IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 16.08.2018

CORAM:

THE HONOURABLE MR.JUSTICE ABDUL QUDDHOSE

C.M.A.NO.2924 of 2008

Saraswathi (died)

1.Kamalam

2.SivaKumar

3.Karnan ....Appellants / Petitioners

Vs

1.Giri

2.The Managing Director,
Tamil Nadu State Transport Corporation Ltd,
No:37, Mettupalayam Road,
Coimbatore,
Coimbatore-District. ....Respondents/Respondents

Prayer: Civil Miscellaneous Appeal filed under Section 173 of Motor Vehicles Act, 1988 against the Judgement and Decree dated 19.04.2004 made in M.C.O.P.No.440 of 2003 on the file of Motor Accident Claims Tribunal (Fast Track Court No:3) at Dharapuram.

For Appellants : Mr. MA.P.Thangavel

For Respondents : Mr. S.V.Vasanthakumar for R2
No Appearance for R1

J U D G M E N T

The instant appeal has been filed challenging the quantum of compensation Awarded to the appellants by the Motor Accident Claims Tribunal (Fast Track Court No:3) at Dharapuram in its Judgment and Decree dated 19.04.2004 in M.C.O.P.No.440 of 2003. In this appeal, the appellants have sought for enhancement of compensation.

2. The brief facts leading to the filing of the instant appeal are as follows:

(i) On 24.11.1999, the deceased Govindaraj and one Subramaniam were travelling in a motor cycle bearing Registration number TN-41-C-1399. The motorcycle was driven by Subramaniam and Govindaraj was on the pillion. At about 7:00 P.M., while the motorcycle was proceeding towards south in Pollachi to Anaimalai Road near Sundharapuri village, a Tamil Nadu State Transport Corporation bus bearing Registration number TN-37-N-0305 which came in the same direction towards south, driven by its driver in a rash and negligent manner, dashed against the said motorcycle, in which, the deceased Govindaraj sustained severe injuries and he subsequently died as a result of the injuries.

(ii) The appellants are the legal heirs of the deceased and they preferred a compensation claim for a sum of Rs.13,00,000/- before the Motor Accident Claims Tribunal (Fast Track Court No.3) at Dharapuram in M.C.O.P.No.440 of 2003, against the second respondent / Transport Corporation for the death caused to Govindaraj by the rash and negligent driving by the driver of the bus owned by the Transport Corporation.

(iii) The Motor Accident Claims Tribunal by its Award dated 19.04.2004 awarded a compensation in favour of the appellants directing the 2nd respondent Transport Corporation to pay a sum of Rs.2,81,000/- and deducted 25% towards contributory negligence on the part of the two wheeler and finally awarded a compensation of Rs.2,10,750/- together with interest at the rate of 9% per annum from the date of claim till the date of realisation.

(v) Aggrieved by the quantum of compensation fixed and awarded by the tribunal, the appellants have preferred this appeal seeking enhancement of compensation and they have challenged the findings of the tribunal that there was 25% contributory negligence on the part of the deceased.

3. Heard Mr. MA.P.Thangavel, learned counsel for the Appellants and Mr. S.V.Vasanthakumar, learned counsel for the 2nd respondent.

4. The primary ground for challenge in the instant appeal is that the compensation Awarded by the tribunal is meagre and inadequate. According to the learned counsel for the Appellants, without establishing contributory negligence on the part of the deceased, the tribunal has deducted 25% towards contributory negligence out of the total compensation amount awarded to the appellants.

5. Learned counsel for the appellants drew the attention of this Court to the findings of the tribunal and submitted that the 2nd respondent was unable to establish by letting in oral and documentary evidence that the deceased Govindaraj also contributed to the negligence in the causing of the accident and he referred to paragraph 5 in page 4 of the impugned award.

6. The learned counsel for the appellants drew the attention of this Court to the following judgments, wherein, he referred to the relevant paragraphs in those judgments;

7. In the judgment of the Honourable Supreme Court in the case of Dinesh Kumar Versus National Insurance Company Limited and others reported in 2018(1) TN MAC 34 (SC), he referred to paragraphs 8 and 9, which reads as follows;

> '8. In so far as the Judgment of the High Court is concerned, the Division Bench has placed a considerable degree of importance on the fact that there was no visible damage to the Lorry but that it was the Motorcycle which had suffered damage and that there was no Eyewitness. We are in agreement with the submission, which has been urged on behalf of the Appellant that plea of Contributory Negligence was accepted purely on the basis of conjecture and without any evidence. Once the finding that there was Contributory Negligence on the part of the Appellant is held to be without any basis, the second aspect which weighed both with the Tribunal and the High Court, that the Appellant had not produced the Driving Licence, would be of no relevance. This aspect has been considered in a Judgment of this Court in Sudhir Kumar(supra), where it was held as follows:
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> "9.If a person drives a vehicle without a Licence, he commits an offence. The same, by itself, in our opinion, may not lead to a finding of negligence as regards the accident. It has been held by the Courts below that it was the Driver of the Mini Truck, who was driving rashly and negligently. It is one thing to say that the Appellant was not possessing any Licence but no finding of fact has been arrived at that he was driving the Two-wheeler rashly and negligently. If he was not driving rashly and negligently which contributed to the accident, we fail to see as to how, only because he was not having a Licence, he would be held to be guilty of Contributory Negligence...

10.The matter might have been different, if by reason of his rash and negligent driving, the accident had taken place."

9.In view of the above position, we are of the view that the deduction of forty per cent which was made on the ground of Contributory Negligence is without any basis. Accordingly, we direct that the Appellant shall be entitled to an additional amount of Rs.4.60 lakhs, which was wrongly disallowed.'

8. According to the learned counsel for the appellants, the facts of the above referred judgment are similar to the facts of the instant case. In the above referred judgment, the appellant had not produced the driving licence and in the case on hand also, the appellant did not produce the driving licence before the tribunal. No contributory negligence was also established in the above referred judgment.

9. According to the learned counsel, applying the same analogy in the instant case as seen from the findings of the tribunal, the Transport Corporation has not established that there was contributory negligence on the part of the deceased as well as the rider of the two wheeler.

10. Therefore, according to him, the deduction of 25% towards contributory negligence by the tribunal under the impugned Award is not in accordance with law.

11. The next judgment relied upon by the learned counsel for the appellants is a Division Bench Judgment of this Court in the case of Oriental Insurance Company Limited Versus T.R.Subramani and others reported in 2013(1) TN MAC 60 (DB), wherein, he referred to Paragraphs 7,8 and 9 which read as follows:

"7. 'Contributory negligence' implies contribution of a material act - a reckless act - which is also responsible for the road accident. Contributory negligence cannot be assumed or presumed. It must be proved like any other fact. It must be established by relevant evidence. There must be positive evidence to show that the accident had occurred also due to the reckless act of late Subramani.

8. Earlier, the view of the Court is that by the mere fact of the victim not possessing the driving licence while driving the vehicle, it was construed as an act of negligence. Now, the present position is that merely on account of the victim of road accident not

> possessing the driving licence, the Court cannot come to the conclusion that he also contributed to the accident, since contributory negligence must be established by positive evidence.
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> 9. In this case, there is no evidence to show that at the time of accident T.M. Subramani drove the bike in a rash and negligent manner. In the circumstances, the auguments as to contributory negligence cannot be sustained. The Tribunal has rightly held that the accident was due to the rash and negligent driving of the car by the 4th respondent."

12. According to the learned counsel for the appellants, even in the above referred judgment, the Insurance Company did not establish the contributory negligence on the part of the deceased. He also submitted that as observed by the Division Bench of this Court, the contributory negligence cannot be assumed or presumed. It must be proved like any other fact and it must be established by relevant evidence. In the instant case, according to him, no such evidence was placed by the second respondent Corporation to establish that there was contributory negligence on the part of the deceased.

13. The learned counsel for the appellants then drew the attention of this Court to a judgment of the Honourable Supreme Court in the case of Laxmidhar Nayak and Others versus Jugal Kishore Behera and others reported in (2018)1 Supreme Court Cases 746 and referred to paragraph 5 of the said judgment which reads as follows;

> "In our view, deceased Chanchali Nayak, being a woman and mother of three children, would have also contributed her physical labour for maintenance of household and also taking care of her children. The High Court as well as the Tribunal did not keep in view the contribution of the deceased in the household work, being a labourer and also maintaining her husband, her daily income should be fixed at Rs 150 per day and Rs 4500 per month."

14. After referring to the above said judgment, the learned counsel for the appellant submitted that in the above referred judgment, the accident took place on 29.9.1991 and the Honourable Supreme Court fixed the monthly salary of the deceased at Rs.4500/- per month.

15. According to him, even in the above referred judgment of the Honourable Supreme Court, the deceased was a labourer and did not file any documentary evidence before the tribunal to establish his monthly income.

16. According to the learned counsel for the appellants, in the instant case, the accident took place in the year 1999 and the deceased was running a small Provisional Stores and therefore applying the same yardstick, a sum of Rs.4500/- per month should be fixed as his notional income.

17. Learned counsel for the appellants further submitted that the age of the deceased at the time of accident was 52 years and the relevant multiplier to be applied is 11 and 10% future prospects will have to be added as per the Judgment of the Honourable Supreme Court in the case of National Insurance Company Limited versus Pranay Sethi and others reported in 2017(2) TN MAC 609(SC).

18. The same judgment was also referred to in the above cited judgment (2018)1 Supreme Court Cases 746 referred to supra.

19. According to the learned counsel for the appellant, only a sum of Rs.10,000/- was awarded by the tribunal for loss of consortium instead of Rs.40,000/- as per National Insurance Company Limited versus Pranay Sethi and others reported in 2017 (2) TN MAC 609(SC) Judgment.

20. Even the compensation awarded for love and affection, funeral expenses, loss of estate and transportation is not commensurate with the decision of the Honourable Supreme Court in the case of National Insurance Company Limited versus Pranay Sethi and others reported in 2017(2) TN MAC 609(SC)

21. Per contra, learned counsel for the 2nd respondent Transport Corporation submits that the compensation awarded by the tribunal is only in accordance with law. According to the learned counsel for the 2nd respondent, only due to the contributory negligence of the deceased, 25% was deducted from and out of the total compensation amount.

22. Learned counsel for the 2nd respondent further submitted that the accident took place in the year 1999 and therefore the appellants cannot claim compensation based on the standards and the rates applicable currently.

23. This Court after having considered the materials available on record and after examining the award and after hearing the submissions of the respective counsels, observes the following;

a. As seen from the findings of the tribunal, even though the 2nd respondent Corporation was unable to establish the contributory negligence on the part of the deceased who was the pillion rider of the two wheeler, the tribunal erroneously deducted 25% out of total compensation amount towards contributory negligence on the part of the deceased.

b. The Tribunal has not followed the principles laid down by the Honourable Supreme Court in the case of National Insurance Company Limited versus Pranay Sethi and others reported in 2017(2) TN MAC 609(SC) as well as Judgment reported in (2018)1 Supreme Court Cases 746 in the case of Laxmidhar Nayak and Others versus Jugal Kishore Behera and others reported in (2018)1 Supreme Court Cases 746, wherein the Honourable Supreme Court has held that higher compensation is payable on account of loss of consortium, love and affection, funeral expenses, loss of estate and transportation charges.

c. Contributory Negligence cannot be assumed or presumed. It must be proved like any other fact. It must be established by relevant evidence. There must be positive evidence to show that the accident had occurred only due to the reckless act of the deceased. In the Instant case, no such evidence has been placed by the 2nd respondent corporation to establish Contributory Negligence on the part of the deceased.

d. As held by the Honourable Supreme Court in the Judgment of Dinesh Kumar Versus National Insurance Company Limited and others reported in 2018(1) TN MAC 34 (SC) that just because driving license was not produced by the claimant, that will not disentitle the claimant from getting the compensation. The Honourable Supreme Court in that Judgment has observed that the Appellant had not produced driving license and held that it would not be of any relevance while granting compensation.

24.In view of the above observations, this court is of the considered view that the compensation awarded to the Appellants ought to be enhanced in the following manner:

Sl. No	Head	Amount Awarded by the Tribunal	Modified Amount
1	Loss of Income	Rs.2,64,000/- (Rs.3000x12x11x 1/3)	Rs.4,90,050/- (Rs.4,500+450x 12x11x ¼)
2	Loss of Consortium	Rs.10,000/-	Rs.40,000/-
3	Love & Affection for 2 persons	Nil	Rs.80,000/-
4	Funeral Expenses	Rs.5,000/-	Rs.15,000/-
5	Loss of Estate	Nil	Rs.15,000/-
6	Transportation	Rs.2,000/-	Rs.10,000/-
	Total	Rs.2,81,000/-	Rs.6,50,050/-
	(-) Negligence at 25 %	Rs.78,680/-	Nil
	Award Amount	Rs.2,10,750/-	Rs.6,50,050/-

25. In the result,

(i) The Award passed by the tribunal dated 19.04.2004 in M.C.O.P.No.440 of 2003 is hereby modified by enhancing the compensation to Rs.6,50,050/- instead of Rs.2,10,750/- as awarded by the tribunal by setting aside the 25% Contributory Negligence as observed by the Tribunal in its finding against the deceased Govindaraj and the Appeal is partly allowed.

(ii) The enhanced compensation of Rs.4,39,300/-(6,50,050-2,10,750) shall carry interest at the rate 7.5% per annum from the date of claim till the date of realisation.

(iii) No costs.

(iv) The 2nd respondent is directed to deposit the entire award amount as awarded by this Court, along with accrued interest thereon to the credit of MCOP.No.440 of 2003, after adjusting the amount, if any, already deposited and on such deposit being made, the appellants are permitted to withdraw the same on filing an appropriate application before the tribunal.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

msr/mbi/nl

To

1.The Motor Accident Claims Tribunal
(Fast Track Court No:3) at Dharapuram.

2.The Record Keeper,
Vernacular Section.
Madras High Court.

+1cc to M/s.MA.P.Thangavel, Advocate, S.R.No.56473

+1cc to M/s.S.V.Vasantha Kumar, Advocate, S.R.No.56313

C.M.A.No.2924 of 2008

GMR(CO)
SSM(02/01/2019)