

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on :03.09.2020

Pronounced on :08.09.2020

CORAM:

THE HONOURABLE DR. JUSTICE G.JAYACHANDRAN

C.M.A.No.2447 of 2016

and

C.M.P.No.17244 of 2016

The Branch Manager,
The Oriental Insurance Company Ltd.,
Gopal Rao Library Building(First Floor),
Kumbakonam Taluk. .. Appellant /2nd Respondent

/versus/

- 1.S.Senthilkumar(died) ...1st Respondent/claimant
- 2.A.Buruhanudeen ...2nd Respondent/1st Respondent
- 3.Abiramni
- 4.S.Nandhini
- 5.S.Swathi Sri (Minor)
- 6.Santhi
(R3 to R6 suo moto impleaded as party
respondents vide Court order dated
26.07.2018 made in C.M.A.No.2447/2016
(NKKJ and KRJ) ...3 to 6 Respondents/Legal Heirs
(R5 minor rep by mother R3)

Prayer: Civil Miscellaneous Appeal has been filed under Section 173 of Motor Vehicles Act, 1988 against the decree and judgment dated 27th day of April 2016 made in M.C.O.P.No.38 of 2008 on the file of Motor Accident Claims Tribunal(Court of Chief Judicial Magistrate), Thiruvarur.

For Appellant :Mr.Elveera Ravindran

For Respondents:Mr.R.Thirugnanam for
R3,R4,R5,R6
R2-NDW
R1-died

J U D G M E N T

(The case has been heard through video conference)

This appeal is at the instance of the Insurance Company against the award of the Motor Accident Claims Tribunal, Thiruvavur passed in M.C.O.P.No.38 of 2008.

2.On 30/11/2007, the claimant while returning back to Nagapattinam from Tanjavur along with his friends in a Santro car bearing Registration No.TN-51-C-7905, an Ambassador car bearing Registration No.TN-51-Z-0657 proceeding from the opposite side at Koradacherri near Ayaikudi Samathuvapuram dashed the santro car. The occupants in the Santro car viz, the claimant Senthilkumar, Ayyasamy and the driver Palanidurai sustained injuries. They all were taken to the hospital in an ambulance. The claimant was treated at Vinodagan Hospital at Thanjavur. In the accident, the claimant lost his left eye vision, sustained fracture of orbital bone, nasal bone and facial disfigurement. The claimant, who working as Unit Manager in SBI life Insurance on the date of accident was earning about Rs.33,000/- per month. The accident injury has caused loss of amenities, earning capacity and income. The Doctors, who clinically examined the claimant assessed a total permanent disability of 30% for the loss of left eye vision and partial permanent disability of 35% for other injuries. A sum of Rs.25 lakhs was sought as compensation.

3.The Insurance Company took a specific stand that the accident occurred due to the negligence of the santro car driver. Even otherwise, it was the result of contributory negligence by the santro car driver and the Ambassador car driver. The claim of Rs.33,000/- as monthly income denied. No loss of income to the claimant due to the injuries proved. In the connected, claim petitions filed by the driver Palanidurai and other occupant Ayyasamy. The Tribunal in M.C.O.P. No.305/2008 and M.C.O.P.No.306/2008 held that the accident occurred due to the contributory negligence of the ambassador car driver and the santro car driver. Only 50% liability was fixed against the insurer of the santro car and balance 50% on

the insurer of the ambassador car.

4.The Tribunal based on the appointment order, order declaring probation and the increment order which are marked as Ex.P-12 to Ex.P-14, fixed the monthly income of the claimant at Rs.24,000/-. Deducted 50% towards personal expenditure. Applied multiplier ''16''. Considering the medical records fixed 50% functional disability and awarded Rs.11,52,000/- towards loss of income. Under other non-conventional heads, it awarded a sum of Rs.84,,000/- and reimbursed the medical expenses of Rs.55,459/- as per the bills produced. Totally, a sum of Rs.12,91,459/- was awarded to the claimant.

5.The Tribunal in the light of the First Information Report marked as Ex.P-1 and the extract of the S.T.C.No.503/2008 on the file of Judicial Magistrate, Thiruvarur marked as Ex.P-6, declined to accept the theory of contributory negligence. The award passed in the connected claim petitions apportioning the liability between the two insurers was distinguished by the Tribunal in the impugned award, pointing that the Tribunal which decided M.C.O.P.Nos.305 and 306 of 2008 had no opportunity of considering the result of the criminal case where the Ambassador car driver against whom the police registered case for rash and negligent driving had pleaded guilty and paid the fine amount. Ex.P-6 was not placed before the Tribunal when deciding M.C.O.P.Nos. 305 and 306/2008 .

6.The Insurance Company being aggrieved by the compensation of Rs.12,91,459/- awarded to the claimant, has preferred this appeal on the ground that the Tribunal erred in not considering the negligence of the Santro Car driver who contributed for the accident. In the connected claim petitions arising from the same accident, the Court has apportioned the liability between the insurers of the two vehicles by fixing 50: 50 contribution.

7.Referring the judgment of this Court in Palanisamy -vs- Chinnakali reported in 2007 (2) TN MAC 147, the learned counsel for the appellant /Insurance Company submitted that there cannot be different findings by different Courts in respect of same set of facts. Hence, it is pleaded that 50% of their liability has to be deducted for the contributory negligence of the santro car driver. That apart, the learned counsel also contended that the application of multiplier for the injuries is not proper. The claimant never incurred loss of income. In fact, after the accident he continue to work and Ex.A-14 is the promotion order, which the claimant gained after the accident. Therefore, sought for modification of the award.

8.The learned counsel appearing for the Legal representatives of the claimant would submit that, the claimant due to the accident lost his left eye vision. He sustained fracture of his orbital bone and nasal bone. His face got disfigured due to these fractures. He lost his future prospect due these injuries. In fact, 10 years after the accident, he died at the age of 48 years. The Tribunal fixed the monthly income as only Rs.24,000/- though evidence was placed to show he earned about Rs.33,000/- p.m and also not added future prospects to it. The loss of one eye vision for an officer at administrative level in a nationalised bank was taken into account by the Tribunal and fixed the loss of earning capacity at 50%.

9.Referring Rajkumar -vs- Ajay Kumar case, the learned counsel for the respondents submitted that the functional disability has been rightly taken note by the Tribunal since the loss of vision and disfigurement of face have direct impact in the earning capacity of the injured, who was working as Unit Manager in SBI life Insurance.

10.Regarding negligence, the learned counsel for the respondents submitted that, the accident was caused by the Ambassador car driver, who drove his car in rash and negligent manner. The criminal case filed against the ambassador car driver ended in conviction on he pleading guilty. This evidence was not placed before the other Tribunal which decided M.C.O.P.Nos.305 and 306 of 2008. Omission to produce Ex.A-6 before that Tribunal by the claimants in those petitions, cannot prejudice this claimant. The Tribunal which decided this case independently considered the material placed before it and found that there is no negligence on the part of the santro driver.

11On considering the rival submissions, this Court arrive at the following decision:

Quantum:

This Court on perusal of the records finds the Tribunal has chosen to apply multiplier, since the medical records indicates loss of left eye vision, fracture of nasal bone and zycoma bone leading to disfigurement of the face. Loss of eye vision is a schedule injury. It requires application of multiplier for loss of income as per the Act. For loss of one eye vision, the loss of income has to be taken as 30% as per the schedule. For other injuries which are non-schedule injuries, the Doctor has assessed 35% of physical disability. The Tribunal has assessed 20% functional disability for the non-schedule injuries for applying multiplier. Though the physical disability of non-schedule injuries to the claimant no way reduced his earning

capacity, the Tribunal has erroneously taken it as functional disability. Those disabilities are partial permanent in nature. The loss could be compensated by paying a lumpsum instead of adding it to the permanent disability caused due to loss of vision. Multiplier has to be applied for schedule injury and lumpsum to be paid for non-schedule injuries.

12. At the same time, as pointed by the learned counsel for the respondents, the Tribunal has erroneously deducted 50% for personal expenditure, which is applicable only in cases of death and not in injury cases like, one in hand. Besides, it has also failed to add future prospect of 50% with multiplicand '15' as the disability is total and perpetual throughout his life and as the claimant was about 38 years at the time of accident and a salaried person employed in a Nationalised bank as Unit Manager permanently.

13. For the reasons stated above, the compensation under the head loss of future income is redrawn as below:-

Loss of future income (Rs.24,000+12,000/-FP)x12x15x30/100:	Rs.19,44,000/-
Disability due to non schedule injuries (25% x 2000)	:Rs. 50,000/-
Pain and sufferings	:Rs. 20,000/-
Nutritious food	:Rs. 10,000/-
Transport	:Rs. 10,000/-
Medical expenses	:Rs. 55,459/-
Total	:Rs.20,89,459/-
(rounded off to Rs.20,89,500/-)	

14. Negligence:

The police has duly registered First Information Report Ex.P-1 against the driver of the ambassador car, based on the complaint given by the driver of the santro car. The criminal case has ended in conviction because the accused has pleaded guilty. The Tribunal relying upon Ex.A-1 and Ex.A-6 has held the insurer of the Ambassador car alone is liable to compensate. The award in the other connected claim petitions is marked as Ex.R-4. In the said claim petitions, the respondents are the insurers and owners of both the vehicles. In that factual scenario, the Tribunal on perusing the Motor Vehicle Inspector report and eye witness deposition has held that the accident has occurred due to the head on collusion of two vehicles. The negligence of both the vehicle drivers had contributed for the accident. Hence,

the liability has been apportioned equally between the two insurers.

15. Contrarily, in this claim petition, the claimant had not chosen to implead the owner and insurer of the santro car in which he travelled. The material evidence proves the head on collision of the two vehicles has caused the accident. The rash and negligence on both the vehicle drivers is palpable seen. The proceedings in a criminal court is not conclusive proof for negligence. The attendant facts ought to have been independently appreciated by the Tribunal. To be noted, the First Information Report was given by the driver of santro car alleging negligence against the driver of the opposite vehicle (Ambassador car). The Courts have consistently held that in Motor Accident claims cases, First Information Report, at best, can be taken on record, to set the criminal law in motion, and to the factum of accident, unless it is disputed. The contents of the First Information Report, regarding negligence is always subjected to the result of investigation and the verdict of the Court after trial. In this case, from Ex.A-4, we find that the accused driver had pleaded guilty. Therefore without trial, summarily the criminal case has been disposed. In such circumstance, the Accident Claims Tribunal cannot take the criminal court verdict as conclusive proof, more so when the negligence is under dispute. The Tribunal has to necessarily consider the evidence relevant to assess the negligence. First Information Report given by a third party or interested party, need not always reflect the correct particulars, in all respects.

16. In Bijoy Kumar Dugar -vs- Bidyadhar Dutta and another reported in AIR 2006 SC 1255, the Hon'ble Supreme Court held that:

"It was head- on collision in which both the vehicles were damaged and unfortunately, Raj Kumar Dugar died on the spot. The MACT, in our view, has rightly observed that had it been the knocking on one side of the car, the negligence or rashness could have been wholly fastened or attributable to the driver of the bus, but when the vehicles had a head-on collision, the drivers of both the vehicles should be held responsible to have contributed equally to the accident. The finding on this issue is a finding of fact and we do not find any cogent and convincing reason to disagree with the well-reasoned order of the MACT on this point."

17. In a case of collusion, if materials are available to fix the negligence at different ratio, then it has to be apportioned according to the degree of negligence. If no material is available, then the negligence has to be attributed to both the vehicle drivers equally. In the instant case, the Motor Vehicle Inspector Report of the vehicles involved in the accident is before this Court. Ex.P-3 is for the Santro car and Ex.P-4 is for the Ambassador car. These two exhibits show that the front portion of these two vehicles got damaged extensively. This indicates both the vehicles had head on collision. If any one of the vehicle driver was alert he would have averted the accident or atleast the direct collision. Therefore, the insurer of the ambassador car who is the appellant herein is liable to pay only 50% of the total compensation and the balance has to be paid by the insurer of the santro car. As pointed earlier, the claimant in this case had chosen not to implead the santro car owner and its driver. For his failure to implead the necessary party, the appellant cannot be held responsible. Therefore, this Court is of the view that the appellant shall be liable to pay only 50% of the award amount i.e Rs.10,44,750/-/- with interest at the rate of 7.5% pa from the date of petition till the date of deposit and costs.

18. In this matter, pending appeal, the claimant died on 07/03/2017. Based on the legal heir certificate submitted by the counsel for the respondents, his legal heirs namely Smt. Abirami (wife) aged 42 years, S. Nandhini (daughter) aged 19 years, S. Swathi (daughter) aged 7 years and his mother Santhi aged 71 years were impleaded as respondents 3 to 6 vide order of this Court dated 26/07/2018. Being the legal heirs of the claimants, the awarded compensation has to be apportioned among the respondents 3 to 6 equally.

19. Accordingly, this Civil Miscellaneous Appeal is partly allowed. The appellant/ Oriental Insurance Company, Kumbakonam is directed to deposit 50% of the award amount i.e Rs.10,44,750/- with 7.5% interest per annum calculated from the date of claim petition (17/09/2008) till the date of realisation, except for a period between 29/06/2009 to 25/11/2014 (the date of dismissal of the claim petition for default and the date of its restoration on file vide order in I.A.No.36/2014) with cost, within 12 weeks from the date of receipt of this order. On such deposit, respondents 3,4 and 6 are permitted to withdraw the amount on appropriate petition for withdrawal. The award amount of 5th respondent Swathi (minor) shall be invested in any one of the nationalised bank till she

attains majority. The 3rd respondent, who is the mother and natural guardian of the 5th respondent is permitted to withdraw the interest on such deposit, once in 6 months to meet out the basic needs of the minor.

20. In the result, with the above direction, this Civil Miscellaneous Appeal is partly allowed No costs. Consequently, connected Miscellaneous Petition is closed.

-s/d-
Assistant Registrar

True Copy
Sub-Assistant Registrar

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To

1.The Motor Accident Claims Tribunal, Chief Judicial Magistrate, Thiruvarur.

2.The Section Officer, VR Section, Madras High Court.

+2 cc to Mr.R.Thirugnanam Advocate sr29225 & 29226

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and
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