

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 16/6/2017

C O R A M

The Honourable Mr.JUSTICE S. MANIKUMAR
and
The Honourable Mr.JUSTICE M. GOVINDARAJ

Civil Miscellaneous Appeal No.1024 of 2017
a n d
Cross Objection No.49 of 2017

CMA.No.1024/17:

The Manager
ICICI Lombard General Insurance
Company Limited
Namakkal Taluk & District. ...Appellant/2nd Respondent

Vs

1. Dhandayudhapani

2. Thangammal

3. Akalya

4. Minor Dharun Pranav
(R-4 represented by its guardian,
mother Akalya/R.3) ...respondents 1 to 4/
Claimants 1 to 4

5. Ganesh Satchithananthan ...5th Respondent/1st
Respondent

Cross Objection No.49/17:

Dhandayadhapani (died)

1.Thangammal

2.Akalya

3.Minor Dharan Branav

Minor rep by Guardian /next friend
mother Akalya

...Cross objectors/respondents
2 to 4 in CMA

Vs

1.The Manager
ICICI Lombard General Insurance Co Ltd
Namakkal Taluk District ...1st Respondent/Appellant in
CMA.

2.Ganesh Satchithanathan ...2nd Respondent/5th
Respondent in CMA

Appeal filed under Section 173 of the Motor Vehicles Act,
1988 against the Judgment and Decree dated 21/12/2012, in
M.C.O.P.No.713 of 2011, on the file of the Motor Accident Claims
Tribunal (Principal District Judge), Namakkal.

For Appellant : Ms.Sree Vidhya
For respondents : Mr.Ma.P.Thangavel
(claimants)

C O M M O N J U D G M E N T

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

Challenging the quantum of compensation awarded to the legal
representatives of the deceased, ICICI Lombard General Insurance
Company Ltd., Namakkal, has filed the instant appeal, on the
grounds of negligence and liability. Not satisfied with the
quantum of compensation, the respondents/claimants have also
filed Cross Objection No.49 of 2017.

2. Brief facts leading to the appeal are as follows:-

On 24/11/2010, at 9.40 a.m., the deceased Sivakumaran, went
to Regional Transport Office, for registering his two wheeler.
After registration, while he was proceeding to Maravapalayam,
near Buvaaneswari petrol bunk, NH-7 Bye-pass road cutting, a car,
bearing Registration No.TN28AC-5555, came in a rash and
negligent manner and caused the accident. In the result, the
motorcyclist was thrown out and suffered grievous injuries. He
was taken to Namakkal CM Hospital and thereafter, he was rushed
to Kovai Hospital, where he succumbed to injuries and died, at
about 6.50 p.m.

3. In this regard, a case in Crime No.556 of 2010, was
registered against the driver of the car bearing Registration
No.TN28AC-5555, under Sections 279 and 394 (A) of the Indian
Penal Code, on the file of Paramathi Police Station.

4. Legal representatives of the deceased had filed
M.C.O.P.No.713 of 2011, on the file of the Motor Accident Claims
Tribunal (Principal District Judge), Namakkal, claiming
compensation of Rs.80,00,000/-, under various heads.

5. Disputing the manner of accident, appellant/Insurance Company has filed counter affidavit before the Tribunal. Without prejudice to the above, the Insurance Company, disputed the manner of accident and quantum of compensation, claimed under various heads.

6. Based on the materials available on record, the Tribunal has discussed the issues of negligence, liability and also quantum of compensation. In order to prove the claim, the claimants have examined P.Ws 1 to 3 and marked Exs.P.1 to P.15. On the side of the respondents, the driver of the car had examined himself as R.W.1 and marked Ex.R.1 rough sketch, to show that the deceased was negligent.

7. The Tribunal, on the issue of negligence has relied, on the depositions of P.W.1 and P.W.2 and Ex.P.1 xerox copy of First Information Report, Ex.P.4 xerox copy of charge sheet, decided that the driver of the car was rash and negligent in causing the accident. The Tribunal has also found that the deceased has almost reached the partition wall and the driver of the car, ought to have slowed down his vehicle and avoided the accident and therefore, rash and negligent driving was totally attributed to the car driver and insurer was made liable to pay compensation.

8. On the issue of quantum, the Tribunal, on the basis of Ex.P.8 salary certificate, Ex.P.10 PAN card, Ex.P.11 Income tax statement for the year 2009 - 2010, Ex.P.12 Acquittance, Ex.P.13 appointment order and Exs.P.14 and 15 Income tax statements for the year 2008 - 09 and 2009 - 10, respectively, has come to the conclusion that the deceased was drawing a monthly salary of Rs.27,702/- and rounded off to Rs.27,700/- p.m. Since the age of the deceased was 44 years, the Tribunal applied multiplier 14. Following the judgment of Sarala Verma & Others Vs. Delhi Transport Corporation and Another {2009 (5) L.W - 561}, 30% was added towards future prospects. As the deceased was paying Rs.5,600/- as income tax and also professional tax of a sum of Rs.2,188/-, for 14 years, income at the rate of Rs.28,000/- p.m., was calculated. After deducting 1/3 compensation, loss of contribution was arrived at Rs.31,60,000/-. The Tribunal has also awarded Rs.40,000/- towards loss of love and affection and Rs.10,000/- towards funeral expenses and Rs.10,000/- towards loss of consortium and thus, arrived at a total compensation of Rs.32,20,000/-, with interest at the rate of 7.5% p.a., from the date of claim till realisation.

9. Aggrieved against the award passed by the Tribunal, the appellant/Insurance Company has preferred the instant appeal.

10. Mrs. Sree Vidya, learned counsel appearing for the Insurance Company would submit that evidence on record would clearly reveal that the car of the fifth respondent was proceeding from South to North and it was going in the inner lane of the National Highways abutting the divider. The road in which the deceased was coming in his two wheeler was a side road, running from West to East, which join the National Highways - 7, on the western side. The intention of the deceased was to cut across the National Highways, to go in the eastern direction. Without even following the elementary rule, the deceased suddenly emerged from the side road and collided with the car. In such circumstances, the deceased alone was solely responsible for the accident.

11. Per contra, the learned counsel appearing for the cross objector/claimants would argue that the car driver should have exercised care and caution, as it is a crossing area on the highway. The motorcyclist has almost reached the median. But instead of avoiding collusion, the car driver in a rash and negligent manner, drove the car in a very high speed and dashed against the two wheeler. Further on the issue of quantum, the Tribunal had deducted $\frac{1}{3}$ instead of $\frac{1}{4}$. Award under the head loss of love and affection, to the minor child and the parents of the deceased and loss of consortium to the wife are very meagre and have to be interfered with.

12. Learned counsel for the cross objector has vehemently contended that Ex.R.1 rough sketch shall not be relied on fastening the negligence. He would rely on the judgment of the Hon'ble Supreme Court reported in {(2013) 9 SCC - 166 (JIJU JURUVILA AND OTHERS Vs. KUNJUJAMMA MOHAN AND OTHERS)}, wherein, the Hon'ble Supreme Court has held that paragraph 20.4 as follows:-

"20.5. 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 a number of factors like the 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 was caused, but in the 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."

13. We have heard the learned counsel appearing on either side and perused the impugned judgment.

14. From the materials available on record, on the basis of documents, we could see that on the fateful day, the car was driven in a National highway. Totally, four lanes were divided for free flow of traffic. A perusal of Ex.R.1 rough sketch filed by the respondents, we could see that the deceased has crossed the road from west to east. The car was proceeding in a National highway in a high speed from south to north. A rough sketch further shows that motorcyclist has almost reached the median, but still on the road. From the evidence of R.W.1, driver of the car, we could see that he was driving the vehicle, in a high speed lane, in 100 Kms. It is his statement that the motorcyclist had suddenly crossed in 'no crossing zone' and since he had suddenly came, he could not avoid collision and therefore, the accident has taken place only due to the rash and negligent act of the deceased.

15. During cross examination, there was no suggestion to prove that the deceased has exercised due care and caution and it was caused only due to the irrational driving of the car. The complaint was given by the relative of the deceased, who accompanied him to the Regional Transport Office.

16. Naturally, the complaint given by the relative will be against the car driver. Therefore, in considering the totality of circumstances, we could visualise that in a high way, when the car was proceeding in a high speed, two wheeler rider while crossing the road, should exercise care and caution. But in the instant case, it appears that the judgment of the deceased had failed and he could not reach the other side before the car crossed the spot. Accidents will happen in fraction of seconds. When the driver of the car had clearly deposed that he could not avert the accident due to sudden entry of the two wheeler rider. In that event the deceased must have crossed the road suddenly taking the car driver by surprise or else the car driver could have applied brakes as it is an involuntary action. The evidence of the driver that deceased crossed the road has not been controverted and disproved. Therefore, it is highly probable that two wheeler rider had not exercised due care and caution and crossed the road. An erroneous assessment that car will not reach the spot or he could have crossed the road in a reckless manner. At the same time, we consider that the two wheeler rider was also negligent in the accident. At the same time, a car driver was equally negligent as he could also have

avoided the accident. But there is no material available, to ascertain the reason for unavailability of the accident.

17. In such circumstances, we come to the conclusion that both the car driver as well as the two wheeler rider have contributed, to the cause of accident. Since the car driver was driving from a long distance in a high way, he should have exercised great caution and he should have slowed down, if he views any vehicle. Even if the vehicle crosses the road suddenly, he should be able to control the vehicle.

18. In the instant case, Ex.R.1 rough sketch, does not show the position of the vehicle, after the accident. It cannot be taken as a substantial proof in deciding the rash and negligent driving, on the part of the persons, involved in the accident. After considering the direction of the vehicles and speed of the vehicles and intensity of commission as held by the Supreme Court in {(2013) 9 SCC - 166 (JIJU JURUVILA AND OTHERS Vs. KUNJUJAMMA MOHAN AND OTHERS)}, cited above, we could reasonably arrive at the conclusion that two wheeler driver has also contributed to the accident.

19. Considering the straight stretch of four lane road and possibility of averting the accident, is more on the car driver than the two wheeler rider. Therefore the negligence of car driver is fixed at 65%. At the same time, in a straight road, it is possible for any driver, who could view the crossing vehicles at a distance to slow down and exercise care and caution. Since the car driver cogently deposed that he had no time to avert the accident, we come to the conclusion that the deceased had suddenly crossed the road and contributed to the accident and the rashness and negligence is fastened on the deceased at 35%. Therefore, we hold that the contributory negligence of the car driver and two wheeler at 65 : 35.

20. In so far as quantum is concerned, it is seen from Ex.P.8 salary certificate, the deceased was drawing a salary of Rs.27,702/- and he contributes Rs.5,000/- towards Provident Fund and there are deductions against the Family Benefit Fund, Health Fund and Festival advance. We consider that the festival advance, Family Benefit Fund and Health are deductible expenditure and after deductions, his monthly income was arrived at Rs.27,447/-. The annual income x 12 = Rs.3,29,364. Since the deceased was 44 years old, 30% is awarded towards future prospects. Therefore, the annual income is arrived at Rs.4,28,173/-. By applying the income tax deduction, according to the Income Tax Act, the annual income is arrived at Rs.4,10,851/-. The deceased had five dependants / legal representatives. The tribunal has wrongly deducted 1/3 towards personal and living expenses rather than $\frac{1}{4}$ as deducted by

Supreme Court in Sarala Verma case. Therefore we deducted $\frac{1}{4}$ towards personal and living expenses. The deceased was 44 years, at the time of death and the corresponding multiplier would be 14. Thus Rs.4,10,852 X $\frac{3}{4}$ X 14 = Rs.43,13,946/-. Since we have found that the deceased has contributed to the accident and it is fixed at 35% , the proportionate contribution to the family is arrived at Rs.28,04,064/-. Therefore, the loss of contribution to the family by the deceased is fixed at Rs.28,04,064/-. Under the head consortium, Tribunal has awarded only Rs.10,000/-. As contended by the learned counsel for the cross objection, the loss of consortium is very meagre. 'Consortium' as per the Best v. Samuel Fox reported in 1952 AC 716 means, "Duty owed by a wife to her husband and vice versa, companionship, love and affection, comfort, mutual services, sexual intercourse, etc." In Rajesh and others v. Rajbir Singh and others reported in 2013(3) CTC 883, the Apex Court, held as follows:

"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 recognized 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 atleast Rupees one lakh for Loss of Consortium."

Following the dictum of Supreme Court, we award a sum of Rs.1,00,000/-, towards consortium.

21. Award of the Tribunal under the head loss of love and affection is Rs.40,000/- and the minor child has lost the love and affection of his father. Therefore, Rs.1 lakh is awarded to the minor towards loss of love and affection and Rs.50,000/- each to the parents under the above head. Totally, a sum of Rs.2,00,000/- was awarded under this head. A sum of Rs.10,000/- is awarded towards funeral expenses. The Hon'ble Supreme Court in Rajesh and others Vs. Rajbir Singh and others, reported in 2013(3) CTC 883, held as follows:

"21. We may also take judicial notice of the fact that the Tribunals have been quite frugal with regard to award of compensation under the head 'Funeral Expenses'. The 'Price Index', it is a fact has gone up in that regard also. The head 'Funeral Expenses' does not mean the fee paid in the crematorium or fee paid for the use of space in the cemetery. There are many other expenses in connection with funeral and, if the deceased is follower of any particular religion, there are several religious practices and conventions pursuant to death in a family. All those are quite expensive. Therefore, we are of the view that it will be just, fair and equitable, under the head of 'Funeral Expenses', in the absence of evidence to the contrary for higher expenses, to award at least an amount of Rs.25,000/-."

Accordingly, in the present case also, the funeral expenses are increased from Rs.10,000/- to Rs.25,000/-.

22. A sum of Rs.15,000/- is awarded for transportation. The minor child has lost the care and guardianship of her father. Therefore, a sum of Rs.25,000/- is awarded for loss of estate. A sum of Rs.2,000/- is awarded towards conventional damages. On reworking, the compensation is awarded as hereunder:-

Loss of contribution	...	Rs.28,04,064
Loss of consortium	...	Rs. 1,00,000
Loss of love and affection to the minor child	...	Rs. 1,00,000
Loss of love and affection to the parents Rs.50,000/- each.	...	Rs. 1,00,000
Funeral expenses	...	Rs. 25,000
Transportation	...	Rs. 15,000
Estate	...	Rs. 25,000
Damages	...	Rs. 2,000

Rs.31,71,064

Compensation arrived at by the Tribunal ... 32,20,000.00

Compensation now determined by this Court ... 31,71,064.00

Reduction amount 48,936.00

23. Mrs Sree Vidya, learned counsel appearing for the Insurance Company submitted that entire award amount with proportionate interest and costs has been deposited.

24. It is submitted that the learned counsel for the cross-objectors that the first claimant/first respondent had died during the pending appeal. Therefore, we direct the share apportioned to the first respondent be allotted to the second respondent, wife of the first respondent. Share of the minor/fourth respondent, shall be deposited in Nationalised Banks in fixed deposit under the reinvestment scheme. The interest accruing on the share of the minor shall be paid to the third respondent/mother of the minor, once in three months, till he attain majority. The respondents 2 and 3/claimants are permitted to withdraw the award amount, by making necessary applications. Differential amount is directed to be reduced from the share of the wife of the deceased.

25. ICICI Lombard General Insurance Company Limited, Namakkal, is entitled for refund of excess deposit made and accordingly, is permitted to withdraw the excess amount, lying in the credit of M.C.O.P.No.713 of 2011, on the file of the Motor Accident Claims Tribunal (Principal District Judge), Namakkal.

26. In the result, this Civil Miscellaneous Appeal No.1024 of 2017, filed by the ICICI Lombard General Insurance Company Limited, Namakkal, is partly allowed. No costs. Consequently, connected Miscellaneous Petition is closed. Cross Objection No.49 of 2017 filed by the legal representatives/claimants is dismissed.

Sd/-
Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

To

The Motor Accident Claims Tribunal
(Principal District Judge), Namakkal.

copy to

The Section Officer
VR Section
High Court Madras

+1 cc to Mr.R.Sreevidhya Advocate sr 42964

+1 cc to Mr.Ma.P.Thangavel Advocate sr 43039

C.M.A. No.1024 of 2017
and
Cross Objection No.49 of 2017

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