IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 30.08.2018

CORAM:

THE HONOURABLE MR.JUSTICE K.K.SASIDHARAN
and
THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN

C.M.A. Nos.3529 and 3530 of 2017
and
C.M.P.Nos.22631 and 22633 of 2017

CMA.No.3529 of 2017:-

M/s.The New India Assurance Co. Ltd.,
Kongu Complex, Opposite to Tio Bus Stand,
34/35, Bypass Road, Dharapuram - 638 657.

... Appellant/2nd Respondent
... 1st Respondent(Claimant)
..2nd Respondent(1st Respondent)

-vs-

1.V.Sivakumar
2.S.Chandrakala
3.Kavitha
4.Minor Santhiya
5.Minor Saranya
Minors rep. by their Guardian and mother Kavitha.
6.Seeranayee
7.M/s.National Insurance Co. Ltd.,
Divisional Office - II, No.11, Ramakrishna Road,
Salem - 7.

... Respondents 3 to 7
(Respondents 3 to 7)

CMA.No.3530 of 2017:-

M/s.The New India Assurance Co. Ltd.,
Kongu Complex, Opposite to Tio Bus Stand,
34/35, Bypass Road, Dharapuram - 638 657.

... Appellant/2nd Respondents

-vs-

1.Kavitha
2.Minor Santhiya
3.Minor Saranya
Minors rep. by their Guardian and mother Kavitha.

4.Seeranayee ... Respondents 1 to 4 (Claimants)

5.S.Chandrakala .. 5th Respondent(1st Respondent)

6.M/s.National Insurance Co. Ltd.,
Divisional Office - II, No.11, Ramakrishna Road,
Salem - 7. .. 6th Respondent/3rd Respondent

PRAYER in CMA.No.3529 of 2017:-

Civil Miscellaneous Appeal filed under Section 173 of Motor Vehicles Act, to set aside the judgment and decree passed by the Tribunal in MCOP.No.786 of 2009 dated 28.03.2017 on the file of the Motor Accident Claims Tribunal (Special District Judge, Motor Accidents Claims Tribunal) Salem.

PRAYER in CMA.No.3530 of 2017:-

Civil Miscellaneous Appeal filed under Section 173 of Motor Vehicles Act, to set aside the judgment and decree passed by the Tribunal in MCOP.No.787 of 2009 dated 28.03.2017 on the file of the Motor Accident Claims Tribunal (Special District Judge, Motor Accidents Claims Tribunal) Salem.

For Appellant : Mr.M.Krishnamoorthy
in both the Appeals

For Respondents: Mr.K.Balaji for R1
R2 to R6 - Exparte
R7 - No appearance
in CMA.No.3259 of 2017

Mr.K.Balaji for R1 to R4
R5 - Exparte
R6 - No appearance
in CMA.No.3230 of 2017

J U D G M E N T
[Judgment of the Court made by R.SUBRAMANIAN,J.]

The Insurance Company which suffered an award for payment of Rs.64,695/- as compensation for the injuries suffered by one V.Sivakumar and for payment of a sum of Rs.15,52,000/- for the death of one Senthil Kumar who died in the same accident which occurred on 21.03.2008 has come forward with these appeals challenging the awards on both quantum and negligence.

The case of the claimants is as follows:-

2. The deceased Senthil Kumar whose legal representatives

are the claimants in MCOP.No.787 of 2009 along with the injured Sivakumar who is the claimant in MCOP.No.786 of 2009 had gone to Pondicherry to celebrate the birthday of Sivakumar, while they were returning from Pondicherry to Salem, near Pathur on Trichy to Chennai National Highways, the lorry bearing registration No.TN-33-X-4244 owned by, the 2nd respondent in CMA.No.3529 of 2017/ 5th respondent in CMA.No.3530 of 2017, one S.Chandran insured with the appellant Insurance Company, which was driven by its driver in a rash and negligent manner in the opposite direction dashed against the Tata Sumo car causing injuries to both the said Senthil Kumar and Sivakumar. As a result of the accident, the said Senthil Kumar died on the way to hospital and Sivakumar sustained grievous injuries.

3. The claimants in MCOP.No.787 of 2009 who are the wife and children of the deceased Senthil Kumar sought for a compensation of Rs.20,00,000/- and while the injured Sivakumar, claimant in MCOP.No.786 of 2009 sought for a compensation of Rs.5,00,000/-.

4. The appellant, Insurance Company which was the 2nd respondent in the Original Petitions resisted the claim contending that the accident occurred due to the rash and negligent driving of the driver of the Tata Sumo Car bearing registration No.TN-28-F-919 and not due to the rash and negligent driving of the lorry. Narrating the manner in which the accident happened, the Insurance Company would contend that the lorry bearing registration No.TN-33-X-4244 was laden with nearly 9 tons of ground nuts and therefore the lorry would not have travelled at a high speed as alleged by the claimants. Relying upon the sketch as well as the FIR, the Insurance Company would contend that the accident was only due to the rash and negligent driving of the driver of the Tata Sumo Car.

5. Since both the Original Petitions related to the same accident the Tribunal recorded common evidence and disposed of the OPs by a common judgment. On a consideration of the evidence on record, the Tribunal concluded that the accident occurred due to the rash and negligent driving of the lorry. The Tribunal while coming to the said conclusion observed that though the driver of the lorry was examined as RW1, he has not produced the rough sketch prepared by the Police or the observation Magazar.

6. On the quantum, the Tribunal took the income of the deceased Senthil Kumar at Rs.9,000/- per month, deducting 1/4th

towards his personal expenses, the Tribunal calculated the loss of dependency at Rs.81,000/- applying multiplier of '17', the Tribunal arrived at a total loss of dependency at Rs.13,77,000/-. Apart from the monetary loss awarded as above, the Tribunal also granted a sum of Rs.25,000/- towards funeral expenses, Rs.40,000/- towards loss of consortium to the wife and Rs.50,000/- each towards loss of love and affection to the two children and Rs.10,000/- towards loss of love and affection to the mother. In all the Tribunal has awarded Rs.15,52,000/-.

7. Insofar as the case of injured, the Tribunal assessed the permanent disability caused at 10% and awarded a sum of Rs.30,000/- towards disability at Rs.3,000/- per percentage, another Rs.10,000/- towards attender charges, Rs.14,695/- towards medical expenses and Rs.10,000/- towards pain and suffering. The total award was for a sum of Rs.64,695/-.

8. Concluding that the lorry is insured with the appellant Insurance Company, the Tribunal directed the appellant Insurance Company to pay the entire compensation. Aggrieved, the appellant Insurance Company has come forward with the above appeal.

9. We have heard Mr.M.Krishnamoorthy, learned counsel appearing for the appellant Insurance Company, Mr.K.Balaji, learned counsel 1st respondent in CMA.No.3529 of 2017 and for respondents 1 to 4 in CMA.No.3530 of 2017. The respondents 2 to 6 in CMA.No.3529 of 2017 have remained exparte and the 7th respondent, though served, have not chosen to appear either in person or through counsel. The 5th respondent in CMA.No.3530 of 2017 has remained exparte and the 6th respondent, though served has not chosen to appear either in person or thorough counsel.

10. Mr.M.Krishnamoorthy, learned counsel appearing for the appellant Insurance Company would contend that the Tribunal erred in holding that the lorry was solely responsible for the accident. Drawing our attention to the contents of the FIR as well as the sketch drawn by the Inspector of Police, Thiruanvalur Police Station appended to the FIR, Mr.M.Krishnamoorthy, would contend that the manner in which the accident had occurred would show that there was some negligence on the part of the driver of the Tata Sumo Car.

11. Admittedly the road in question viz., Trichy to Chennai National Highway is a four lane road and on the fateful day the lane on the East side was closed for traffic, therefore, the

vehicles proceeding from North to South were also diverted to the West lane which is actually meant for vehicles proceeding from South to North. Therefore, the lorry which was proceeding from North to South had to take the West lane and as per the rough sketch the lorry is on the extreme left side of the West lane, whereas, the Tata Sumo car is also on the right side of the lane which demonstrates that it was the Tata Sumo car which had gone on the wrong side. Relying upon the above features which are self-explanatory, Mr.M.Krishnamoorthy would contend that the Tribunal should have atleast apportioned the negligence between the lorry and the Tata Sumo car.

12. The learned counsel would also point out that the Tribunal while rejecting the evidence of RW1 had erroneously observed that RW1 has not produced the Inspection Magazar or rough sketch prepared by the Police. The learned counsel would further submit that the rough sketch prepared by the police formed part of the FIR.

13. On the quantum, Mr.M.Krishnamoorthy, would contend that the Tribunal erred in fixing the income of the deceased at Rs.9,000/- in the absence of any reliable documentary evidence. Therefore, he would also seek rejection of the quantum of compensation awarded by the Tribunal.

14. Per contra, Mr.K.Balaji, learned counsel appearing for the claimants viz., 1st respondent in CMA.No.3529 of 2017 and respondents 1 to 4 in CMA.No.3530 of 2017 would contend that the FIR was lodged by the driver of the offending lorry and therefore, the same cannot be safely relied upon. He would also contend that except examining the driver, the Insurance Company has not chosen to examine any witnesses to that effect. Of course the claimant in OP.No.786 of 2009 Mr.Sivakumar who was the passenger in the car was examined as PW2. But his testimony is also interested testimony, because he is also a claimant seeking compensation for the injuries that had been caused to him in the accident. He would further contend that the compensation awarded by the Tribunal considering the age and income of the deceased was very much on the lower side.

15. We have given our anxious consideration to the submissions of the learned counsel on either side. The Tribunal has rejected the evidence of RW1, driver of the lorry solely on the ground that he has not produced the documents like inspection magazar or rough sketch prepared by the Police. This observation of the Tribunal is clearly erroneous, inasmuch as the rough sketch has been produced along with the FIR.

16. A perusal of the rough sketch shows that the description of the manner in which the accident occurred by RW1 is more probable. The location of the lorry is shown on the extreme East side of the road which is the correct side and the Tata Sumo Car is also shown to have travelled on the East side of the road which is actually wrong side. The road in question is a four lane road and the East side lane was closed for traffic on the date of the accident, therefore all the vehicles were forced to travel on the West side lane. The fact that the lorry was carrying the load of about 9 tons of groundnuts is also not denied. A lorry with a load of about 9 tons could not have travelled at a high speed as suggested by the claimant and PW2. We are therefore of the considered opinion that the driver of the Tata Sumo car, deceased Senthil Kumar had also contributed to the accident.

17. Considering the nature of the accident and the manner in which the accident had taken place we are of the considered opinion that the contributory negligence on the part of the driver of the Tata Sumo car could be fixed at 50%. The Insurer of the Tata Sumo Car has been impleaded in the Original Petition as well as in the appeal. However, the said Insurer viz., National Insurance Company has not chosen to enter appearance in the appeal also. It had remained exparte before the Tribunal. However, insofar as the case of the deceased Senthil Kumar is concerned, the 6th respondent in the appeal in CMA.Mo.3530 of 2017 cannot be held liable, inasmuch as he was the Insured-cum-owner-cum-driver of the offending vehicle. We therefore, conclude that the deceased Senthil Kumar had contributed to the accident to the extent of 50%.

18. Insofar as the case of Sivakumar, injured is concerned, he was the passenger in the Tata Sumo car. Therefore, it would be a case of composite negligence and not a contributory negligence. If it is the case of composite negligence, the injured claimant has got an option to sue any one of the tort-feasor and the Insurance company in this case. We find that the claim has been lodged against the appellant Insurance Company, the Insurer of the Tata Sumo car viz., National Insurance

Company has also been impleaded in the Original Petition.

19. We are therefore of the considered opinion that the award in O.P.No.786 of 2009 could be apportioned between the two Insurance Companies viz., the appellant and the 7th respondent in CMA.No.3529 of 2017, inasmuch as we have held that the driver of the Tata Sumo car in which the injured, 1st respondent in CMA.No.3529 of 2017 was a passenger had contributed to the accident.

20. As regards the quantum of compensation, Mr.M.Krishnamoorthy, learned counsel appearing for the Insurance Company would contend that the Tribunal was not right in fixing the income at Rs.9,000/- per month that too in the year 2008 without any concrete documentary evidence. Though the said contention appears to be very attractive, we find that there is no scope for reducing the monthly income fixed by the Tribunal. In fact there is evidence of the wife of the deceased to show that he has been doing some business. The Bank statement of the wife of the deceased have been produced.

21. Taking into account the over all circumstances and the fact that the deceased was owning Tata Sumo car as his personal vehicle, we are of the opinion that the fixation of Rs.9,000/- as monthly income by the Tribunal cannot be faulted with. The Tribunal has however not taken into account the future prospects. In view of the judgment of the larger Bench of the Hon'ble Supreme Court in National Insurance Company Vs. Pranay Sethi and others reported in 2018 (1) LW 330, it is incumbent on the Tribunal to take into account the future prospects even in the case where a person is self-employed. Considering the age of the deceased viz., 28 years as fixed by the Tribunal we are of the opinion that 40% should be taken as future prospects. If 40% is taken as future prospects the monthly income will be Rs.12,600/- (9000+3600) adopting 1/4th towards his personal expenses the monthly monetary loss will be Rs.9,450/-. The deceased was aged about 28 years and therefore the appropriate multiplier would be '17'. Thus worked out, the total loss of dependency to the family would be Rs.19,27,800/-. The Tribunal has awarded a sum of Rs.25,000/- towards funeral expenses, Rs.40,000/- towards loss of consortium and Rs.1,00,000/- towards loss of love and affection at Rs.50,000/- each to the children. Rs.10,000/- towards loss of love and affection to the 4th claimant mother.

22. Of these awards, the award of Rs.40,000/- towards loss of consortium, Rs.25,000/- towards funeral expenses are sustained. The Tribunal has awarded a sum of Rs.1,10,000/- towards loss of love and affection at Rs.50,000/- each to the children and Rs.10,000/- to the mother. As per the judgment of the Hon'ble Supreme Court in National Insurance Company Vs. Pranay Sethi and others referred to supra, the loss of love and affection cannot be more than Rs.40,000/-. Therefore, the said award is reduced to Rs.90,000/- i.e., Rs.40,000/- to the two children and Rs.10,000/- for the mother. The Tribunal has not awarded any amount towards loss of estate and hence a sum of Rs.15,000/- is awarded towards loss of estate and a sum of Rs.10,000/- is awarded towards travelling expenses, inasmuch as the accident occurred almost near Thindivanam which is about 217 Kms from Salem, where the claimants belong. Thus calculated, the total award works out to Rs.21,07,800/- and the same is rounded of to Rs.21,10,000/-. Since we have held that the deceased who was the driver of the Tata Sumo car had contributed to the accident to an extent of 50%. The appellant Insurance Company will be liable to pay a sum of Rs.10,55,000/- which is 50% of the compensation fixed as above.

23. Insofar as the case of the injured in CMA.No.3529 of 2017 is concerned, Mr.M.Krishnamoorthy, learned counsel appearing for the Insurance Company would fairly concede that the quantum of compensation awarded by the Tribunal is reasonable, therefore, the quantum of compensation awarded by the Tribunal is confirmed. As regards the liability we have already held that both the vehicles had contributed equally to the accident and therefore, the appellant Insurance Company and the 7th respondent in CMA.No.3529 of 2017 viz., National Insurance Company would be equally liable to pay the compensation. Therefore, insofar as the CMA.No.3529 of 2017 is concerned while confirming the quantum of compensation, we direct apportionment of the award equally between the two Insurance Companies. If the appellant Insurance Company has paid any amount pending appeal, it will be entitled to recover the same from the 7th respondent viz., National Insurance Company.

24. In the result, CMA.No.3530 of 2017 is partly allowed, the quantum of compensation as fixed at Rs.21,10,000/-. However, the appellant Insurance Company would be liable to pay only 50% of the said sum viz., Rs.10,55,000/- towards compensation with 7.5% p.a. interest and proportionate costs. The compensation is apportioned between the claimants as follows:-

(i) The 1st respondent wife of the deceased would be entitled to a sum of Rs.3,55,000/- with proportionate interest and entire costs.

(ii) The minor children, 2nd and 3rd respondents would be entitled to Rs.3,00,000/- each with proportionate interest and

(iii) The mother, the 4^{th} respondent would be entitled to Rs.1,00,000/- with proportionate interest.

25. CMA.No.3529 of 2017 is partly allowed. The compensation awarded is apportioned between the appellant Insurance Company and the 7^{th} respondent equally if the appellant Insurance Company had deposited any amount, it will be entitled to recover the same from the 7^{th} respondent Insurance Company in this proceedings itself.

26. The Insurance Company is directed to deposit the award amount less the amount already deposited, if any, within a period of four weeks from the date of receipt of a copy of the order. On such deposit the Tribunal is directed to deposit the share of the minors in the interest earning Fixed Deposit in any one of the Nationalized Banks till they attain majority. The 1^{st} respondent mother of the minor children would be entitled to draw quarterly interest from the Fixed Deposit for the maintenance of the children. There will however be no order as to costs in these appeals. Consequently, the connected Miscellaneous Petitions are also closed.

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

dsa
To

The Special District Judge,
Motor Accidents Claims Tribunal,
Salem.

Copy To
The Section Officer,
VR Section, High Court,
Madras-104. (2 Copies)

+2cc to Mr.M.Krishnamoorthy, Advocate, S.R.No.59902, 59903
+1cc to Mr.K.Balaji, Advocate, S.R.No.60001

C.M.A.Nos.3529 and 3530 of 2017

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