IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 22.03.2018

CORAM:

THE HONOURABLE MR.JUSTICE S.BASKARAN

C.M.A.Nos.3417 of 2014 and 2182 of 2016
and
and CMP.Nos.17853 of 2017 and M.P.No.1 of 2014

C.M.A.No.3417 of 2014:-
Royal Sundaram Alliance Insurance Co.Ltd.,
No.45 and 46, Sundaram Towers
Whites Road, Chennai-14
...Appellant/2nd respondent

vs

1.Mrs.Subbulakshmi
2.M.Pavithra (Minor)
3.M.Nithiya (Minor)
4.M.Balamurugan (Minor)
5.M.Muthu Priya (Minor)
Minors are represented by their mother
and next friend M.Subbulakshmi

6.Mrs.Muthu ...Respondents 1 to 6/Petitioners

7.S.Jeevarathinam ...Respondent No.7/1st respondent.

(7th respondent remained exparte
before the lower court)

C.M.A.No.2182 of 2016:-
1.Mrs.Subbulakshmi
2.M.Pavithra (Minor)
3.M.Nithiya (Minor)
4.M.Balamurugan (Minor)
5.M.Muthu Priya (Minor)
Minors are represented by their mother
and next friend M.Subbulakshmi.

6.Mrs.Muthu ..Appellants/Petitioners

Vs

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1.S.Jeevarathinam

2.Royal Sundaram Alliance Insurance Company Ltd.,
No.45, 46, Sundaram Towers
Whites Road, Chennai-14. .. Respondents/Respondents

Prayer in CMA.No.3417 of 2014 & 2182 of 2016:- Both Civil Miscellaneous Appeals under Section 179 of Motor Vehicles Act 1988 filed against the judgment and decree dated 05.03.2014 made in M.C.O.P.No.4187 of 2011 on the file of Motor Accident Claims Tribunal, (Chief Judge Small Causes Court), Chennai.

In CMA.No.3417 of 2014:-
For appellant : : Mr.M.Krishnamoorthy
for Respondents : : Mr.V.Mohan Choudary for R1 to R6.

In CMA.No.2182 of 2016:-
For appellants : : Mr.V.Mohan Choudary
For respondents : : Mr.M.Krishnamoorthy for R2.
R1- No appearance

COMMON JUDGMENT

C.M.A.No.3417 of 2014 is filed by the Insurance Company and C.M.A.No.2182 of 2016 is filed by the Claimants, challenging the decree and judgment dated 05.03.2014 made in M.C.O.P.No.4187 of 2011 on the file of Motor Accident Claims Tribunal, (Chief Small Causes Court), Chennai.

2. The case of the Petitioners/claimants is that on 16.02.2011 at about 05.00 hours, while the deceased was riding his two wheeler bearing Reg.No.TN-07-R-6970 in Maduravoyal Tambaram Bye pass road from North to South, the lorry bearing Reg.No.TN-21-A-9919 overtook the two wheeler and suddenly stopped without any signal resulting in the deceased dashing against the rear side of the Lorry, which later resulted in his death. The deceased was aged 44 years and was earning Rs.400/- per day by working as a Mobile Fish Vendor. The Petitioners who are the wife, children and mother of the deceased were dependants of the deceased income. It is stated that the accident occurred only due to said lorry driver. Hence, the petitioners seek a compensation of Rs.21,00,000/- from the respondents who are the owner and insurer of the offending vehicle.

3. On the other hand, opposing the claim of the Petitioners, the 2nd respondent contends that the accident did not occur in the manner alleged by the Petitioners. The deceased only caused the accident due to over speeding of the two wheeler which he

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rode and that too under the influence of alcohol. The Lorry was parked on the extreme left side of the road and the deceased only dashed against the rear side of the parked vehicle resulting in his death. The FIR was lodged against the deceased only and after investigation, the Police closed the FIR since the tortfeasor was no more. The accident occurred on 16.02.2011. The injured died only on 09.06.2011 and as such, the petitioners have to prove that the death was the consequence of the injuries suffered in the accident. The claim of the petitioners is very exorbitant. The Insurance company sought for dismissal of the claim petition.

4. Before the Tribunal, the petitioners examined P.W.1 to P.W.3, produced Exhibits P.1 to P.15 to prove their claim. On the side of the 2nd respondent-Insurance Company, R.W.1 to R.W.3 was examined and documents Ex.R.1 and Ex.R.2 was produced. The Tribunal on the basis of available evidence on record, found that the negligence of the Lorry driver alone caused the accident and passed the award for Rs.11,24,365/- jointly and severally payable by the respondents. Aggrieved over the said finding of the Tribunal, the 2nd respondent/Insurance Company preferred appeal in C.M.A.No.3417 of 2014; whereas being not satisfied with the quantum of award, the petitioners/claimants filed appeal in C.M.A.No.2182 of 2016 and both the appeals are taken up together.

5. The learned counsel for the 2nd respondent/Insurance company contends that the Tribunal failed to appreciate the evidence properly. The Tribunal ought to have fixed negligence on the part of the deceased only caused the accident. The Tribunal also failed to take into consideration the evidence on record regarding the deceased driving the vehicle under the influence of alcohol. The Tribunal also failed to take into consideration that the Police registered the case against the deceased only. The Tribunal ought to have fixed entire negligence on the deceased only on the basis of available evidence. The Tribunal ought to have rejected eyewitness account of P.W.2 in the light of Ex.P.1 FIR and Ex.P.2 Discharge summary, wherein, it is clearly stated that the deceased dashed against the stationary Lorry. Thus the 2nd respondent sought for allowing the appeal and to set aside the award passed by the Tribunal.

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6. Per contra, the learned counsel for the Petitioners/claimants contended that after fixing negligence on the part of the first respondent Lorry driver alone caused the accident, the Tribunal erred in fixing the monthly income of the deceased at Rs.4500/- per month while the evidence clearly stated that the deceased was earning Rs.400/- per day. The amount awarded by the Tribunal under various heads is very low. Thus the petitioners/claimants sought for enhancement of the

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award by entertaining the appeal, while seeking dismissal of the appeal filed by the Insurance Company/2nd respondent.

7. The Petitioners stated that on the occurrence day at about 5 a.m., while the deceased was proceeding in his two wheeler in Maduravoyal Tambaram Road, the 1st respondent lorry bearing Reg.No.TN 21-AA-9919 came at high speed, dashed against the two wheeler, which the deceased was driving and caused him grievous injuries resulting in his death subsequently. The eyewitness who deposed as P.W.2 clearly stated that while he was proceeding in his two wheeler, the deceased was going ahead of him in another two wheeler and at that time, the Lorry came in high speed, overtook and dashed against the vehicle in which the deceased was proceeding causing him grievous injuries. Thus, it is clear from P.W.2 evidence that the Lorry overtook him and dashed against the two wheeler in which the deceased was proceeding.

8. On the other hand, the 2nd respondent/Insurance company contended that the Police registered Ex.P.1-FIR against the rider of the motor cycle and subsequently the same was closed as tortfeasor died. According to R.W.2, the 1st petitioner, who is the wife of the deceased appeared in the Police station and gave a statement that the accident occurred due to the fault of the deceased. Hence, further action was dropped by them.

9. Admittedly, the 1st petitioner was not an eyewitness to the accident. R.W.2 admitted that he did not do the investigation and the same was done by another Sub Inspector of Police. There is nothing on record to show that proper permission was obtained from the higher authority concerned for dropping further action. The private investigating official examined by the 2nd respondent-Insurance company viz., R.W.3 clearly stated that his evidence is based on available Police records. However, the Police officials who deposed as R.W.2 clearly stated that action is not dropped and investigation is pending. Thus the contention of the 2nd respondent-Insurance company that the case registered against the deceased was closed cannot be accepted. In such circumstances, the eyewitness account stated by P.W.2 is being cogent and categorical has to be accepted. In such circumstances, it is clear that the petitioner has clearly established the fact that negligence of the 1st respondent Lorry driver alone caused the accident.

10. It is contended by the counsel for the 2nd respondent/Insurance company that the deceased was riding the two wheeler under the influence of alcohol and that is the reason for the accident. R.W.1, the employee in Government Hospital produced Ex.R.1-Accident register copy. It is evident from the said document that smell of alcohol was found and the

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same is mentioned in Ex.R.1. However, no doctor has been examined to prove that the deceased was in drunken mood and no medical record is produced to prove that the deceased was in drunken state.

11. Refuting the said contention of the learned counsel for the 2nd respondent/Insurance company, the learned counsel for the Petitioners/claimants contended that there is no evidence available on record to show that the deceased was under influence of alcohol and there is no medical records available to prove the allegation. Even if it is accepted that alcohol smell is found, unless it is proved that alcohol content of 30 mg in 100 ml of blood is found, the person cannot be stated to be under the influence of alcohol. In support of the same, the learned counsel for the Petitioners/claimants relied upon the Ruling of the Apex Court reported in 2017 ACJ 114 [Oriental Insurance Co.Ltd., Vs. Vineetha Nair and others]. In paragraph 10 of the said judgment it is held as follows:-

> " 10. Now, the next point raised before us by the insurance company is regarding the non-consideration of the specific contention taken by the company founded on the principle of volunti non fit injuria. It is true that the principle of volunti non fit injuria can be taken as a defence even in a liability arising on the strict liability principle developed from the good old case law in Ryland v. Fletcher, much less to say, in a claim under the Motor Vehicles Act. The positive case of the insurance company is that the deceased driver of the car was under the influence of alcohol. Ext.A7 is the post mortem certificate of Govind G.Nair. We perused the said document. It can be seen that there is nothing therein to show that he had consumed alcohol. Ext.B2 is the copy of the postmortem certificate of the deceased driver. It is stated therein that the stomach contained clear fluid having alcoholic smell. Only because there is alcoholic smell, it cannot be held that he was under the influence of alcohol. Even in a prosecution under section 185 of the Motor Vehicles Act, there should be a clear allegation to the effect that the alcohol content is 30 mg per 100 ml of blood. Considering all these aspects and also keeping in mind the fact that only because the driver of the car was found consumed alcohol, by no stretch of imagination, can it be said that the co-passenger will not be entitled for compensation. The act complained of, in this case, would not constitute a good defence by reason of the maxim 'volunti non fit injuria' which bars the right of action as 'damage suffered by consent is not a cause of action'. According to us, the conduct as alleged against the deceased would not amount to

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consent capable of bringing a bar based on the aforesaid principle. For the reasons now stated, we are of the considered view that no illegality was committed by the Tribunal in not accepting the contentions based on the aforesaid principle. Moreover, the said contention was advanced by the insurance company of the Maruthi car. An insurance company can advance only defence available under section 149 (2) of the M.V.Act. There is no material before us to hold or presume that the owner of the vehicle permitted them or gave consent to drive the vehicle in a sottish stage. Similarly, mere consumption of alcohol is not a defence available under Section 149(2) of MV Act. Under such circumstances, the insurance company cannot avoid, by putting forward the principle volunti non fit injuria."

He also relied upon the Ruling reported in 2016 ACJ 2097 [Jose P.V. Vs. United India Insurance Co.Ltd.,], wherein it is held as follows para 5 and 6.

" 5. The Tribunal deducted 50% of the amount arrived at as compensation finding contributory negligence on the part of the appellant. The reasons stated for finding contributory negligence are : (1) The appellant was crossing the road at the time of accident and then he was on the middle of the road. (2) It is noted in the wound certificate of the appellant that 'Smell of alcohol present in breath'. The finding entered by the learned Tribunal that there was contributory negligence on the part of the appellant cannot be accepted for reasons. It is a common law right of every citizen of this country to use the public streets. It is only usual and necessary for the citizens to use the road for walking, crossing from one side to the other and in many other ways. While using the road in those ways by the citizens, a driver is not entitled to drive his vehicle negligently so as to injure those citizens. A driver should take that much care while driving the vehicle so as to avoid any possible or probable accident on the road. Had the driver of the car involved in this accident taken the required care, the accident would not have occurred. Therefore, the negligence on the part of the driver of the car alone had caused the accident.

6. The entry made by the doctor in the wound certificate thatsmell of alcohol was present in the breath of the appellant cannot be a reason for finding that he was under the influence of

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alcohol rendering him unable to keep himself proper and stable and contributing to the cause of accident. Drinking of alcoholic beverages is not a prohibited thing in this democratic country. But the crucial question is as to whether after drinking alcohol, the appellant had actually contributed to the cause of accident by his deeds while using the road. Here, there is absolutely no evidence to show that he was under the influence of alcohol or he had contributed to the cause of accident. For these reasons, the finding entered by the learned Tribunal that there was contributory negligence on the part of the appellant cannot be accepted. We vacate that finding. Therefore, the deduction of 50% effected by the Tribunal from the total amount of compensation arrived at is unsustainable. The appellant is entitled to the total amount of compensation arrived at by the Tribunal as well as by this Court."

From the above said Ruling it is clear that unless and until blood test is conducted and the doctor who made the entries in Accident Register copy was examined, the allegation that smell of alcohol was detected and that the deceased rider was under the influence of alcohol cannot be accepted. Hence, on the said ground, the contention of the learned counsel for the 2nd respondent/Insurance company fails and the same is unsustainable.

12. The learned counsel for the 2nd respondent/insurance company contended that the lorry was the stationary vehicle and the deceased dashed against the rear side without noticing the parked vehicle. Even assuming it is true, as the accident occurred in the Highways, unless and until it is proved that the said vehicle was parked with proper light and warning signals, negligence cannot be fixed on the rider of the two wheeler. In support of the same, learned counsel for the petitioners/claimants relied upon the Ruling reported in 2014 ACJ 2495 [Deepak Jain Vs. Sukhvinder Karur and others] wherein it is held as follows:-

"16. Learned Tribunal noticed that as per the photographs taken by photographer Balwan Singh, in the crime scene, there was no indicator, reflector or tree branch or barricade placed behind the tanker to avoid accident. However, learned criminal court acquitted the driver of the offending vehicle on the ground that case against the driver was that he had parked the vehicle on the road in a rash and negligent manner due to which one TSR bearing No.DL 1-RH 0843 struck against the said vehicle and its

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driver died in the said accident.

17. The fact remains that the accident took place between 2 and 3 a.m., and that is in the month of November 2005, in winter season. There was no indicator, reflector or tree branch or barricade placed behind the tanker to avoid accident. If it is presumed that the offending vehicle was a stationary vehicle, event hen the negligent and careless conduct of the offending vehicle is not ruled out. Moreover, the appreciation of evidence for assessing the negligent under the Motor Vehicles Act is standing on a different footing: the concept of proof beyond reasonable doubt is not the rule of evidence."

Likewise, the learned counsel for the Petitioner relied upon Ruling 2018 ACJ 275 [Manjit Kaur and others Vs. Jagtar Singh and others]. In the case on hand, there is no such evidence available on record to show that the1st respondent Lorry was parked with proper warning signals. Further, the 2nd respondent has not produced any rough sketch of the occurrence spot. As such the learned counsel for the petitioners/claimants submitted that the contention of respondent that the deceased only negligently dashed against parked lorry cannot be accepted. The same is to be accepted in the light of above said discussion.

13. Thus, it is clear that the tribunal has properly appreciated the evidence available on record and concluded that negligence of the respondent lorry driver alone caused the accident and the same is evidenced by P.W.2 eyewitness account. The said conclusion is proper and needs no interference.

14. The Petitioners contend that the deceased was aged 44 years at the time of the accident and was earning Rs.400/- per day by doing fish vending business. The petitioners did not produce any supporting document to prove the age of the deceased. It is clear from Ex.P.4 death certificate that the age of the deceased is 45 years. In the absence of any other material, the age of the deceased is fixed as 45. Further, before the Tribunal, as the petitioner has not produced any evidence regarding the avocation and income of the deceased, the notional income of the deceased was fixed at Rs.4500/-. Considering the fact that the deceased was carrying on business viz., fish vending and that the accident occurred during 2011, it will be appropriate to fix the notional income of the deceased at Rs.6000/- who was aged 45. Further it will be appropriate to add 25% of the income towards future prospects. Thus the income of the deceased will be Rs.6000/- and by adding 25% towards future prospects, he would have been earning Rs.7500/- per month. Further, considering the number of

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dependants, it will be appropriate to deduct 1/4th towards personal expenses of the deceased. Thus the contribution to the family will be Rs.5625/-. Thus the loss of dependency due to the death of the deceased is calculated as under:-
Monthly salary - Rs.6000
25% future prospects (1500) = 7500
7500 - 1/4th deduction (1875) = 5625
5625 x 12 x 14= 9,45,000/-.
Thus, a sum of Rs.9,45,000/- is awarded under the head "Loss of dependency". As per the Medical Bills produced by the Petitioners, the compensation of Rs.2,87,265/- granted by the Tribunal, is confirmed as just and proper. Taking into consideration the fact that the accident took place on 16.02.2011 and the victim died on 09.06.2011 and considering the nature of treatment undergone, the petitioner is to be provided transportation charges of Rs.10,000/-. Further, by following the decision of Apex Court reported in 2017 (2) TN MAC 609 (SC) [National Insurance Co.Ltd., Vs. Pranay Sethi and Others], under conventional heads, the following amounts are to be awarded to the Petitioners.

Loss of consortium	-	Rs. 40,000/-
Loss of Estate	-	Rs. 15,000/-
Funeral expenses	-	Rs. 15,000/-
Add : Loss of dependency	-	Rs. 9,45,000/
Medical bills	-	Rs. 2,87,265/-
Transportation charges	-	Rs. 10,000/-
Total	-	Rs.13,12,265/-

15. In view of the foregoing discussion, the modified enhanced compensation granted by this Court is Rs.13,12,265/-. The Petitioners/Claimants/Appellants in CMA.No.2182 of 2016 herein are entitled to the award amount as per the following apportionment.
1st petitioner -30%
2nd, 3rd , 4th and 5th petitioners - 15% each
6th petitioner - 10%.
In so far as the Petitioners 2, 3, 4 and 5/Respondents 2 to 5 in CMA.No.3417 of 2014/Appellants 2 to 5 in CMA.No.2182 of 2016 are concerned, their share of award amount shall be deposited in Fixed Deposit in Nationalised Bank, till they attain majority.

16. In view of the above findings, CMA No.3417 of 2014 filed by Insurance company is dismissed. CMA No.2182 of 2016 filed by Petitioners/claimants is partly allowed.
(1) The award granted by the Tribunal is enhanced to Rs.13,12,265/- from 11,24,365/-.
(2) The award amount will carry interest at the rate of 7.5% per annum from the date of petition till the date of realisation.
(3) The 2nd respondent/Insurance Company is directed to deposit the enhanced award of Rs.13,12,265/- less the amount, if any

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already deposited, along with the proportionate accrued interest and costs, within a period of six weeks from the date of receipt of a copy of this order.

(4) The 1st and 6th Appellants in CMA.No.2182 of 2016/Petitioners 1 and 6/Claimants 1 and 6 are permitted to withdraw the award amount along with accrued interest as per the apportionment ordered above, by following the due procedure before the Tribunal. No costs. Consequently, connected MPs are closed.

Sd/--
Assistant Registrar(CCC)

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Sub Assistant Registrar

nvsri

To.

1. The Chief Judge, Small Causes Court,
   Motor Accident Claims tribunal, Chennai.

+2cc to Mr.M.Krishnamoorthy, Advocate Sr.No.21749 & 21750
+2cc to Mr.V.Mohan Choudary, Advocate Sr.No.21692

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