

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 29.09.2020
DELIVERED ON : 02.11.2020

CORAM

THE HONOURABLE MR.JUSTICE R.MAHADEVAN

C.M.A.No.1916 of 2017
and C.M.P.No.10308 of 2017

M/s.United India Insurance Co.Ltd.
Thiruvallur-602 001.Appellant/2nd Respondent

Vs

1.S.Baby Latha

2.Minor S.Divya
rep.by her mother S.Baby Latha

3.K.RamanathanRespondents /Petitioner 1 &2/
1st Respondent

Appeal filed under Section 173 of the Motor Vehicles Act against the judgment and decree dated 26.09.2016 made in MCOP No.807 of 2011 on the file of the Motor Accidents Claims Tribunal, II Additional District Judge, Thiruvallur at Poonamallee.

For Appellant : Ms.R.Rathna Thara

For Respondents: Mr.K.Varadhakamaraj for
R1 and R2

R3-Ex parte
JUDGMENT

This Civil Miscellaneous Appeal has been filed by the Insurance Company against the judgment and decree dated 26.09.2016 passed by the Motor Accidents Claims Tribunal, II Additional District Judge, Thiruvallur at Poonamallee, in MCOP No.807 of 2011.

2.The case in brief, is as follows:

On 30.07.2011 at about 22.00 hours, the deceased Selvaraj was riding his TVS-XL motorcycle bearing Reg.No.TN-02-AL-2176 from Ambattur Industrial Estate to Red Hills. A lorry bearing Regn.No.TSD 4779 belonging to the third respondent and insured

with the appellant insurance company, was parked on the road without any signal, near Om Shakthi Hotel at Shanmugapuram. Since there was no signal to show that a lorry has been parked there, the deceased's vehicle dashed against the lorry and due to the impact, the deceased sustained grievous injuries and he died on the way to the hospital. The wife, daughter and father of the deceased, filed a claim petition claiming a sum of Rs.8,00,000/- as compensation. The Tribunal, considering the materials and evidence available on record, calculated the compensation at Rs.14,72,000/-, and since the claimants restricted their claim to Rs.8,00,000/-, awarded the said sum of Rs.8,00,000/- with interest at the rate of 9% per annum from the date of petition, excepting the default period from 22.04.2015 to 03.12.2015. Challenging the said judgment and decree of the Tribunal, the present appeal has been filed by the appellant Insurance Company.

3. Assailing the impugned judgment passed by the Tribunal, the learned counsel for the appellant Insurance Company raised the following contentions:

(i) the Tribunal has erred in awarding a sum of Rs.8,00,000/- as claimed by the claimants, when the claim petition was filed under Section 163-A of the Motor Vehicles Act; and the Tribunal ought to have awarded only the statutory amount of Rs.50,000/- under Section 140 of the Motor Vehicles Act for "No Fault Liability" in respect of the involvement of lorry, though stationed on the road side.

(ii) the Tribunal erred in fixing the liability on the insurance company, overlooking the facts that P.W.2 is only an interested witness and not proved to be a witness present at the scene of occurrence; Ex.P1-FIR has been registered only against the deceased; and the Case Sheet and Final Report marked as Exs.R1 and R2, respectively, also categorically stated that the deceased was rash and negligent in riding his motorcycle and dashed against the stationed lorry; and the deceased did not possess valid driving licence and he was in drunken mood at the time of accident; and in such circumstances, the Tribunal ought to have ordered pay and recovery.

Stating so, the learned counsel prayed to allow this appeal by setting aside the judgment impugned herein.

4. On the other hand, the learned counsel for the first and second respondents / claimants, referring to the judgment of this Court in P.Radhakrishnan v. M.Murugesan, reported in 2011 (2) TN MAC 515, has submitted that a mere mention of Section 163-A in the claim petition by itself is not a ground to reject the claim of the claimants seeking enhancement of award. The learned counsel further submitted that the Tribunal has considered the materials and evidence in accordance with law and has quantified the total compensation at Rs.14,72,000/-,

however, awarded only a sum of Rs.8,00,000/-, as claimed by the claimants, which is erroneous; mere fact that the claimants have confined their claim to Rs.8,00,000/-, cannot be a criteria in granting fair and reasonable compensation for the death of the deceased; and hence, the Tribunal ought to have awarded the entire compensation quantified by it, to the claimants. In support of the said submission, he placed reliance on the decision of the Supreme Court in Ramla & Ors. v. National Insurance Company Limited & Ors. [(2019) 2 SCC 192]. It is also submitted that the appellant/Insurance Company has not proved that the rider of the motorcycle did not possess driving licence and was in an inebriated condition at the time of accident and hence, the Tribunal considering the materials available on record and evidence of P.W.2/eye-witness to the accident, correctly held that the accident had occurred only due to the fault on the part of the driver of the stationed lorry and accordingly, fastened the liability on the appellant being the insurer of the offending lorry, which does not call for any interference by this Court.

5. Heard the learned counsel on either side and perused the records.

6. There is no dispute as regards the manner in which the accident had occurred. What was disputed herein is relating to the award of compensation under Section 166 of the Motor Vehicles Act, when the claim petition was filed under Section 163-A and the liability of the appellant insurance company to pay compensation to the claimants.

7. According to the learned counsel for the appellant insurance company, the claimants are not entitled to get compensation under Section 166 of the Motor Vehicles Act, when claim petition was made under Section 163-A; and the Tribunal ought to have awarded only the statutory amount of Rs.50,000/- under Section 140 of the Motor Vehicles Act for "No Fault Liability" for the involvement of lorry, though stationed on the road side. The said submission was seriously resisted by the learned counsel for the respondents, stating that mere mention of Section 163A in the claim petition, cannot be a ground to reject the claim of the claimants seeking enhancement of compensation. To support the said submission, he placed reliance on the decision of this Court in P.Radhakrishnan case (supra).

8. In P.Radhakrishnan case, cited on the side of the respondents / claimants, the learned counsel for the Insurance Company contended that the claimants, having filed claim petition under Section 163-A, it is deemed that negligence of the deceased had been admitted and it is not permissible for the claimants to seek enhancement and that the Tribunal went wrong

in construing the case as one under Section 166 instead of dealing it under Section 163-A. The learned single Judge of this Court, rejected the said contention and observed in paragraphs 10 to 13 as under:

"10. Section 163A of the Act provides for filing of a claim petition where an accident took place by reason of use of the motor vehicle. It is not necessary to prove any fault on the part of the driver of the vehicle. But, the Tribunal in a proceeding arising under Section 166 of the Act is required to hold a full-fledged trial. It is required to collect data on the basis whereof, the amount of compensation can be determined.

11. In my opinion, the very fact that the claim petition was decided on merits by the Tribunal, like a claim petition filed under Section 166 of the Act, is enough to reject the submission of the learned counsel for the 2nd Respondent Insurance Company. In other words, the Tribunal allowed the parties to prosecute the claim petition as if filed under Section 166 of the Act. Not only that, even Tribunal framed issues on all material pleadings applicable for deciding the claim petition under Section 166, such as issues relating to negligence and whether the claimants are entitled to get compensation from the Respondents and then the Tribunal had allowed the parties to adduce evidence on these issues and then answered them on merits in favour of the claimants. It was held that the deceased died due to the negligence of the driver of offending vehicle.

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13. In my opinion, therefore, mere mention of Section 163A *ibid.* in the claim petition by itself would not be a ground to reject the claim of the Appellants seeking enhancement of the award. When the entire trial of the claim petition was held treating the same to have been filed under Section 166 of the Act without there being any objection, then in that event, the Insurance Company cannot be allowed to raise such technical plea at the appellate stage. The award is passed under Section 166 of the Act as all the ingredients for deciding the claim petition under Section 166 of the Motor Vehicles Act had been satisfied. Therefore, I find no merit in the contention raised by the learned counsel for the Appellants."

9. In the light of the aforesaid judgment, which is squarely

applicable to the facts of the present case, the first contention raised on the side of the appellant insurance company, has no legs to stand and the same is accordingly, rejected. Therefore, the compensation determined by the Tribunal under Section 166 of the Motor Vehicles Act, cannot be found fault with by this Court.

10. With respect to the second contention relating to liability of the appellant insurance company to pay compensation, according to the learned counsel, the rider of the motorcycle, without having a head light brighten and a valid driving licence, rode the vehicle in a rash and negligent manner and hit the rear side of the stationed lorry, which was parked in the mud portion of the road, in front of Om Sakthi Hotel and thereby caused the accident; further he was in a drunken condition, at the time of accident; and hence, he was a tort-feasor. To support the defence so taken, the appellant insurance company has relied upon Ex.P1 FIR and Exs.R1 case history and R2 closure of charge sheet, as per which the criminal case was registered against the rider of the motorcycle and the same was subsequently closed due to death of the deceased, and the evidence of RW1. Thus, according to the learned counsel for the appellant insurance company, since there was violation of policy condition, the Tribunal ought to have ordered pay and recovery, instead of fastening entire liability on the appellant insurance company to pay compensation to the claimants.

11. Such contention was strenuously refuted by the learned counsel for the respondents / claimants stating that there was no iota of evidence to prove that the deceased was in an inebriated condition at the time of accident and he rode the vehicle in a rash and negligent manner and caused the accident. Whereas P.W.2/eyewitness to the accident, in his proof affidavit has fully corroborated the statement of the first claimant that the lorry was parked on the road without giving any indicator or parking light, as a result of which, the accident had occurred. Placing reliance on the same, the Tribunal has correctly held that the accident had occurred due to the fault on the part of the driver of the stationed lorry and accordingly, directed the appellant, who is the insurer of the offending vehicle, to pay compensation to the claimants. Hence, according to the learned counsel, the finding so rendered by the Tribunal does not call for any interference by this Court.

12. It is seen from the records that FIR was registered against the deceased for having caused accident by dashing against the lorry parked on the road, due to his rash and negligent riding of the motorcycle. However, the action was dropped due to death of the deceased. There was no indication in Ex.P2 post mortem report that the deceased was under the

influence of alcohol at the time of accident. P.W.2/eyewitness to the accident, in his proof affidavit has supported the evidence of P.W.1/wife of the deceased, stating that the lorry was parked on the road without giving any indicator or parking light. The motorcyclist going on the road could not have possibly anticipated that some vehicle was parked on the road unless some indications like blinking parking light was there or it was surrounded by some sticks etc. or some warning signal was there. To rebut the said evidence, the appellant insurance company has not examined the driver of the stationed lorry, to the effect that all the precautionary measures were taken to ensure that the vehicles coming on the road were warned about such vehicle having been parked on the road. In the absence of one such evidence, the Tribunal has come to the conclusion that there was negligence on the part of the driver of the parked lorry in causing the accident and accordingly, fastened the entire liability on the appellant insurance company to pay compensation to the claimants.

13. This Court is not in full agreement with the finding so rendered by the Tribunal. It cannot be said that when the dash was given to stationary vehicle, it is because of 100% negligence of the driver of the stationary vehicle and he alone was at fault in happening of the accident. Various factors are to be looked upon like - width of the road; size of the stationary vehicle; exact place on the road where the vehicle was made stationary; the time of incident; flow of traffic; aspect of one or two way flow of the traffic etc. The question of contributory negligence also arises, when there has been some act or omission on the part of the deceased. Hence, independent conclusion has to be drawn, on the basis of the given facts and circumstances of the case.

14. Admittedly, in the present case, the deceased dashed to a stationary vehicle from behind which was parked on the road. So, it is not expected that the driver of the lorry would say anything about the actual happenings. Normally in such cases, the vehicle driver may not be on the spot or if he is in the cabin of the vehicle, he cannot see as to what happened at the back side of the vehicle. Further, there is no rough sketch available as to the place of accident. The accident took place at 10.00pm on Ambattur Estate to Redhills Road, near Om Sakthi Hotel, Shanmugapuram. It is apparent that the speed of two wheeler was uncontrollable, which resulted into dash, though the lorry was seen at the last moment. It is an order of the day that number of vehicles are made stationary on the road. Therefore, the two wheeler rider was also expected to take reasonable care and caution. He had last opportunity to avoid the accident, no sooner he saw the stationary vehicle. The lorry was made stationary somewhat in the midst of the road without

signal, therefore, the major negligence lies on the driver of the offending vehicle. However, as the two wheeler rider has not taken care while riding his vehicle, rather drove in too excessive speed, therefore, some negligence do attributes towards him. If the rider of the two wheeler was cautious and attentive, then certainly he had last opportunity to avoid the accident. In the circumstances, this Court holds that it is a case of contributory negligence, where some negligence to the extent of 35% would be of deceased, and decide the point of negligence accordingly.

15. In respect of the contention of the learned counsel for the appellant insurance company that the rider of the motorcycle did not possess valid driving licence and he was in drunken mood at the time of accident, as already stated, there was no proof that the deceased was in an inebriated condition at the time of accident. In a claim for compensation, it is certainly open to the insurer under Section 149(2)(a)(ii) to take a defence that the driver of the vehicle involved in the accident was not duly licensed. Once such a defence is taken, the onus is on the insurer. The appellant insurance company, except examining official from the Insurance Company as R.W.1 with regard to policy, they have not summoned any official from the R.T.O. to prove the same. In view of the failure on the part of the appellant to prove that the rider of the motorcycle did not possess driving license at the time of accident, the contention of the learned counsel appearing for the appellant that the Tribunal ought to have ordered pay and recovery, is without merits and acceptance. Since the insurance policy was in force at the time of accident, the appellant insurance company is liable to compensate the death of the deceased, to the extent as determined by this Court.

16. With regard to the quantum of compensation awarded by the Tribunal, the Tribunal has relied upon the evidence and materials available on record and determined the total compensation at Rs.14,72,000/-. Since the claimants have restricted their claim to Rs.8,00,000/-, the Tribunal has awarded only a sum of Rs.8,00,000/- with interest at 9%p.a. as compensation to the claimants. In the opinion of this Court, such course adopted by the Tribunal is erroneous, in view of the recent decision of the Supreme Court in Ramla & Ors. v. National Insurance Company Limited & Ors. [(2019) 2 SCC 192], wherein, in para 5, it was held as follows:

"Though the claimants had claimed a total compensation of Rs.25,00,000/- in their claim petition filed before the Tribunal, we feel that the compensation which the claimants are entitled to is higher than the same as mentioned supra. There is no restriction that the Court cannot

award compensation exceeding the claimed amount, since the function of the Tribunal or court under Section 168 of the Motor Vehicles Act, 1988 is to award "just compensation". The Motor Vehicles Act is a beneficial and welfare legislation. A "just compensation" is one which is reasonable on the basis of evidence produced on record. It cannot be said to have become time barred. Further, there is no need for a new cause of action to claim an enhanced amount. The courts are duty bound to award just compensation."

Thus, the limiting of claim of the claimants to Rs.8,00,000/- cannot come into way in awarding higher compensation and hence, there is no restriction for awarding more compensation than what was claimed by the claimants. At the same time, it could be seen that the total compensation of Rs.14,72,000/- quantified by the Tribunal is just and reasonable, in the given facts and circumstances of the case.

17.It is pertinent to mention here that originally, the claimants are the wife, daughter and father of the deceased. During the pendency of the claim petition, the father had died. The Tribunal, based on the available materials and evidence, has fixed the monthly income of the deceased at Rs.8750/-, in which 1/3rd was deducted towards personal expenses, has taken the age of the deceased at 40 years and adopted the multiplier of 16 as per II Schedule of the Motor Vehicles Act and calculated the compensation under the head "loss of income" at Rs.11,20,000/-, which is fair, just and reasonable and hence, the same warrants no interference by this Court.

18.Regarding the compensation under other conventional heads, the Tribunal has awarded Rs.50,000/- towards funeral expenses and transportation, Rs.1,00,000/- towards loss of consortium, and Rs.2,00,000/- towards loss of love and affection, which in the considered view of this Court, is on the higher side. Hence, as per the decision of the Supreme Court in National Insurance Company Ltd. v. Pranay Sethi and others [2017-13 SCALE 12], the compensation awarded by the Tribunal towards funeral expenses and transportation, loss of consortium and loss of love and affection is hereby modified to Rs.30,000, Rs.40,000/-, and Rs.40,000/- respectively. Considering the date of accident i.e., 30.07.2011, the interest at 9% per annum awarded by the Tribunal is hereby reduced to 7.5%p.a. However, there is no modification as regards the award of Rs.2,000/- towards damage to clothes. Thus, the break-up details of the modified compensation are as follows:

Heads	Amount (Rs.)
Loss of income	11,20,000-00
Funeral expenses & Transportation	30,000-00
Loss of consortium	40,000-00
Loss of love and affection	40,000-00
Damage to clothes	2,000-00
Total	12,32,000-00

After deducting 35% towards contributory negligence on the part of the deceased, the compensation payable to the respondents / claimants is Rs.8,00,800/- @ Rs.8,00,000/-.

19. Accordingly, this appeal is partly allowed. No costs. The appellant Insurance Company is directed to deposit the modified award of Rs.8,00,000/- with interest at 7.5% p.a. from the date of petition, after deducting the amount if any already deposited, within a period of six weeks from the date of receipt of a copy of this judgment. Now, the second respondent minor would have attained majority. Hence, on such deposit being made, the first and second respondents / claimants are permitted to withdraw their respective share, as apportioned by the Tribunal, on making proper application before the Tribunal. Consequently, connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar(CS IX)

//True Copy//

Sub Assistant Registrar

KM/rk

To

1. Motor Accidents Claims Tribunal,
The II Additional District Judge,
Thiruvallur at Poonamallee.

Copy to :

The Section Officer,
VR Section, Madras High Court.

+1 cc to Mr.K.Varadha Kamaraj, Advocate Sr.No. 35361

C.M.A.No.1916 of 2017
and C.M.P.No.10308 of 2017

AD(CO)
RMP(07/05/2021)