

Reserved on: 26.10.2016
Delivered on: 30 .11.2016

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 30.11.2016

CORAM

THE HONOURABLE MR. Justice M.DURAI SWAMY
AND

THE HONOURABLE MR. Justice R.SURESH KUMAR

C.M.A.Nos. 2457 of 2012 and 3140 of 2014 &
C.M.P.No.4653 of 2016 in C.M.A.No.2457 of 2012 and
M.P.No.1 of 2014 in C.M.A.No.3140 of 2014

C.M.A.No. 2457 of 2012

1. S.Manjula Devi

2. S.Sibi

... Appellants/Petitioners

vs.

1. Brijpal Singh

2. M/s.Prasad & Co. (Project work Ltd),
H.No. B1-25 B Sallipatti, Ammaianokanur,
Kodai Road, Nilakottai Taluk.

3. United India Insurance Company,
Rep. By its Manager Having Office at,
Door No.7, United India Towers,
Basheerbagh, Hyderabad.

4. IFFCO TOKIO Insurance Company,
Rep. By its Manager,
Having Office at Tulsi Chambers,
3rd Floor, 195, T.V.Swamy Road (W)
R.S.Puram, Coimbatore.

..Respondents/Respondents

C.M.A.No. 3140 of 2014

1. United India Insurance Company Ltd.,
Rep. By its Manager Having Office at,
Door No.7, United India Towers,
Basheerbagh, Hyderabad.

..Appellant/3rd Respondent

Vs.

1. S.Manjula Devi

2. Minor.S.Sibi

Minor rep. by his guardian Mother

Mother S. Manjula Devi. ..RR 1&2 Respondents/Petitioners

3. Brijpal Singh

4.M/s.Prasad & Co. (Project work Ltd),

rep. by Managing Director,

H.No. B1-25 B Sallipatti,

Ammaianokanur,

Kodai Road, Nilakottai Taluk.

rep. by Managing Director

5. IFFCO TOKIO General Insurance Company Ltd.,

Rep. By its Manager,

Having Office at Tulsi Chambers,

3rd Floor, 195, T.V.Swamy Road (W)

R.S.Puram, Coimbatore.

...3 to 5 Respondents/
Respondents 1,2 & 4

Civil Miscellaneous Appeals filed against the award and decree dated 20.3.2012 made in M.C.O.P.No.138 of 2010 on the file of the Principal District Judge, Erode.

For Appellants in C.M.A.No.2457/2012 : Mr.V.Ragavachari for
Mr.V.Kadirvelu

For R1 in C.M.A.No. 2457 of 2012 : not ready in notice

For R2 in C.M.A.No. 2457 of 2012 : No appearance

For R3 in C.M.A.No. 2457 of 2012 : Mr.S.Arun Kumar

For R4 in C.M.A.No. 2457 of 2012 : Mr. N.Vijayaraghavan

For Appellants in C.M.A.No. 3140 of 2014 : Mr.S.Arun Kumar

For R1 & R2 in C.M.A.No. 3140 of 2014 : V.Kadirvelu

For R3 & R4 in C.M.A.No. 3140 of 2014 : Not ready in notice

R5 in C.M.A.No. 3140 of 2014 : No appearance

COMMON JUDGMENT

R.SURESH KUMAR.J.,

As against the award passed by the Motor Accidents Claims Tribunal/ Principal District Judge, Erode in M.C.O.P.No.138 of 2010 dated 20.3.2012, the claimants have come out with an appeal in C.M.A.No. 2457 of 2012 for enhancement of compensation.

2. As against the same award, the United India Insurance Company Limited/ third respondent before the Tribunal (hereinafter referred to as "Insurance Company") has come out with the appeal in C.M.A.No.3140 of 2014, challenging the liability fixed on the driver of the lorry alone, which was insured with the Insurance Company.

3. The first claimant is the wife of the deceased. The second claimant is the minor son of the deceased. Though the fourth respondent before the Tribunal was impleaded as a party being the insurer of the car driven by the deceased, according to the claimants, the fourth respondent was impleaded only as a formal party for proper adjudication of the issue. The claimants filed the said M.C.O.P.No.138 of 2010 before the Tribunal seeking for a compensation of Rs. 1 crore.

4. The facts leading to the filing of the claim petition is as follows:-

On 07.10.2009, at about 9 pm, the fateful accident had taken place on Madurai-Dindugal National Highway opposite to Sri Karthik Timbers, near Thomayapuram, Dindugal. According to the claimants, a tanker lorry bearing registration No.TN.57-S-0603 was parked and it was watering the plants planted on the road divider line without parking lights or reflectors. During that time, the deceased one Senthil Kumar was driving his car bearing registration No. TN.33.AK.5200 from Madurai to Erode. The deceased was proceeding from South to North in the said National Highway. According to the claimants, there was a curve in the road and also the road was in complete darkness, therefore, on the sudden appearance of the stationed lorry, the deceased hit his car on the rear side of the lorry, in the result, he sustained head injury and died on the spot. The said accident had occurred only due to the negligent act on the part of the lorry driver, who was the first respondent before the Tribunal. At the time of the accident, the deceased was 48 years and was doing a good business in granite in the name and style of "Sibi granite" and was earning about Rs. 1 lakh per month and he was an income tax assessee and also, he was cultivating the lands of one Krishnaswamy on lease basis. Since the accident took place only because of the negligence on the part of the first respondent, who was the driver of the vehicle, the second respondent, who is the owner of the lorry and the third respondent/Insurance Company, being the insurer of the lorry, are jointly and severally liable to pay the compensation claimed by the claimants.

5. The said claim petition was opposed by the third respondent/insurance company. The Insurance Company denied the averment that on 07.10.2009, at about 9 pm, the first respondent/driver of the lorry parked the vehicle at Madurai-

Dindigul National Highway near Thomayapuram and watering the plants on the road divider line without switching on the parking lights or reflectors and therefore, because of the same, the deceased, who drove the car No. TN 33 AK 5200, from Madurai to Erode, from South to North, hit the rear side of the lorry and resultantly, the accident took place. The further case of the Insurance Company before the Tribunal was that the first respondent/driver was driving the lorry slowly on the road with all lights switched on and watering the plants. Only at that time, the deceased drove the car in a rash and negligent manner and dashed against the rear portion of the lorry which alone caused the accident. Therefore, the deceased was only responsible for the accident. According to the third respondent, the age, avocation and income of the deceased as claimed by the claimants are not correct and the claims made under various heads by way of compensation are excessive.

6. The fourth respondent filed a counter before the Tribunal stating that even according to the petitioners/claimants, the accident occurred due to the rash and negligent driving of the first respondent driver alone. The police also registered a case only against the first respondent. Therefore, respondents 1 to 3 alone were liable to pay the compensation and the fourth respondent is only a mis-joinder of party in the petition. Moreover, the claimants did not even inform about the accident to the fourth respondent. According to the 4th respondent, the claim was excessive. Therefore, the said claim petition had to be dismissed.

7. Before the Tribunal, on the side of the claimants, 5 witnesses were examined and 53 documents, Exs.P-1 to P-53 were marked and on the side of the respondents, R.W.1 was examined and Ex.R-1 was marked.

8. The Tribunal, after taking into consideration the oral and documentary evidences let in by the parties, came to the conclusion that the first respondent-driver of the lorry was solely responsible for the accident and therefore, the respondents 1 to 3 are liable to pay the compensation of a sum of Rs. 34,07,144/-

9. With regard to the quantum to be fixed for compensation, the income tax assessment returns of the deceased for the years 2007-08 to 2010-11 were also considered by the Tribunal and the Tribunal has taken Ex.P.21-the income tax return for the year 2010-11 as the basis to fix the income of the deceased. Accordingly, the Tribunal fixed the total income of the deceased

per annum as per Ex.P.21 as Rs. 4,19,643/- and after deducting 1/3rd for his personal expenses, the annual income of the deceased was arrived at Rs.2,79,762/-[i.e. Rs. 4,19,643/-(-) Rs.1,39,881/-].

10. The age of the deceased was fixed as 48. The Tribunal had also given a finding that for the age of 48, the corresponding multiplier is 13, according to the second schedule of amended Motor Vehicles Act. But, in the instant case, the first claimant is a adult member, therefore, the Tribunal applied only the multiplier 12 as a just and reasonable one. By applying multiplier 12, the loss of earning was fixed at Rs.33,57,144/-. The Tribunal has awarded Rs.25,000/- under the loss of consortium and Rs.15,000/- towards loss of love and affection to the second claimant, Rs.5000/- for transport charges and another Rs.5000/- for funeral expenses. Therefore, the Tribunal altogether, awarded a total compensation of Rs. 34,07,144/- to the claimants with 7.5% interest per annum from the date of petition till the date of realization with proportionate cost. The Tribunal dismissed the petition as against the fourth respondent, who is the insurer of the vehicle of the deceased.

11.1 According to the claimants, in C.M.A.No.2457 of 2012, the Tribunal should have considered the increase in the volume of business and consequent increase in the income of the deceased. They further urged that since the deceased was only 48 years of age at the time of accident, the future prospects in the business of the deceased was not taken into account by the Tribunal.

11.2 It is also urged on behalf of the claimants/appellants that in view of the settled principles as laid down by the Hon'ble Supreme Court, if the deceased is more than 40 years, 30% of the yearly income have to be added towards future prospects. while computing loss of income.

11.3 It is also urged by the claimants/appellants that the Tribunal was in error in applying multiplier 12 instead of taking into account of the age of the deceased. According to the claimants, 13 multiplier ought to have been adopted.

11.4 It was also urged on behalf of the claimants that the award given by the Tribunal towards loss of consortium and love and affection were very low. Further, the interest awarded at the rate of 7.5% is very less and it should have been 12%.

11.5 The further ground raised by the claimants/appellants is that the agricultural income of the deceased had not been taken into account and income from other sources earned by

the deceased by extending service to various business people also had not been taken into account in spite of the evidences of P.Ws. 4 and 5.

12.1 On the other hand, the respondents/Insurance Company submitted that the Tribunal was in error in holding that the driver of the tanker lorry alone was responsible for the accident in spite of the fact that the deceased drove the car in a rash and negligent manner and hit behind the parked lorry. It was also urged by the Insurance Company that the Tribunal erred in relying on the evidence of P.W.3, that his presence at the accident spot was not substantiated through acceptable evidence. It was also urged that the Tribunal also failed to note that R.W.1 has closed the criminal case, as the negligence was totally on the part of the deceased. The learned counsel for the Insurance Company contended that when P.W.3 was able to see the Tanker lorry about 40 feet away, the deceased could have also noticed the stationary lorry and could have avoided dashing against the said lorry.

12.2 It was also urged by the Insurance Company that the fixing of Rs.4,19,643/- as annual income of the deceased relying on Ex.P.21 is an error as the said income tax return was filed well after the demise of the deceased. It was also urged by the Insurance Company that the Tribunal failed to note that the business income is always subject to variation and the last income tax return could not have been taken as a source of income for computation of compensation. By raising these grounds, the Insurance Company also has come out with this appeal.

13. Since, these two appeals are arising out of the same award passed by the Tribunal, they are taken up together and decided by this Common Judgment.

14.1 The learned counsel appearing for the claimants has raised an issue that the deceased was doing a granite business and out of his business, he was earning at least, a lakh of rupees per month, therefore, he was able to run a decent life in the society. The deceased was an income tax assessee and he had purchased number of properties, for which, documents were filed before the Tribunal.

14.2. According to the learned counsel for the claimants Exs.P.18 to 21 are the income tax returns from the year 2007-08 to 2010-11. If we look into the said Ex.P.18 to P.21, the annual income, as audited by the Income Tax Department and accepted by them, has steadily increased from year to year. When the income of the deceased for the year 2007-08 was

Rs.1,91,301/- as per Ex.P 21, it had been increased more than 100% in the year 2010-11. If this aspect is taken into consideration and the deceased had lived a normal life period, he would have earned much more than what was earned by him in the year 2010-2011.

14.3 Further, the learned counsel for the claimants submitted that the Tribunal, totally on an erroneous consideration, had taken up Ex.P.21, the income tax return and also the annual income of Rs.4,19,643/- and based on which, future loss of income was calculated. The learned counsel would further contend that the agricultural income fetched by the deceased out of the lands he cultivated through lease for which documents were produced before the Tribunal had been wrongly rejected by the Tribunal. Like that, the categorical evidences of P.Ws.4 and 5, who had directly deposed before the Tribunal and who are the business people on the same line of granite business for whom the deceased had rendered service as an expert in the field and fetched a sum of Rs.2 lakhs and 5 lakhs from them every year, were also rejected by the Tribunal, erroneously. If these evidences had been taken into account, certainly, total loss of income in the future of the deceased could have been very much on the higher side and ultimately, the compensation as claimed by the claimants could have been very well granted. Further, the learned counsel submitted that the Tribunal has failed to take into account all these income aspects of the deceased. Therefore, he urged that the award, which is under challenge in the appeal, is certainly, liable to be interfered with by this Court and it has to be enhanced to a greater extent and the actual claim made by the claimants before the Tribunal may be allowed.

15. On the other hand, the learned counsel appearing for the Insurance Company, has mainly urged the point that the very finding of the Tribunal that the accident had taken place only due to the negligence of the lorry driver, is completely erroneous. The learned counsel further submitted that it is the usual practice in the National Highway that for watering the plants, the lorries loaded with water either being parked or moved slowly in the National Highway and therefore, the deceased should have anticipated the same and averted the accident. Further, the learned counsel submitted that the National Highway consists of four lane i.e., two lane meant for ongoing vehicle and two lane meant for upcoming vehicle and when the road was very broad, the deceased could have averted the accident by moving away from the lane in which the lorry was parked or moving slowly. Therefore, according to the learned counsel, the driver of the lorry alone could not be found fault with for the accident and the deceased had also contributed

negligence for the accident by driving the car in a rash and negligent manner.

16. The learned counsel appearing for the Insurance Company would further submit that according to the sketch of the accident place, as submitted by R.W.1, it is a straight road of four lane National Highway. There is no curve or bend shown in the sketch. While so, if a car comes from South to North direction, assuming that the lorry was either stationed or moving slowly for watering purpose of the plants in the divider on the right end of the first lane, as per the witnesses, who deposed before the Tribunal, and also in the common knowledge that atleast two more vehicles, apart from the parked lorry or slowly moving lorry can ply on the road at the side and therefore, there is absolutely, no reason to conclude that only because of the stationed or slow moving lorry, the deceased car hit the lorry and ultimately, the accident had occurred. If a person drives vehicle, that too, a high speed vehicle like a car in a National Highway, it is for the driver of the car to take all cautious and vigilant decision and if the driver had taken precaution and had been vigilant certainly, he would have overtaken the lorry and could have avoided the lorry by simple negotiation which the deceased had completely failed. Only with the result of that negligent manner, by way of rash driving of the deceased, the accident had taken place and if at all the Tribunal wants to fix the responsibility, atleast the responsibility of contributory negligence should have been fixed. Failure to fix such contributory negligence on the part of the driver of the lorry as well as the driver of the car i.e., the deceased, is totally unjustifiable and it goes against the settled principles of law as enunciated in a number of well considered decisions of the Hon'ble Apex Court.

17. The learned counsel appearing for the Insurance Company by heavily relying on the Judgment in Raj Rani and Others Vs. Oriental Insurance Company Limited and Others reported in 2009 (1) TN MAC 638(SC) contended that the facts in the said case before the Hon'ble Apex Court is exactly similar to that of the present case and therefore, the ratio decidendi in the said case on the issue of contributory negligence is squarely applicable to the present case also and if the said principle is applied in the present case, certainly, it can be easily found that the findings rendered by the Tribunal fixing the responsibility only on the lorry is totally erroneous. In this regard, the learned counsel relied on paragraph 16 and 17 of the said Judgment in Raj Rani's case, which are usefully referred here under:

16. So far as the issue of "contributory negligence" is concerned, we may notice that the Tribunal has deducted 1/3rd from the total compensation on the ground that

deceased had contributed to the accident. The same, we find, has been upheld by the High Court. This Court in *Usha Rajkhowa v. Paramount Industries* [(2009) 14 SCC 71] discussed the issue of contributory negligence noticing, inter alia, earlier decisions on the same topic. It was held that: (SCC p. 75, para 20)

"10. The question of contributory negligence on the part of the driver in case of collision was considered by this Court in *Pramodkumar Rasikbhai Jhaveri v. Karmasey Kunvargi Tak* [(2002) 6 SCC 455 : 2002 SCC (Cri) 1355]. That was also a case of collision between a car and a truck. It was observed in SCC p. 458, para 8:

"The question of contributory negligence arises when there has been some act or omission on the claimant's part, which has materially contributed to the damage caused, and is of such a nature that it may properly be described as "negligence". Negligence ordinarily means breach of a legal duty to care, but when used in the expression "contributory negligence" it does not mean breach of any duty. It only means the failure by a person to use reasonable care for the safety of either himself or his property, so that he becomes blameworthy in part as an "author of his own wrong".

17. The principle of 50:50 in cases of contributory negligence has been discussed and applied in many cases before this Court. In *Krishna Vishweshwar Hede v. Karnataka SRTC* [(2008) 15 SCC 771 : 2008 ACJ 1617] this Court upheld the judgment of the Tribunal assessing the ratio of liability at 50:50 in view of the fact that there was contributory negligence on the part of the appellant and fixed the responsibility for the accident in the ratio of 50:50 on the driver of the bus and the appellant. In this case, the truck was stationary. Some amount of negligence on the part of the deceased cannot be ruled out.

18. Hence in the instant case, we find that there was contributory negligence on the part of the deceased and accordingly the claimant was entitled to only 50% of the total amount of loss of dependency.

18. Countering the submissions made by the learned counsel appearing for the Insurance Company that the deceased had also contributed negligence for the accident, Mr.V.Ragavachari, the learned counsel appearing for the claimants submitted that since the vehicle was parked on the main road, i.e., on the National Highway, the deceased cannot be expected to anticipate that on the National Highway a lorry has been parked on the middle of the road for watering the plants. Therefore, the learned counsel submitted that the Tribunal had rightly found that the driver of the lorry was negligent and fastened the liability on the respondents. In support of his contention, the learned counsel relied upon the following Judgments:-

(i) 2013 (4) TNMAC 44 SC [Jiju Kuruvila & others Vs. Kunjujamma Mohan & others]

17.The second question is relating to contributory negligence of the deceased. According to the claimants, accident occurred due to rash and negligent driving on the part of the bus driver, P.C. Kurian and there was no negligence on the part of the deceased, Joy Kuruvila. Per contra, according to the Insurance Company, the accident took place due to negligent driving on the part of the deceased, who was in the intoxicated condition. They relied on Ext.-A5, the post-mortem report.

...

22. Ext.-A1, FIR registered by Pampady Police against the bus driver, P.C. Kurian, under Sections 279, 337 and 304A IPC shows that the accident occurred due to rash and negligent driving on the part of the bus driver. After investigation, the police submitted a charge-sheet (Ext.-A4) against the bus driver under Section 279, 337 and 304A IPC with specific allegation that the bus driver caused the death of Joy Kuruvila due to rash and negligent driving of the bus on 16th April, 1990 at 4.50P.M. In view of the direct evidence, the Tribunal and the High Court held that the accident was occurred due to rash and negligent driving on the part of the bus driver.

23. There is no evidence on record to suggest any negligence on the part of the deceased. Ext.-B2, 'Scene Mahazar' also does not suggest any rash and negligent driving on the part of the deceased.

24. The mere position of the vehicles after accident, as shown in a Scene Mahazar, cannot give a substantial proof as to the rash and negligent driving on the part of one or the other. When two vehicles coming from opposite directions collide, the position of the vehicles and its direction etc. depends on number of factors like speed of vehicles, intensity of collision, reason for collision, place at which one vehicle hit the other, etc. From the scene of the accident, one may suggest or presume the manner in which the accident caused, but in absence of any direct or corroborative evidence, no conclusion can be drawn as to whether there was negligence on the part of the driver. In absence of such direct or corroborative evidence, the Court cannot give any specific finding about negligence on the part of any individual."

(ii) (2009) 13 Supreme Court Cases 498 [Rani Gupta and others Vs. United India Insurance Company Limited and others] wherein the Hon'ble Supreme Court held as follows:

"...

9. Determination of the amount of compensation arising out of loss of life of a person, who was the earning member of the family, would depend upon a large number of factors; one of them being the nature of job or business he was doing. For the said purpose, an average gross future monthly income must be arrived at by adding the actual gross income at the time of his death to the maximum which he might have got, had he not met a premature death.

...

11. [Ed.: Para 11 corrected vide Official Corrigendum No. F.3/Ed.B.J./54/2009 dated 22-5-2009.] This Court in Sarla Dixit v. Balwant Yadav [(1996) 3 SCC 179] took into consideration the future prospects of the deceased in great detail. It was held that the multiplier method involving the ascertainment of the loss of dependency should be applied in appropriate cases. It took into consideration the decisions of the English courts to opine that the said method is appropriate. It opined that only in rare cases, the said method should be departed from. As regards adoption of proper multiplier, it was held: (SCC p. 188, para 7)

"7. So far as the adoption of the proper multiplier is concerned, it was observed that the future prospects of advancement in life and career should also be sounded in terms of money to augment the multiplicand. While the chance of the multiplier is

determined by two factors, namely, the rate of interest appropriate to a stable economy and the age of the deceased or of the claimant whichever is higher, the ascertainment of the multiplicand is a more difficult exercise. Indeed, many factors have to be put into the scales to evaluate the contingencies of the future. All contingencies of the future need not necessarily be baneful."

(iii) 2013 (2) TN MAC 55 (SC) [Rajesh & others Vs. Rajbir Singh & others] wherein the Hon'ble Supreme Court held as follows:

" 11. Since, the Court in Santosh Devi Vs. National Insurance Company Limited and others, 2012 (2) TN MAC 1 (SC), actually intended to follow the principle in the case of salaried persons as laid in Sarla Verma and others Vs. Delhi Transport Corporation and another, 2009 (2) TN MAC 1 (SC) and to make it applicable also to the self-employed and persons on fixed wages, it is clarified that the increase in the case of those groups is not 30% always, it will also a reference to the age. In other words, in the case of self-employed or persons with fixed wages, in case, the deceased victim was below 40 years, there must be an addition of 50% to the actual income of the deceased while computing Future Prospects. Needless to say that the actual income should be income after paying the tax, if any. Addition should be 30% in case the deceased was in the age group of 40 to 50 years."

(iv) 2012 (3) CTC 513 [Poongavanam, 2.Tamilselvi, 3.Maheswari, 4.Porutselvan Vs. D.Johnson, 2.Regional Manager, The National Insurance Co. Ltd., No.19, Officers Line, Vellore Town, Taluk & District] wherein a Division Bench of this Court held as follows:

"...

14.A perusal of Ex.P-4-Salary Certificate relating to the deceased shows that as on 1.9.2006 the deceased was getting a salary of Rs. 21,987/- which includes the sum of Rs. 50/- paid towards the Medical Allowances. As rightly contended by the learned Counsel for the Insurer, the Medical Allowance is payable only to the deceased and is personal to him and therefore, the same should be deduced and all the other allowances should be taken into consideration while fixing the monthly income and if so, from the gross salary of Rs. 21,987/-, Rs. 50/- paid towards the Medical Allowance has to be deducted and if so deducted, the monthly salary comes to Rs. 21,937. Since the deceased was holding a permanent post as a

Junior Engineer with the Tamil Nadu Electricity Board and he was only 48 years of age at the time of death, as per the law laid down in the case of Sarla Verma v. DTC, 2009 (2) TN MAC 1 (SC) : 2009 (6) SCC 121 his future prospects of earning should be taken into consideration. Since he was 48 years of age, 30% of his last drawn salary should be added towards the future prospects and if so done, Rs. 6,581/- (30% of Rs. 21,937/-) has to be added with Rs. 21,937/- and if so added, the monthly income will come to Rs. 28,518/-. The annual income will come to Rs. 3,42,217/-. In 2006 the exemption allowed under the Income-tax Act from the annual income was Rs. 1,00,000/-. If Rs. 1 lakh is deducted, then the taxable income will be Rs. 2,42,217/-. The slab applicable will be 20% tax. If 20%, namely, Rs. 48,443/- is deducted from the annual income, the annual net income will be Rs. 2,93,774/-. Since there are admittedly four dependants, 1/4th namely Rs. 73,444/- is deducted, the annual pecuniary loss will come to Rs. 2,20,330/-. The proper multiplier applicable in this case is '13' and if the multiplier of '13' is applied, the total pecuniary loss comes to Rs. 28,64,290/-."

(v) (2015) 7 MLJ 805 [New India Assurance Company Limited, rep. By its Divisional Manager, Madurai V. U.Karmegam and others] wherein a Division Bench of this Court held as follows:

"3. According to the respondents 1 to 4, the deceased Santhanakumar was driving his motorcycle on 28.03.2013 at 8.15 pm. At that time, Mini Lorry ? Tata 407 - bearing Registration No.TN 63 B 4125 belonging to the fifth respondent was parked in the right side without any parking light or indicator. The deceased dashed behind the backside of Mini Lorry and died due to the injuries sustained by him in the said accident. According to the respondents 1 to 4, accident took place only due to negligence on the part of the driver of Mini Lorry. The deceased was working as Teacher in Panchayat Union Elementary School and was earning a sum of Rs.7,031/-. Therefore, they claimed a sum of Rs.12,00,000/- as compensation.

19. We have considered the rival submissions made by the respective learned counsel appearing for the parties as well as the materials placed before this Court.

20.1 The Main issue that arise for consideration in these appeals is with regard to negligence aspect i.e., whether the driver of the lorry alone was responsible for the accident or

the driver of the car viz., the deceased also contributed to the cause of the accident and in that case whether the contributory negligence can be fixed on the parties.

20.2 The First Information Report was marked as Ex.P1. On a perusal of the same, it could be seen that one K.P.Marasamy has given a complaint to the police with regard to the accident that had occurred on 07.10.2009 at 9.00 p.m. The said K.P.Marasamy gave the complaint to the police only on 8.10.2009 at 5.00 a.m. In the First Information Report, it has been stated that the deceased was driving the car bearing Regn. No. TN-33-AK-5200 in Madurai - Dindigul Road near Thomayapuram, from south to north. Further, he has stated that on the same direction, a tanker lorry bearing Regn. No.TN.57-S-0603 was parked for watering the plants in the road median without switching on the parking lights. Further, the complainant has stated that the car driven by the deceased dashed against the lorry and out of the said accident, the driver of the car viz., Senthil Kumar had died on the spot. P.W.1 is the wife of the deceased. In her evidence, she has stated that the complainant K.P.Marasamy is the nephew of the deceased.

20.3 On the side of the claimants, P.W.3, who is said to be the eye-witness, was examined to prove the factum of the accident. In his evidence, P.W.3 has stated that on 07.10.2009 at about 9.00 p.m, he was travelling in his car bearing Regn. No. TN-59-AA-4084 in Madurai-Dindigul National Highway near Thomayapuram and that he stopped the car near "Sri Karthik Timbers" to answer the nature's call and when he was about to proceed in the car, he saw the car driven by the deceased Senthil Kumar coming from south to north. Further, he has stated that the driver of the tanker lorry was watering the plants in the road median without any signal and at that time, the vehicle driven by the deceased Senthil Kumar dashed against the lorry and he died on the spot. Further, P.W.3, has stated that the accident had taken place only because of the negligence on the part of the driver of the lorry. Further, P.W.3 has stated that in the road, where the accident took place, there is a curve and the road was completely dark.

20.4 On the side of the respondents, the Investigating Officer was examined as R.W.1 and in his evidence, he has stated that the driver of the car alone was responsible for the accident, since he dashed his car on the rear side of the parked lorry. Further, R.W.1 has stated that there is no curve in the road and it is a straight road proceeding from south to north.

He denied the suggestion that the road was very narrow and he also denied the suggestion that there is no parking light on the rear side of the lorry.

20.5 The rough sketch of the place of the accident has been marked as Ex.P2 and the observation mahazar was marked as Ex.P3. From the oral evidence of R.W.1 and a perusal of Ex.P2 it is clear that there is no curve found in the road, where the accident had taken place and it is a straight road proceeding from south to north. When the documentary evidences show that there is no curve, the evidence of P.W.3 alone cannot be accepted for coming to the conclusion that there is a bend or curve in the road.

20.6 Mr.S.Arun Kumar, learned counsel appearing for the Insurance Company, in support of his contentions relied upon a judgment reported in 2009 (1) TN MAC 638 (SC) [Raj Rani & Ors. Vs. Oriental Insurance Co. Ltd. & Ors.] the relevant portion of the Judgement, we have already extracted.

20.7 The ratio laid down by the Apex court in the said judgment squarely applies to the facts and circumstances of the present case. If the said principle is applied to the present case, the negligence can not only be fixed on the driver of the lorry, who either parked the lorry or was slowly moving the lorry for watering the plants in the road median on the right side of the road, but also on the driver of the car, viz., the deceased, who must have also taken caution as he was driving the car in a National Highway. The deceased could have negotiated the lorry and could have controlled the car by applying brakes, had he driven the car cautiously.

20.8 On a perusal of the available evidence, it is clear that the National Highway is a four lane track consisting of two lane for ongoing and two lanes for upcoming vehicles. From the available evidence, it is clear that atleast 3 vehicles can ply at a time parallelly in the road. That being the case, the driver of the car could have easily negotiated the tanker lorry, which was stationed near the road median. When P.W.3, the alleged eye-witness, has stated that he spotted the stationed lorry at a distance of 40 feet, how the deceased failed to spot the lorry was not explained by the witnesses.

20.9 It is also pertinent to note that though P.W.3 is alleged to have seen the accident, he has not lodged any compliant with the police. However, P.W.3 took the pain of coming to the court and let in oral evidence in support of the claimants. When P.W.3 has taken the trouble of coming to the court and let in evidence before the Principal District Court, Erode, he could have given a complaint immediately on seeing the

accident. However, for the best reasons known to him, he has not done so. From the evidence, it is clear that the deceased had failed to take reasonable care and safety while driving the car.

20.10 The question of contributory negligence arises when there has been some act or omission on the claimant's part, which has materially contributed to the damage caused, and is of such a nature that it may properly be described as 'negligence'. Negligence ordinarily means breach of a legal duty to care, but when used in the expression "contributory negligence", it does not mean breach of any duty. It only means the failure by a person to use reasonable care for the safety of either himself or his property, so that he becomes blameworthy in part as an author of his own wrong. In the case of contributory negligence, the principle of 50:50 in cases of contributory negligence has been discussed and applied in many cases. In view of the fact that there was contributory negligence on the part of the deceased, it would be proper to fix the responsibility for the accident in the ratio of 50:50 on the driver of the lorry and the deceased. In this case, the lorry was stationary and some amount of negligence on the part of the deceased cannot be ruled out. Hence, we find that there was contributory negligence on the part of the deceased and accordingly, the claimants are entitled to only 50% of the total amount of loss of dependency.

21.1 The next issue that arises for consideration is regarding quantum of compensation.

21.2 In order to prove the income of the deceased, the claimants marked Ex.P21, income tax return for the year 2010-2011. Even though the accident had taken place on 07.10.2009, the income of the deceased for the assesment year 2010-11, which was marked as Ex.P1, was taken into account by the Tribunal. In this regard, the principle laid down by the Hon'ble Apex Court in Rajesh & Others Vs. Rajbir Singh & Others reported in 2013 (2) TN MAC 55 (SC) in our considered view, can be taken as a basis. In the said case, the earlier judgment of the Hon'ble Apex Court Santosh Devi v. National Insurance Co. Ltd., and others, 2012 (2) TN MAC 1 (SC) was considered wherein para 14 of the said judgment was extracted which can usefully be referred here under:

"14. We find it extremely difficult to fathom any rationale for the observation made in Paragraph 24 of the judgment in Sarla Verma's case that where the deceased was self-employed or was on a fixed salary without provision for annual increment, etc., the Courts will usually take only the actual income at the time of death and a departure from this rule should be made only in rare and exceptional case involving special circumstances. In our view, it will be nave to say that the wages or total

emoluments/ income of a person who is self-employed or who is employed on a fixed salary without provision for annual increment, etc., would remain the same throughout his life."

21.3 Insofar as the other aspects of the compensation is concerned, in the said Rajesh case cited supra at para 20, their lordships have held as follows:

"20. The ratio of a decision of this Court, on a legal issue is a precedent. But an observation made by this Court, mainly to achieve uniformity and consistency on a socio-economic issue, as contrasted from a legal principle, though a precedent, can be, and in fact ought to be periodically revisited, as observed in Santosh Devi [Santosh Devi v. National Insurance Co. Ltd., and others, 2012 (2) TN MAC 1 (SC)]. We may therefore, revisit the practice of awarding compensation under conventional heads: loss of consortium to the spouse, loss of love, care and guidance to children and funeral expenses. It may be noted that the sum of Rs 2500 to Rs 10,000 in those heads was fixed several decades ago and having regard to inflation factor, the same needs to be increased. In Sarla Verma case [Sarla Verma v. Delhi Transport Corporation and another, 2009 (2) TN MAC 1(SC)], it was held that compensation for loss of consortium should be in the range of Rs 5000 to Rs 10,000. In legal parlance, "consortium" is the right of the spouse to the company, care, help, comfort, guidance, society, solace, affection and sexual relations with his or her mate. That non-pecuniary head of damages has not been properly understood by our courts. The loss of companionship, love, care and protection, etc., the spouse is entitled to get, has to be compensated appropriately. The concept of non-pecuniary damage for loss of consortium is one of the major heads of award of compensation in other parts of the world more particularly in the United States of America, Australia, etc. English courts have also recognised the right of a spouse to get compensation even during the period of temporary disablement. By loss of consortium, the courts have made an attempt to compensate the loss of spouse's affection, comfort, solace, companionship, society, assistance,

protection, care and sexual relations during the future years. Unlike the compensation awarded in other countries and other jurisdictions, since the legal heirs are otherwise adequately compensated for the pecuniary loss, it would not be proper to award a major amount under this head. Hence, we are of the view that it would only be just and reasonable that the courts award at least rupees one lakh for Loss of Consortium."

21.4 If the ratio laid down in those cases with regard to the computation of just compensation is taken into account and applied in this case, absolutely, there is no error on the part of the Tribunal to adopt the income tax return for the year 2010-11 of the deceased, which was marked as Ex.P.21, as the basis for calculating the loss of income of the deceased. In Ex.P21, the gross total income of the deceased was shown as Rs.4,19,643/-. However after deduction, the total taxable income was shown only as Rs.3,61,140/-. Normally, this taxable income alone shall be taken into account for calculating the future loss of income of the deceased. However, the Tribunal has taken the gross income itself i.e., Rs.4,19,643/- as income for the deceased per year. Therefore, the contention of the learned counsel for the claimants to state that the Tribunal was in error in fixing the quantum by taking the income of the deceased on the basis of 2010-11 income tax return alone, is liable to be rejected.

22. In respect of deduction towards personal expenses of the deceased is concerned, following the ratio laid down by the Apex Court in the judgment reported in 2009(6) SCC 121 [Sarala Verma and others v. Delhi Transport Corporation], the Tribunal deducted 1/3rd of the income. Therefore, the deduction of 1/3rd towards personal expenses was rightly done by the Tribunal.

23. There is no dispute with regard to the age of the deceased, which was fixed as 48 years. The Tribunal adopted the multiplier of 12. However, as per the judgment reported in 2009(6) SCC 121 [cited supra] the multiplier to be adopted for the age of 48 years should be 13. Since the Tribunal erred in applying 12 as multiplier, we modify the same as 13.

24. The Tribunal awarded a sum of Rs.25,000/- towards loss of consortium to the first claimant and a sum of Rs.15,000/- towards loss of love and affection to the second claimant. The Tribunal also awarded a sum of Rs.5,000/- towards transportation charges and another sum of Rs.5,000/- towards funeral expenses. Since the award passed by the Tribunal

under the above heads are very much on the lower side, we enhance the same as follows:-

S.No	Head	Amount granted by the Tribunal	Amount granted by this court
1	Loss of consortium to the 1 st claimant	Rs. 25,000/-	Rs. 1,00,000/-
2	Loss of love and affection to the 2 nd claimant	Rs.15,000/-	Rs. 1,00,000/-
3	Transport expenses	Rs. 5,000/-	Rs. 25,000/-
4	Funeral expenses	Rs. 5,000/-	Rs. 25,000/-

25. As far as the contention of the claimants that the Tribunal should have considered the future prospects of the deceased and should have fixed a higher income is concerned, admittedly, the deceased was doing business in granite and he was not permanently employed getting assured monthly salary. The Apex Court in various judgments, including the judgments reported in 2009(6) SCC 121 [cited supra] , 2011(4) Supreme Court Cases 689 (K.R.Madhusudhan and others v. Administrative Officer and another) and 2013(7) Supreme Court Cases 476 (Vimal Kanwar and others v. Kishore Dan and others) held that future prospects can be considered for the salaried persons. Further, future prospects for business man was not considered for the reason that in the future years, he could have also incurred loss in the business and he could have earned less than what he was earning. Further more, the claimants have not let in any evidence with regard to future prospects of the deceased. In the absence of any evidence to establish that the deceased would have earned more income, the contentions raised by the learned counsel for the claimants with regard to future prospects cannot be accepted and the same is rejected.

26. The Tribunal had rightly fixed the annual income of the deceased as Rs.4,19,643/-. After deducting 1/3rd towards personal expenses, the contribution to the family comes to Rs.2,79,762/-. Adopting 13 as multiplier, the loss of earning of the deceased comes to Rs.36,36,906 [Rs.2,79,762/- x 13] from which, 50% shall be deducted towards contributory negligence on the part of the deceased. Thus, the claimants are entitled to a sum of Rs.18,18,453/- towards loss of earning power. In all, the award of the Tribunal is modified as follows:

S.No	Head	Amount granted by the Tribunal	Amount granted by this court
1	Loss of earning power	Rs.33,57,144/-	Rs.18,18,453/-
2	Loss of consortium to the 1 st claimant	Rs. 25,000/-	Rs. 1,00,000/-
3	Loss of love and affection to the 2 nd claimant	Rs.15,000/-	Rs. 1,00,000/-
4	Transport expenses	Rs.5,000/-	Rs. 25,000/-
5	Funeral expenses	Rs. 5,000/-	Rs. 25,000/-
	Total	Rs. 34,07,144/-	Rs.20,68,453/-

together with interest at 7.5% per annum.

27. It is brought to the notice of this court that the Insurance company had deposited a sum of Rs.39,05,767/- and the claimants were permitted to withdraw 50% of the compensation amount of their respective shares.

28. In the result, the Civil Miscellaneous Appeal in C.M.A.No.3140 of 2014 is partly allowed and the award is modified as follows:

(i) The award of the Tribunal is reduced to Rs.20,68,453/- from Rs.34,07,144/-.

(ii) The interest granted by the Tribunal at 7.5% shall stand confirmed.

(iii) The 1st claimant is entitled to withdraw the modified award amount, after deducting the amount already withdrawn by her, together with proportionate interest lying in the bank. As far as the 2nd claimant is concerned, he is entitled to withdraw the modified award amount, on production of necessary proof with regard to his age.

(iv) The insurance company is entitled to get refund of the balance amount.

The Civil Miscellaneous Appeal filed by the claimants in C.M.A.No.2457 of 2012 stands dismissed. No costs. Consequently, miscellaneous petitions closed.

Sd/-
Assistant Registrar(CS V)

//True Copy//

Sub Assistant Registrar

kua /Rj

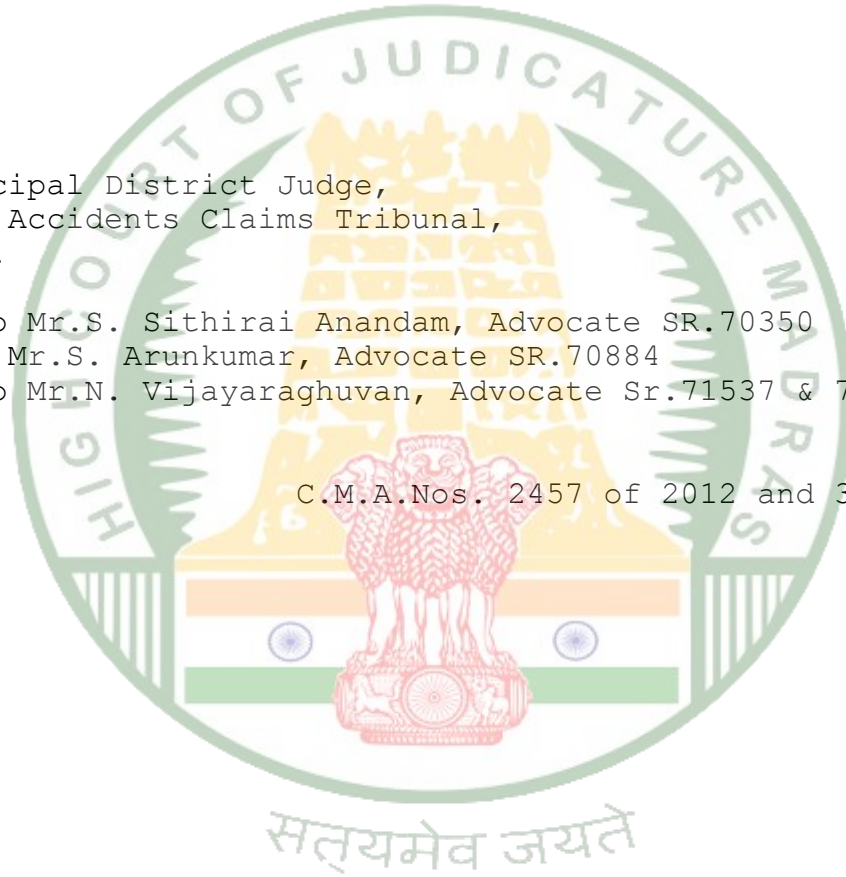
To

The Principal District Judge,
Motor Accidents Claims Tribunal,
Erode.

+ 2 ccs to Mr.S. Sithirai Anandam, Advocate SR.70350
+ 1 cc to Mr.S. Arunkumar, Advocate SR.70884
+ 2 ccs to Mr.N. Vijayaraghuvan, Advocate Sr.71537 & 71538

C.M.A.Nos. 2457 of 2012 and 3140 of 2014

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