

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 10.12.2020

CORAM:

THE HONOURABLE MS.JUSTICE V.M.VELUMANI

C.M.A.No.874 of 2013

1.Jagadeeswari
2.Kalaiselvi
3.Jayaganesh ... Appellants/Claimants

Vs.

1.R. Nithiya Kalyani
2.HDFC General Insurance Co. Ltd.,
Raheja Towers,
No.177, Anna Salai,
Chennai 02. ... Respondents/Respondents

Prayer: This Civil Miscellaneous Appeal is filed under Section 173 of Motor Vehicles Act, 1988, against the judgment and decree dated 28.11.2012, made in M.C.O.P. No.1378 of 2009, on the file of the Chief Small Causes Court, (Motor Accident Claims Tribunal), Chennai.

For Appellants : Mr. K. Varadhakamaraj

For Respondent : No appearance (For R1)
Mrs. R. Sreevidhya (For R3)

J U D G M E N T

This matter is heard through "Video Conferencing".

This Civil Miscellaneous Appeal has been filed against the award dated 28.11.2012, made in M.C.O.P. No.1378 of 2009, on the file of the Chief Judge, Small Causes Court, (Motor Accident Claims Tribunal), Chennai.

2.The appellants filed M.C.O.P. No.1378 of 2009, on the file of the Chief Judge, Small Causes Court, (Motor Accident Claims

Tribunal), Chennai, claiming a sum of Rs.6,45,000/- restricted to Rs.3,00,000/- as compensation for the death of one Balasundaram @ P.M.Durai, who died in the accident that took place on 27.10.2008.

3. According to the appellants, on the date of accident, when the deceased was riding his Motorcycle bearing Registration No.TN-09-AQ-1456 under Kathipara fly over, Guindy, driver of the Car bearing Registration No.TN-07-AP-1188 belonging to the 1st respondent drove the same in a rash and negligent manner and dashed on the Motorcycle driven by the deceased and caused accident. In the accident, the deceased succumbed to fatal injuries. The accident occurred only due to rash and negligent driving by the driver of the Car belonging to the 1st respondent and hence, the appellants filed the claim petition claiming compensation against the respondents as owner and insurer of the Car.

4. The 1st respondent remained exparte before the Tribunal.

5. The 2nd respondent-Insurance Company, insurer of the Car, filed counter statement and denied all the averments made by the appellants in the claim petition. According to the 2nd respondent, the deceased drove his Motorcycle on the wrong side of the newly constructed fly over bridge and hit the Car belonging to the 1st respondent which was coming towards Guindy on the correct direction. The accident occurred solely due to negligence on the part the deceased and he was shown as accused in criminal case. Hence, the claim petition is not maintainable. The appellants have to prove that the Car was insured with the 2nd respondent and at the time of accident, the driver of the Car possessed valid driving license to ply on road. The appellants also have to prove the age, avocation and income of the deceased, to claim compensation. In any event, the total compensation claimed by the appellants is excessive and prayed for dismissal of the claim petition.

6. Before the Tribunal, the 3rd appellant examined himself as P.W.1 and marked 4 documents as Exs.P1 to P4. The respondents examined Sub Inspector of Police as R.W.1 and marked 1 document as Ex.R1.

7. The Tribunal considering the pleadings, oral and documentary evidence, held that accident occurred due to negligence of both the deceased, rider of the Motorcycle as well as the driver of the Car and apportioned 50:50 negligence on both of them. The Tribunal awarded a sum of Rs.1,69,500/- and directed the 2nd respondent-Insurance Company to pay a sum of Rs.84,750/- being 50% of the award amount, as compensation to the appellants.

8. Challenging the contributory negligence fixed on the deceased and not being satisfied with the amounts granted by the award dated 28.11.2012, made in M.C.O.P. No.1378 of 2009, the appellants have come out with the present appeal.

9. The learned counsel appearing for the appellants contended that the claim petition was filed by the appellants under Section 163 A of the Motor Vehicles Act (hereinafter referred to as 'the Act') and when the claim petition was filed under Section 163 A of the Act, negligence need not be proved. The Tribunal erroneously fixed 50% negligence on the part of the deceased. The Tribunal ought to have fixed entire negligence on the driver of the Car which caused the accident. The respondents have not let in any evidence contra to the evidence let in by the appellants. The deceased was aged 65 years at the time of accident. The correct multiplier applicable is '7'. The Tribunal erroneously applied the multiplier '6'. The amounts awarded by the Tribunal for loss of consortium and funeral expenses are meagre, when the appellants claimed Rs.50,000/- and Rs.25,000/- respectively towards the same. The Tribunal failed to grant any amount for loss of love and affection and prayed for setting aside 50% negligence fixed on the deceased and for enhancement of the compensation.

10. Though notice has been served on the 1st respondent and her name is printed in the cause list, there is no representation for her either in person or through counsel.

11. The learned counsel appearing for the 2nd respondent-Insurance Company contended that the accident occurred only due to negligence on the part of the deceased. He came in wrong side in the one way and dashed against the Car belonging to the 1st respondent. The FIR was registered only against the deceased and the same was closed as charges abated. The 2nd respondent examined Sub Inspector of Police as R.W.1 and proved that the deceased came in wrong side and invited the accident. The Tribunal ought to have fixed entire negligence on the deceased, relying on the evidence of R.W.1 and dismissed the claim petition. The claim petition was filed under Section 163 A of the Act and Tribunal awarded compensation as per II Schedule of the Act. In any event, the appellants are not entitled for any enhancement and prayed for dismissal of the appeal.

12. Heard the learned counsel appearing for the appellants as well as the 2nd respondent-Insurance Company and perused the materials available on record.

13. From the materials on record, it is seen that it is the contention of the appellant that while the deceased was riding his Motorcycle at Kathipara fly over, Guindy, the driver of the Car belonging to the 1st respondent came in a rash and negligent manner and dashed against the Motorcycle in which the deceased was riding and caused the accident. In the accident, the deceased sustained fatal injuries and died. The appellants examined 3rd appellant as P.W.1 and marked FIR as Ex.P1. The 2nd respondent contended that the deceased came in the wrong side in one way and invited the accident. To prove the same, the 2nd respondent examined the Sub Inspector of Police as R.W.1 and marked copy of the charge sheet, accident register, post-mortem certificate and rough sketch as Ex.R1 series. Both the appellants and respondents have not examined any eye witness. The appellants have filed claim petition under Section 163 A of the Act only against the owner and insurer of the Car, alleging that the driver of the Car was responsible for the accident. Even though the appellants are not liable to prove the negligence on the part of the driver of the Car, the Tribunal considering the pleadings, framed two specific issues with regard to negligence on the part of the driver of the Car as well as the deceased. By framing these two issues, the Tribunal has converted the claim petition filed under Section 163 A of the Act to Section 166 of the Act and decided the case. Considering the materials placed before it, the Tribunal held that both the driver of the Car as well as the deceased are equally responsible for the accident. On such findings, the Tribunal fixed 50% negligence on the part of the driver of the Car and 50% negligence on the deceased. There is no error in the reasoning given by the Tribunal for such finding, warranting interference by this Court.

14. As far as the quantum of compensation is concerned, the Tribunal considering the materials, gave a finding with regard to negligence, but erred in adopting II Schedule of the Act to award compensation. The same is not correct. The appellants are entitled to compensation as though the claim petition is filed under Section 166 of the Act. In the claim petition, the appellants have stated that the deceased was self-employed and was earning a sum of Rs.5,000/- per month. They have failed to prove the same. The accident is of the year 2008. Considering the year of accident, a sum of Rs.5,000/- per month, as claimed by the appellants, is fixed as monthly income of the deceased. The appellants have produced driving license of the deceased as Ex.P4. The Tribunal considering Ex.P4, fixed the age of the deceased as 65 years. The correct multiplier applicable is '7'. There are three dependants of the deceased and hence $1/3^{\text{rd}}$ is deducted towards personal expenses of the deceased. Hence, the amounts awarded by the Tribunal towards loss of dependency is

modified to Rs.2,80,000/- [Rs.5,000/- x 12 x 7 x 2/3]. The Tribunal has awarded meagre amount of Rs.5,000/- towards loss of consortium to the 1st appellant. The 1st appellant being wife of the deceased is entitled to Rs.40,000/- towards loss of consortium. The sum of Rs.2,000/- and Rs.2,500/- awarded by the Tribunal towards funeral expenses and loss of estate are also meagre. Hence the same are enhanced to Rs.15,000/- each. The Tribunal failed to award any amount towards loss of love and affection to the appellants 2 and 3. The appellants 2 and 3 who are the children of the deceased are entitled to a sum of Rs.20,000/- each towards loss of love and affection. Thus, the compensation awarded by the Tribunal is modified as follows:

S. No	Description	Amount awarded by Tribunal (Rs)	Amount awarded by this Court (Rs)	Award confirmed or enhanced or granted
1.	Loss of dependency	1,60,000/-	2,80,000/-	Enhanced
2.	Loss of consortium to 1 st appellant	5,000/-	40,000/-	Enhanced
3.	Loss of love and affection to appellants 2 and 3	-	40,000/-	Granted
4.	Funeral expenses	2,000/-	15,000/-	Enhanced
5.	Loss of estate	2,500/-	15,000/-	Enhanced
	Total	1,69,500/-	3,90,000/-	Enhanced by Rs.2,20,500/-
	50% of the compensation	84,750/-	1,95,000/-	Enhanced by Rs.1,10,250/-

15. In the result, the appeal is partly allowed and the amount awarded by the Tribunal at Rs.1,69,500/- is enhanced to Rs.3,90,000/- together with interest at the rate of 7.5% per annum from the date of petition till the date of deposit. The 2nd respondent-Insurance Company is directed to deposit a sum of Rs.1,95,000/- being 50% of the award amount, now determined by this Court, along with interest and costs, within a period of six weeks from the date of receipt of a copy of this judgment, to the credit of M.C.O.P. No.1378 of 2009. On such deposit, the appellants are permitted to withdraw their share of the award amount, now determined by this Court, along with interest and

costs, as per the ratio of apportionment fixed by the Tribunal, after adjusting the amount, if any already withdrawn, by filing necessary applications before the Tribunal. No costs.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

gsa

To

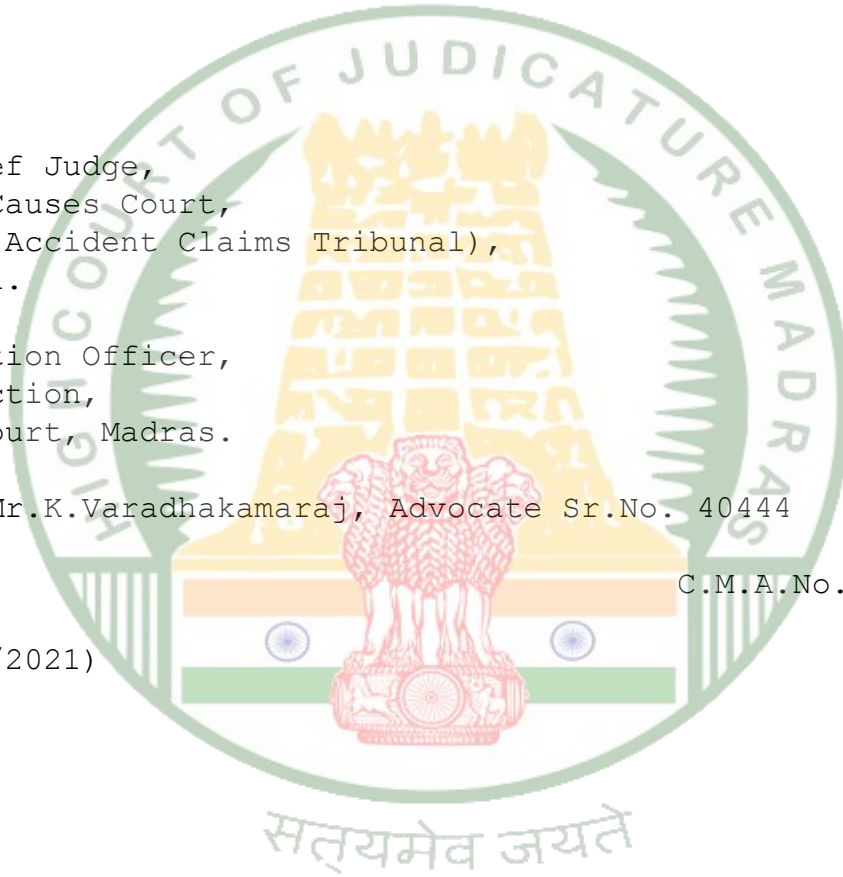
1.The Chief Judge,
Small Causes Court,
(Motor Accident Claims Tribunal),
Chennai.

2.The Section Officer,
V.R Section,
High Court, Madras.

+1 cc to Mr.K.Varadhakamaraj, Advocate Sr.No. 40444

C.M.A.No.874 of 2013

LN (CO)
RMP (01/04/2021)



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