BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 18.07.2023

Pronounced on : 18.08.2023

CORAM:

THE HON'BLE MR.JUSTICE **K.MURALI SHANKAR**

C.M.A.(MD)No.6 of 2020

The Divisional Manager,
New India Assurance Private Limited,
Divisional Office,
No.85 B, Market Road,
Thanjavur City,
Thanjavur District. ... Appellant/
2nd Respondent

Vs.

1. Dharanya
2. Minor Yogeshwaran
(Minor 2nd respondent is represented by his mother and natural guardian, the 1st respondent Dharanya)
3. Rani
4. Suresh ... Respondents 1to4/
Petitioners
5. Somasundaram ... 5th Respondent/
1st Respondent

Prayer : This Civil Miscellaneous Appeal filed under Section 173 of the Motor Vehicles Act, to set aside the judgment and decree in M.C.O.P.No. 934 of 2017 dated 18.07.2019 on the file of the Motor Accidents Claims Tribunal, Special District Court, Thanjavur and allow the appeal with costs.

For Appellant : Mr.J.S.Murali

For R1 to R4 : Mr.G.Karnan

For R5 : No appearance

JUDGMENT

The Civil Miscellaneous Appeal is directed against the award passed in M.C.O.P.No.934 of 2017 dated 18.07.2019 on the file of the Motor Accident Claims Tribunal/Special District Court, Thanjavur.

2. The appellant/insurer, who was made liable to pay compensation of Rs.17,51,686/- (Rupees Seventeen Lakhs Fifty One Thousand Six Hundred and Eighty Six only) being the 50% of the award amount with interest at 7.5% per annum to the respondents 1 to 4/claimants for the death of one Thavamani, who died in an accident occurred on 09.04.2017, challenged the liability mulcted on it.

3. Admittedly, the first respondent/first claimant is the wife, the second respondent/second claimant is the son, the third respondent/third claimant is the mother and the fourth respondent/fourth claimant is the brother of the deceased Thavamani.

4. The case of the respondents 1 to 4/claimants is that on 09.04.2017 at about 09.00 p.m., the deceased Thavamani was proceeding in a car bearing Registration No.TN-51-H-3000 towards Thiruthuraipoondi and at the place near Matangkad petrol bunk, one auto suddenly crossed the road from petrol bunk and the deceased Thavamani/driver, in order to avert the accident, had applied brake to stop the car, but the vehicle losing control had dashed against palm tree situated on the side of the road and as a result of which, the deceased Thavamani had sustained serious injuries and that he was immediately taken to Government Hospital, Nagapattinam, but he succumbed to the injuries on the way to hospital.

5. It is the further case of the respondents 1 to 4/claimants that the deceased Thavamani was working as a permanent driver to the vehicle under the control of Nagapattinam District Backward Classes and Minorities Welfare Department, Tamilnadu Government and was getting monthly salary of Rs.26,019/- (Rupees Twenty Six Thousand and Nineteen only).

6. The defence of the appellant/insurer is that the accident was occurred only due to the careless and negligence of the deceased

Thavamani and on that basis, a complaint was registered against him and as such, the claim petition itself is not maintainable.

7. During enquiry, the respondents 1 to 4/claimants have examined the first respondent/first claimant Dharanya as P.W.1 and two other witnesses Thiru.Gurumoorthy and Thiru.Saravanan as P.W.2 and P.W.3 respectively and exhibited 16 documents as Ex.P.1 to Ex.P.16 and two witness documents through P.W.3 as Ex.X.1 and Ex.X.2. The fifth respondent/first respondent had remained exparte. The appellant/insurer has examined its official Thiru.Santhosh as R.W.1 and exhibited 2 documents as Ex.R.1 and Ex.R.2.

8. The learned trial Judge, upon considering the evidence both oral and documentary and on hearing the arguments of both the sides, has passed the impugned order dated 18.07.2019 holding that the deceased Thavamani and the auto driver are jointly responsible for the accident and directed the appellant/insurer to pay 50% of the compensation amount i.e., Rs.17,51,686/- (Rupees Seventeen Lakhs Fifty One Thousand Six Hundred and Eighty Six only) with interest and costs. Aggrieved by the impugned award, the insurer has preferred the present appeal.

9. The points that arises for determination are :

1) *Whether the Tribunal erred in mulcting 50% of the liability on the appellant/insurer despite showing that the deceased Thavamani is the tortfeasor and as such, the claim petition itself is not maintainable?*
2) *Whether the impugned award dated 18.07.2019 is liable to be interfered with?*

10. It is not in dispute that the car bearing Registration No.TN-51-H-3000, involved in the accident, was owned by the fifth respondent/first respondent and that the owner's brothers Jeyaraman and Ramakrishnan, Ramakrishnan's wife Amutha and brother's son Dwarakai Krishnan were travelling in the said car and that the same was driven by the deceased Thavamani, none other than the friend of the said Jeyaraman.

11. Admittedly, the said Jeyaraman, who travelled in the said car, has lodged the complaint and only on that basis, FIR came to be registered in Crime No.131 of 2017 dated 10.04.2017 and in the complaint, it has been stated that since they had missed the train at Nagapattinam, they have proceeded to board a bus at Thiruthuraipoondi and while the vehicle was

proceeding in Velankanni ECR road and at the place near Matangkad petrol bunk, one auto had suddenly come out of the petrol bunk and that the deceased Thavamani, who was driving the car at great speed, in order to give way to the auto, had suddenly applied brake and as a result of which, the car losing control had toppled and dashed against the palm tree.

12. It is pertinent to note that the complainant in the FIR has specifically stated that his friend Thavamani was driving the vehicle with great speed at the time of accident. In the claim petition, it has been specifically stated that the deceased Thavamani, in order to avoid dashing against the auto, had applied brake negligently and as a result of which, the car dashed against the palm tree. Considering the above, it is clear that the respondents 1 to 4/claimants have also taken a stand that the deceased Thavamani had driven the car negligently at the relevant point of time.

13. The respondents 1 to 4/claimants, in order to prove the mode of accident, has examined P.W.2 alleged to be the occurrence witness. As rightly observed by the Tribunal, P.W.2 has not stated anything as to how and for what purpose, he was there at 09.00 p.m. near the petrol bunk.

Moreover, in the FIR, it has been stated that the auto has suddenly crossed the road. The Tribunal, considering the evidence available on record, has specifically observed that the accident was occurred only due to the rash and negligent driving of the deceased Thavamani, but subsequently, has given a finding that both the deceased Thavamani and the auto driver are responsible for the accident.

14. In FIR or in the claim petition, the respondents 1 to 4/claimants have not furnished any particulars about the auto and they have not even chosen to examine any one of the car passengers to prove the mode of accident. Except the FIR and the post mortem certificate, the respondents 1 to 4/claimants have not chosen to produce the rough sketch, motor vehicle inspection report and the final report, if any filed by the jurisdictional police.

15. It is pertinent to note that since the car passengers have already missed their train, the deceased Thavamani had taken them in the said car so as to enable them to board a bus at Thiruthuraipoondi.

16. Considering the above, this Court has no hesitation to hold that the accident was occurred only due to the rash and negligent driving of the deceased Thavamani. The Tribunal, after giving a finding that the deceased Thavamani alone was at fault, subsequently without assigning any reason has also mulcted responsibility on the auto driver and as such, the same is not proper.

17. At this juncture, it is necessary to refer the judgment of the Hon'ble Supreme Court in ***Ningamma and another Vs. United India Insurance Co. Ltd.*** reported in ***2009 (13) SCC 710,***

> *"13. In the light of the aforesaid submissions, the question that falls for our consideration is whether the legal representatives of a person, who was driving a motor vehicle, after borrowing it from the real owner meets with an accident without involving any other vehicle, would be entitled to compensation under Section 163-A of MVA or under any other provision(s) of law and also whether the insurer who issued the insurance policy would be bound to indemnify the deceased or his legal representative?.....*
>
> ....

18. In the case of ***Oriental Insurance Company Ltd Vs. Rajni Devi and others*** *reported in* ***(2008) 5 SCC 736,*** *wherein one of us, namely, Hon'ble Justice S.B. Sinha is a party, it has been categorically held that in a case where third party is involved, the liability of the insurance company would be unlimited. It was also held in the said decision that where, however, compensation is claimed for the death of the owner or another passenger of the vehicle, the contract of insurance being governed by the contract qua contract, the claim of the claimant against the insurance company would depend upon the terms thereof. It was held in the said decision that Section 163-A of the MVA cannot be said to have any application in respect of an accident wherein the owner of the motor vehicle himself is involved. The decision further held that the question is no longer res integra. The liability under section 163-A of the MVA is on the owner of the vehicle. So a person cannot be both, a claimant as also a recipient, with respect to claim. Therefore, the heirs of the deceased could not have maintained a claim in terms of Section 163-A of the MVA. In our considered opinion, the ratio of the aforesaid decision is clearly applicable to the facts of the present case. In the present case, the deceased was not the owner of the motorbike in question. He borrowed the said motorbike from its real* *owner. The deceased cannot be held to be employee of the owner of the motorbike although he was authorised to drive the said vehicle by its owner, and therefore, he would step into the shoes of the owner of the motorbike."*

18. As already pointed out, the car owner's brother had engaged his friend Thavamani to drive the car for taking their family members to Thiruthuraipoondi. As rightly contended by the learned counsel appearing for the appellant/insurer, it can be easily inferred that the deceased Thavamani stepped into the shoes of the actual owner of the vehicle i.e., fifth respondent/first respondent. As already pointed out, the deceased Thavamani is the tortfeasor. Applying the legal dictum above mentioned, this Court has no hesitation to hold that the claim petition filed under Section 166 of the Motor Vehicles Act or even if it is filed under Section 163A of the Motor Vehicles Act is not legally maintainable.

19. No doubt, as per the dictum of the Hon'ble Supreme Court in ***Ramkhiladi and another Vs. United India Insurance Company and another*** reported in ***(2020) 2 SCC 550,*** in case of personal accident, as per

the contract of insurance, the owner-cum-driver is entitled to the amount stipulated and that the deceased, who would be in the shoes of the owner of the vehicle, shall be entitled to the amount, as per the terms of contract of insurance. In the case on hand, Ex.P.3 is a package policy, but admittedly, no premium was paid for personal accident coverage for owner-cum-driver. Since there was no personal accident coverage in Ex.P.3 policy, the respondents 1 to 4/claimants are not entitled to get any amount even under the contract of insurance. But the Tribunal, without considering the above aspects in proper perspective, has granted compensation. Hence, this Court has no hesitation to hold that the impugned award, which is legally unsustainable, is liable to be set aside. Considering the other facts and circumstances of the case, this Court further decides that the parties are to be directed to bear their own costs and the above points are answered accordingly.

20. In the result, this Civil Miscellaneous Appeal is allowed and the impugned award dated 18.07.2019 passed in M.C.O.P.No.934 of 2017 on the file of the Motor Accident Claims Tribunal/Special District Court, Thanjavur, is set aside and the claim petition stands dismissed. The

appellant/insurer is permitted to withdraw the amount, if any deposited. The parties are directed to bear their own costs.

18.08.2023

NCC : Yes/No
Index : Yes/No
Internet: Yes/No
csm

To:

1. The Motor Accident Claims Tribunal/Special District Court,
   Thanjavur.

2. The Record Keeper,
   Vernacular Section,
   Madurai Bench of Madras High Court,
   Madurai.

K.MURALI SHANKAR,J.

csm

Pre-Delivery Order made in
C.M.A.(MD)No.6 of 2020

Dated : 18.08.2023