitted to withdraw the amount deposited. There shall be no order as to costs. Consequently, the connected miscellaneous petition is closed.

20.03.2023

Index : yes/no
Internet : yes/no
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To

1.The Motor Accident Claims Tribunal,
(District Judge, District Court-II,
Kanchipuram)

2.The Divisional Manager,

New India Assurance Co. Ltd.,
Motor Third Party Claim Office,
No.1, Officer Line,
C.S.I. Building,
IInd Floor, Vellore.

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

N.MALA, J.

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