BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 05.10.2016

CORAM

THE HONOURABLE MR.JUSTICE M.SATHYANARAYANAN
AND
THE HONOURABLE MS.JUSTICE V.M.VELUMANI

C.M.A.(MD)No.1488 of 2011
&
M.P.(MD)No.1 of 2011

Bajaj Allianz General Insurance Co. Ltd.,
Through its Branch Manager,
TC 28/2222, M.G.Road,
2nd Floor, (5) Anugraha,
Pazhavangadi, Trivandram - 695 023.
Kerala State. ... Appellant/Respondent No.3

Vs.

1.Vijayakumari, W/o.Kithiyone
2.Minor Lisha Gladis, D/o.Kithiyone
3.Minor Leo Glaston, S/o.Kithiyone
(Minor respondents 2 and 3 are
rep. by their mother Vijayakumari)
4.Sundara Rubi, W/o.Lazar ...Respondents 1 to 4/ Petitioners
5.Sahaya Antony Patrick @ Suresh Antony Patric
S/o. Siluvai Rayan
6.Santhana Roke, S/o.Vincent .. Respondents 5 to 6 / Petitioners 1 & 2

Prayer:- Appeal filed under Section 173 of the Motor Vehicles Act, 1988, against the fair and decreetal order dated 06.06.2011 passed in M.C.O.P.No.143 of 2007 on the file of the Motor Accidents Claims Tribunal (Sub-Court), Padmanabhapuram.

For Appellant ... Mr.S.Srinivasaraghavan
For R1 to R4 ... Mr.K.P.Narayanakumar

JUDGMENT

(Judgment of the Court was made by V.M.VELUMANI, J.)

This Civil Miscellaneous Appeal has been filed against the judgment and decree dated 06.06.2011 passed in M.C.O.P.No.143 of 2007 on the file of the Motor Accidents Claims Tribunal (Sub-Court), Padmanabhapuram.

2. The facts in brief leading to the filing of this Civil Miscellaneous Appeal, are as follows:

(i) The appellant Insurance Company is the third respondent and the respondents 1 to 4 are the petitioners/claimants and the fifth respondent/driver of the auto is the first respondent and the sixth respondent/owner of the auto is the second respondent in M.C.O.P.No.143 of 2007 on the file of the Court of Motor Accident Claims Tribunal (Subordinate Judge), Padmanabhapuram. The respondents 1 to 4 filed a claim petition in M.C.O.P.No.143 of 2007 claiming a sum of Rs.30,00,000/- as compensation.

(ii) According to the respondents 1 to 4/claimants, on 12.09.2007 about 03.20 p.m., one L.Kithinyon, husband of the first respondent, father of the respondents 2 and 3 and son of the fourth respondent was riding a motorcycle bearing Registration No.TN-74-A-0882 from west to east on the Parvathipuram Nagercoil Road keeping his left side of the road at the extreme left end of the Tar road. At that time, an auto bearing Registration No.TN-74-L-7398, which was driven by the fifth respondent in a rash and negligent manner, dashed against the motorcycle driven by L.Kithinyon. Due to that, the said L.Kithinyon sustained multiple injuries all over his body. Immediately, he was admitted in Morris Mathias Hospital, Nagercoil and thereafter, he was referred to KIMS Hospital, Trivandram and admitted in Intensive Care Unit and was taking treatment as inpatient from 12.09.2007 to 19.09.2007. In spite of intensive treatment, he died on 19.09.2007.

(iii) The Nagercoil Traffic Police has registered a case in Crime No.95/2007 for the offences under Sections 279, 338, 304-A I.P.C. and Section 187 of Motor Vehicles Act against the fifth respondent.

(iv) The respondents 1 to 4 are the dependants of the deceased and the deceased was working as a Police Head Constable (GRI.PC.632, Kanyakumari District), Armed Reserve Police, Nagercoil. At the time of accident, he was hale and healthy person. He participated many tournaments, sports and games and the Tamil Nadu Government has also given a Gold Medal to him for participating in the Special Task Force, due to competence Courage commitment.

(v) At the time of accident, the deceased was 38 years and was getting a monthly salary of Rs.8,831/- per month. The respondents 1 to 4 were fully depending on the income of the deceased. The accident took place only due to rash and negligent driving by the fifth respondent. The sixth respondent is the owner of the auto and the appellant is the insurer of the said auto and therefore, the respondents 1 to 4 filed a claim petition against the appellant and the respondents 5 and 6, claiming a sum of Rs.31,17,762.51 as compensation, but restricted their claim to Rs.30,00,000/-.

(vi) The respondents 5 and 6 remained *ex-parte* before the Tribunal.

(vii) The appellant filed counter statement denying various allegations and stated that the driver of the auto/fifth respondent did not have valid driving licence to drive the auto at the time of accident. In the circumstances, the appellant is not liable to pay any compensation. The appellant further stated that it is for the respondents 1 to 4 to prove the age and income of the deceased.

(viii) Based on the pleadings, the Tribunal framed necessary points for consideration.

(ix) Before the Tribunal, on behalf of the respondents 1 to 4/claimants, the first respondent herself examined as P.W.1 and one Rajesh, eyewitness was examined as P.W.2 and 24 documents were marked as Exs.P.1 to P.24. On behalf of the appellant, R.Ws.1 and 2 were examined and four documents were marked as Exs.R.1 to R.4.

(x) The Tribunal based on the pleadings, oral and documentary evidence, came to the conclusion that the accident took place only due to the rash and negligent driving by the driver of the auto and considering the evidence of R.W.2, the Tribunal held that the fifth respondent did not have valid driving licence to drive the auto on the date of accident, as he failed to renew the same in time. Further, in this aspect, the Tribunal applying the ratio laid down in the judgments reported in **2011 (1) TN MAC 17 [The Administrator, New India Assurance Co. Ltd., v. Abdulkani]** and **2010 ACJ 2046 [United India Insurance Co. Ltd. Vs. Saravanan and another]** held that the appellant is liable to pay compensation to the respondents 1 to 4/claimants and recover the same from the respondents 5 and 6 and the Tribunal also by applying the judgment of the Hon'ble Apex Court in **Sarla Verma (Smt.) and Others Vs. Delhi Transport Corporation and Another** reported in **2009 (6) SCC 121**, awarded a sum of Rs.20,75,774/- as compensation with interest at the rate of 7.5% p.a., from the date of claim petition till realization, under the following heads :

Sl.No.	Heads	Amount
1	Transportation charges	12,000
2	Medical expenses	1,72,364
3	Funeral expenses	10,000
4	Damage to clothes	2,000
5	Loss of Estate	10,000
6	Loss of consortium to the first respondent	25,000
7	Loss of love and affection to the respondents 2 to 4 (each Rs.10,000/-)	30,000

8	Pain and suffering	25,000
9	Attendant charges	1,200
10	Loss of Income	17,88,210
	Total	20,75,774

3. Aggrieved by the said award, the appellant Insurance Company has come out with the present appeal.

4. Mr.S.Srinivasa Raghavan, learned counsel for the appellant contended that the appellant is challenging only their liability to pay compensation and not the quantum of compensation. He further contended that the appellant has proved that the fifth respondent did not have a valid driving licence to drive the auto at the time of accident. In view of the same, the Tribunal ought to have totally exonerated the appellant from paying compensation. Therefore, the Tribunal erred in ordering pay and recovery.

5. Per contra, Mr.K.P.Narayanakumar, learned counsel for the respondents 1 to 4/claimants submitted that the Tribunal rightly held that the appellant is liable to pay compensation and ordered pay and recovery. There is no reason warranting interference by this Court with the said award and prayed for dismissal of the Civil Miscellaneous Appeal.

6. We have carefully perused all the materials available on record and considered the arguments advanced by the learned counsel appearing for the parties.

7. The point for consideration in this civil miscellaneous appeal is,

Whether the Tribunal is right in directing the appellant to pay compensation awarded at the first instance and recover the same from the respondents 5 and 6 by ordering pay and recovery?

8. From the materials available on record, it is seen that the accident took place only due to rash and negligent driving by the driver of the auto/fifth respondent. At the time of accident, the said auto was insured with the appellant. At the time of accident, he did not have a valid driving licence, as the driving licence held by him was expired and he did not renew the same within the grace period. R.W.2, the Junior Assistant from the Regional Transport Office did not depose that the fifth respondent was prohibited from holding any driving licence. In view of these facts, the Tribunal has rightly ordered pay and recovery, by giving cogent and valid reasons. Therefore, there is no reason warranting interference by this Court with the said finding.

9. In the result, the Civil Miscellaneous Appeal is

dismissed. The appellant/Insurance Company is granted six weeks time to deposit the compensation of Rs.20,75,744/-, with interest at 7.5% p.a. from the date of claim petition till realisation, less the amount already deposited if any. The appellant is at liberty to recover the said amount from the owner of the vehicle *viz.*, the sixth respondent herein, as held in the judgment of the Hon'ble Apex Court in **Oriental Insurance Co.Ltd. Vs. Shri Nanjappan and others**, reported in **2004 (13) SCC 224 : I (2004) ACC 524 (SC)**. However, the mode of recovery shall be made as follows:

> "For the purpose of recovering the compensation amount from the insured, the insurer shall not be required to file a suit. It may initiate a proceeding before the concerned Executing Court as if the dispute between the insurer and the insured was the subject matter of determination before the Tribunal and as if the issue is decided against the owner and in favour of the insurer. A notice shall be issued to the insured to furnish security for the entire amount. The offending vehicle shall be attached as a part of the security. If necessity arises, the Executing Court shall take assistance of the concerned Regional Transport Authority. The Executing Court shall pass appropriate orders in accordance with law as to the manner in which the insured/owner of the vehicle shall make payment to the insurer. In case there is any default it shall be open to the Executing Court to direct realisation by disposal of the securities to be furnished or from any other property of the insured".

10. On such deposit, the respondents 1 and 4 are permitted to withdraw their share, less the amount already withdrawn if any. The second respondent, who was minor at the time of filing the claim petition, would have attained majority by now. Therefore, the second respondent is permitted to withdraw her share by making necessary application before the Tribunal. The Tribunal shall deposit the share of the third respondent, who is minor claimant, in a Fixed Deposit in Indian Bank, Madurai Bench of Madras High Court, Madurai, to the credit of C.M.A.(MD)No.1488/2011, which shall be renewed periodically till he attains majority. The first respondent - mother of the minor is permitted to withdraw interest on the shares of her minor child, *viz.,* the third respondent herein, once in three months from the bank directly. No costs. Consequently, connected M.P.(MD)No.1 of 2011 is closed.

Sd/-
Assistant Registrar(CO)

/True Copy/

Sub Assistant Registrar

To

1. The Court of Motor Accidents Claims Tribunal,
   (Sub-Court), Padmanabhapuram.

2. The Section Officer,
   V.R. Section,
   Madurai Bench of Madras High Court, Madurai.

Copy to:
The Manager,
Indian Bank,
Madurai Bench of Madras High Court,
Madurai

+1 cc to MR.S.SRINIVASA RAGHAVAN, Advocate SR.No.59649

+1 cc to MR.K.P.Narayanakumar, Advocate SR.No.60061

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SMA/PV/08.11.2016:6P/6C