BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 17.02.2021

CORAM:
THE HONOURABLE MRS.JUSTICE PUSHPA SATHYANARAYANA
AND
THE HONOURABLE MRS.JUSTICE S.KANNAMMAL

C.M.A(MD)No.434 of 2020
and
C.M.P(MD)No.5145 of 2020

IFFCO TOKIO General Insurance Company Limited,
No.375A, 1st Floor, Jeyam Building,
Madurai Road,
Theni - 625 531,
Rep. by its Branch Manager. ... Appellant/2nd Respondent

Vs.

1.S.Pitchaimary
2.Minor S.Sahaya Nijon
3.Minor S.Neviya Mercy
4.R.Siriya Pushpam ... Respondents 1 to 4/Petitioners

5.D.Logesh ... 5th Respondent/1st Respondent

(Minor RR 2 & 3 rep. by their mother-1st Respondent)

Prayer: Civil Miscellaneous Appeal filed under Section 173 of the Motor Vehicles Act, 1988, against the award and decree made in M.C.O.P.No.118 of 2018, dated 03.07.2019, on the file of the Motor Accident Claims Tribunal (Additional District Court), Theni.

For Appellant : Mr.V.Sakthivel

For RR 1 to 4 : Mr.Ananth C.Rajesh

JUDGMENT
(Judgment of the Court was delivered by PUSHPA SATHYANARAYANA,J.)

Challenging the award, dated 03.07.2019 passed in M.C.O.P.No.118 of 2018, on the file of the Motor Accidents Claims Tribunal/Additional District Court, Theni, the appellant/IFFCO-TOKIO General Insurance Company Limited has preferred this Civil Miscellaneous Appeal.

2.In the said M.C.O.P, the claimants/respondents 1 to 4 are the wife, two minor children and mother of the deceased-Savarimuthu. The Tribunal had awarded a sum of Rs.29,47,580/- on various heads. The said award is now challenged in the present Civil Miscellaneous Appeal not only on the quantum, but also on the question of negligence.

3.The brief facts relevant for the consideration of the above case is that on 16.08.2018, the deceased-Savarimuthu was riding his two wheeler bearing Registration No.TN-60-R-5819 belonging to the first respondent, which was driven from South to North, hit the two wheeler of the deceased and in the impact, the deceased was thrown out, injuring his head and died on the spot due to the head injury. It was alleged that the accident had occurred due to the rash and negligent act of the driving of the Van belonging to the fifth respondent/first respondent. The said Van was insured with the appellant/second respondent. Hence the respondents 1 to 4/claimants, as legal heirs of the deceased, has filed this claim petition claiming a compensation of Rs.65,00,000/-.

3.Resisting the claim petition, the appellant-Insurance Company has filed a counter affidavit contending that the accident had occurred only due to the reckless act of the deceased and the quantum of compensation claimed by the claimants is highly excessive and without any basis.

4.Before the Tribunal, the wife of the deceased, the first respondent herein was examined as P.W.1, Johnkennadi was examined as P.W.2, Francis was examined as P.W.3 and Manikandan was examined as P.W.4 and Exs.P1 to Ex.P14 were marked. On the side of the appellant, one Senthilkumar was examined as R.W.1 and Exs.R1 and R2 were marked.

5.The Tribunal, after considering the oral and documentary evidences, held that the accident occurred due to the rash and negligent driving of the driver of the fifth respondent/first respondent and that the deceased died on the spot. The Tribunal further held that the appellant/Insurance Company is liable to pay compensation to the claimants and had awarded a total compensation of Rs.29,47,580/- under various heads.

6.Heard the learned counsel appearing on either side and perused the materials available on record.

7.The learned counsel appearing for the appellant/Insurance Company would argue that the deceased, who was riding a two wheeler, did not wear a helmet and also did not follow the road Rules, because of which, the accident had occurred. It is pointedly argued by the learned counsel for the appellant that when it is mandatory to wear a helmet while riding a two-wheeler, the deceased had neglected the same and was not wearing the helmet. Hence, the death was caused due to the head injury. It was stated that if he had worn the helmet, his life would have been saved and prayed that atleast 10% of contributory negligence should be attributed to the deceased. In this regard, the learned counsel appearing for the appellant placed his reliance in ***A.Chitra and others Vs. G.A.Sivakumar and others*** reported in ***2017 (1)TNMAC 423,*** wherein, in paragraph No.7, it is stated as follows:-

> "7.*However, as rightly pointed out by Mr.K.Bhaskaran, learned counsel for the second respondent, the deceased rider was not wearing helmet at the time of accident. Therefore, contributory negligence has to be fixed. Section 128 of the Motor Vehicles Act mandates wearing of hit-wear/helmet and the rider shall wear Helmet. It is not the case of the claimants that the rider was wearing helmet as per Section 129 of the Motor Vehicles Act, 1988. Therefore, 15% contributory negligence has to be fixed on the deceased driver."*

8.However, the learned counsel appearing for the respondents 1 to 4/claimants pointed out that as per Ex.P.13, which is the rough sketch showing the accident, Bodi to Chinnamanur Main Road was a single lane road running from North to South, on the right side of the road, on the Eastern side there is a stream. The deceased was proceeding from North to South and the offending vehicle was moving from South to North. The accident spot has been marked in the above sketch as Ex.P.13. Pointing out the same, the learned counsel for the respondents 1 to 4 argued that it was the driver of the offending vehicle, who had moved to the extreme right side of the road when he has to be on the left side when travelling towards North. Thus, the driver of the offending vehicle had driven the Van in a rash and negligent manner and hit the two wheeler and in the impact, the deceased was thrown out of the vehicle and died of head injury on the spot.

9.Even though in the First Information Report also, it is mentioned that the deceased was not wearing a helmet, unless it is proved that the death was caused due to the non-wearing of the helmet, it cannot be said that the deceased contributed to his own death. There is no reason given as to why the Van was driven to the extreme right of the road and hit the right side handle bar of the two wheeler causing imbalance to the rider, which resulted in the fatal accident. Therefore, as rightly held by the Tribunal, contributory negligence cannot be applied mechanically without sufficient evidence and the same has to be proved beyond doubt. Admittedly, the driver of the Van has not been examined on the side of the appellant and the fifth respondent. Hence, the argument of the learned counsel for the appellant that the deceased had contributed to the negligence and the compensation awarded has to be reduced to a certain percentage does not find merit.

10.Sofar as quantum of compensation awarded by the Tribunal is concerned, it is not in dispute that the appellant-Insurance Company is liable to pay any compensation.

11.The learned counsel for the appellant argued that in order to prove the monthly earning of the deceased, Ex.P.11 was produced, which was the salary certificate issued by the owner of the bore-well machine operator by one Francis. The deceased was employed with him on a daily wage basis. The said E.xP.11-salary certificate was marked through his employer, who has been examined as P.W.3. Even otherwise, the person maintaining his mother, wife and two children should be earning atleast Rs.24,000/- per month to maintain the family, but the Tribunal did not take the income as mentioned in Ex.P.11 and had taken a notional income of Rs.15,000/- per month. The deceased was 41 years at the time of accident. Therefore, proceeding from there, the claimants were entitled to future prospects of 25% which makes the monthly income of the deceased as Rs.18,750/- and $1/4^{th}$ of the same was deducted for the personal and living expenses, it comes to Rs.14,063/- (Rs.18,750-Rs.4,687/-). As per the decision of the Hon'ble Supreme Court in ***National Insurance Company Limited v. Pranay Sethi and Others*** reported in ***2018(1)* LW 3331**, the multiplier adoptable is '14'. Hence, the loss of dependency is worked at Rs.23,62,584/- (Rs.14,065/- X 12 X 14).

12.Insofar as the other heads viz., Transportation-Rs.5,000/-, funeral expenses-Rs.15,000/-, loss of consortium of the first claimant-Rs.40,000/- and loss of love and affection to minor claimants 2 and 3-Rs.40,000/- each and loss of estate-Rs.15,000/-, are not disputed and the same stands confirmed.

13.Insofar as the loss of love and affection to the fourth claimant, who is the mother of the deceased, is to be increased from Rs.30,000/- to Rs.40,000/- and insofar as the maintenance of minor claimants 2 and 3 till they attain majority, the Tribunal had awarded a sum of Rs.2,00,000/- each which is not permissible, in view of ***Pranay Sethi's case*** (cited supra) and the said amount has to be deducted. Therefore, including the loss of dependency viz., Rs.23,62,584/-, the total amount payable by the appellant would be Rs.25,57,584/- and the claimants are entitled to a sum of Rs.25,57,584/-as total compensation.

14.Accordingly, the Award of 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.	Transportation for taking the body	5,000/-	5,000/-	confirmed
2.	Funeral expenses	15,000	15,000/-	Confirmed
3.	Loss of consortium of the first respondent	40,000/-	40,000/-	Confirmed
4.	Loss of love and affection to minor respondents 2 and 3	80,000/- (40,000 X 2)	80,000	confirmed
5.	Loss of love and affection to the fourth respondent	30,000	40,000	enhanced
6.	Maintenance of minor respondents 2 and 3 till they attain majority	4,00,000/- (2,00,000/- X 2)	-----	Not awarded
7.	Loss of estate	15,000/-	15,000/-	confirmed
8.	Loss of dependency	23,62,584/-	23,62,584/-	confirmed
8.	Total	Rs.29,47,580/-	Rs.25,57,584/-	Reduced by Rs.3,89,996/-

15.In the result, the Civil Miscellaneous Appeal is allowed in part as follows:-

(i) The Award of the Tribunal is reduced to Rs.25,57,584/- from Rs.29,47,580/-.

(ii) The interest granted by the Tribunal at 7.5% per annum is confirmed.

(iii) The Award amount is apportioned as per the ratio of apportionment made by the Tribunal.

(iv) The learned counsel appearing for the appellant-Insurance Company submitted that the award amount has not been deposited before the Tribunal. Hence, the appellant-Insurance Company is directed to deposit the award amount to the credit of claim petition, less the amount already deposited, if any, within a period of four weeks from the date of receipt of a copy of this order.

(v) The respondents 1 and 4/claimants 1 and 4 are permitted to withdraw their share in the award amount with proportionate accrued interest and costs. The share of the minor claimants/respondents 2 and 3 are permitted to be kept in any of the Nationalised Bank till they attain majority and the guardian/first respondent is permitted to withdraw the interest amount once in three months and utilize the same for the welfare of the minor children.

No costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-

Assistant Registrar(CS-I)

// True Copy //

/ /2021

Sub Assistant Registrar(CS)

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Note :

In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the advocate / litigant concerned.

To

1.The Motor Accident Claims Tribunal/Additional District Court, Theni.

2.The V.R Section (Records), Madurai Bench of Madras High Court, Madurai(2 copies).

+1 CC to M/s.ANANTH.C.RAJESH, Advocate SR-5569[F] dated 17/02/2021
+1 CC to M/s.V.SAKTHIVEL, Advocate (SR-5821[F] dated 18/02/2021)

C.M.A(MD)No.434 of 2020
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