BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Date of Reservation	21.03.2021
Date of Judgment	08.07.2021

CORAM

THE HONOURABLE MRS.JUSTICE T.KRISHNAVALLI

C.M.A(MD)Nos.1115 and 1170 of 2018
and
CMP(MD)No.11335 of 2018
in CMA(MD).No.1115/2018

(1)CMA(MD)No.1115 of 2018:-

The Oriental Insurance Company Limited,
rep. by its Divisional Manager,
No.16, K.J.R Complex,
Motor Third Party Claims Hub,
North Veli Street,
Madurai District. : Appellant/2nd Respondent

Vs.

1.Muthumeenal @ Muthumeena
2.Minor Maragatham
3.Minor Gayathri
4.Minor Gokul : R1 to R4/Claimants 1 to 4
(Minors respondents 2 to 4 are represented through their mother and natural guardian 1st respondent Muthumeenal @ Muthumeena)

Muthirulan (Died)

5.Sathayee : R5/6th Claimant
6.Sundararasu : R6/1st Respondent
(6th respondent remained exparte before the lower court)
7.The Oriental Insurance Company Limited,
Rep. by its Branch Manager,
Ilayankudi,
(Given up) : R7/3rd Respondent

PRAYER:- Civil Miscellaneous Appeal has been filed under Section 173 of the Motor Vehicles Act, 1988 against the award passed by the Motor Accident Claims Tribunal (VI Additional District Judge), Madurai, in MCOP No.2275 of 2015, dated 14.06.2018.

For Appellant : Mr.K.Bhaskaran
For R1 to R4 : Mr.K.Kumaravel
For 5th Respondent : Dismissed, vide order, Dated 26.06.2019
For 6th Respondent : Mr.S.T.Sasidharan Tamilkani
For 7th Respondent : Given up

(2)CMA(MD)No.1170 of 2018:-

1.Muthumeenal @ Muthumeena
2.Minor Maragatham
3.Minor Gayathri
4.Minor Gokul
(Minors Appellants 2 to 4 are represented through their mother and natural guardian 1st appellant Muthumeenal @ Muthumeena)
Muthirulan (Died)
5.Mrs.Sathayee : Appellants/Claimants 1 to 4, 6

Vs.

1.Sundararasu

2.The Divisional Manager,
The Oriental Insurance Company Limited,
No.16, K.J.R Complex,
Motor Third Party Claims Hub,
North Veli Street,
Madurai District.
3.The Branch Manager,
The Oriental Insurance Company Limited,
Elayangudi,
Sivagangai District. : Respondent/Respondents

PRAYER:- Civil Miscellaneous Appeals have been filed under Section 173 of the Motor Vehicles Act, 1988 against the award passed by the Motor Accident Claims Tribunal (VI Additional District Judge), Madurai, in MCOP No.2275 of 2015, dated 14.06.2018, seeking enhancement of compensation.

For Appellants : Mr.K.Kumaravel
For 1st Respondent: Mr.S.T.Sasitharan Tamilkani
For R2 and R3 : Mr.K.Bhaskaran

COMMON JUDGMENT

CMA(MD)No.1115 of 2018 filed by the Oriental Insurance Company challenging the award passed by the Motor Accident Claims Tribunal (VI Additional District Judge), Madurai, in MCOP No.2275 of 2015, dated 14.06.2018, whereas CMA(MD)No.1170 of 2018 filed by the claimants seeking enhancement of compensation.

2.The short facts of the case is that on 12.06.2014 at about 13.45 hours, the deceased Chandran @ Ramachandran was riding the two wheeler TN-63-H-6796 on Vijayankudi Village Road in Manamadurai to Ilayankudi Main Road and when he was nearing Therkku Vaikkal Eighth Madai, at that time, another two wheeler TN-63-AF-3489 came in a rash and negligent manner and dashed against the deceased vehicle and due to it, the deceased sustained grievous head injuries and died on the same day itself. The legal heirs of the deceased filed a claim petition seeking compensation of Rs.50,00,000/- on the ground that the driver of the offending vehicle caused the accident.

3.The claimants have stated that the deceased was 43 years at the time of accident and he was working as 'Production Operator' in Pre-Circuit Technology Corporation SDN BHD, Malaysia, thereby he was earning Rs.6,00,000/- per annum. It is alleged that the said Chandran @ Ramachandran died only due to the negligence on the part of the driver of the offending vehicle.

4.In the counter filed by the Oriental Insurance Company, they disputed the manner of accident and their liability to pay compensation.

5.Before the tribunal, on the side of the claimants, 2 witnesses were examined and marked 26 documents. On the side of the Insurance Company, 4 witnesses were examined and 7 documents were marked.

6.The Tribunal, on consideration of oral and documentary evidence adduced by the parties, came to the conclusion that the driver of both the two wheelers, was responsible for the accident and awarded compensation of **Rs.14,59,450/-** together with interest @ 7.5% p.a, by fixing the negligence at 60% on the side of the offending vehicle and 40% on the side of the deceased and directed the Insurance Company to pay the award amount and then recover the same from the owner of the offending vehicle. Aggrieved by the award of the tribunal, the Insurance Company and the claimants are before this court.

7.Heard both sides and perused the materials available on record.

8.The first contention of the learned counsel appearing for the Insurance Company is that at the time of accident, the deceased consumed alcohol and hence, the accident had occurred due to the rash and negligent driving of the deceased and not due to the rash and negligent driving of the offending vehicle and hence, the entire negligence can be fixed on the deceased and prays that the Civil

Miscellaneous Appeal has to be allowed.

9.On the other hand, the learned counsel appearing for the claimants submitted that at the time of accident, the deceased was not in drunken mood and in the AR copy of the injured, it was shown that at the time of autopsy, the Doctor found breach of alcohol from the deceased and hence, only due to the rash and negligent driving of the offending vehicle driver, the accident occurred and even though in Ex.R5 AR copy, it was stated that breach of alcohol smell from the deceased and to find out whether the deceased consumed alcohol no urine or blood was conducted and hence, it was not proved that at the time of accident, the deceased consumed alcohol and hence, there was no negligence on the part of the deceased and prays that the CMA(MD)No.1170 of 2018 has to be allowed.

10.In this case, to prove that at the time of accident, the deceased was in intoxicant mood, on the side of the Insurance Company, steps were taken to examine the Doctor, who gave treatment to the deceased. But the alleged Doctor did not appear before the Court. However, the AR copy was produced and marked as Ex.X5.

11.On perusal of Ex.X5, it is stated that *"the alleged road traffic accident took place near Vijayankudi. Travelled in two wheeler on 12.06.2014 at 1.45 p.m.* பைக்கில் வந்தவர் இருவரும் இழத்துக் கொண்டதாக தகவல். *Patient unconscious. Not oriented. Breath smell of alcohol."* In this case, the Doctor, who examined the injured was not requested to find out whether the injured consumed alcohol by way of doing urine and blood test. Further, perusal of Ex.X5, there was no endorsement to the effect that no blood or urine test was done to find out the intoxication of the injured.

12.Further, on perusal of Ex.P3, Postmortem Certificate, it was not stated that alcohol was found in the stomach of the deceased. At this juncture, it is significant to refer the decision reported in **2017 ACJ 114 (Oriental Insurance Company Limited Vs. Vineetha Nair and others)**, wherein it has been held in para 10 as follows:-

> *"10.Now, the next point raised before us by the insurance company is regarding the non-consideration of the specific contention taken by the insurance company founded on the principle of volenti non fit injuria. It is true that the principles of volenti non fit injuria can be taken as a defence even in a liability arising on the strict liability principle developed from the good old case-law in Rylands Vs. Fletcher. (1868)LR 3 HL 330, much less to say, in a claim under the Motor Vehicles Act. The positive case of the insurance company is that the deceased driver of the car was under the influence of alcohol. Exh.A7 is the postmortem certificate of Govind G Nair. We*

> *perused the said document. It can be seen that there is nothing therein to show that he had consumed alcohol. Exn.B2 is the copy of the post-mortem certificate of the deceased driver. It is stated therein that the stomach contained clear fluid having alcoholic smell. On because there is alcoholic smell, it cannot be held that he was under the influence of alcohol. Even in a prosecution under section 185 of the Motor Vehicles Act there should be a clear allegation to the effect that the alcohol content is 30 mg per 100 ml of blood. Considering all these aspects and also keeping in mind the fact that only because the driver of the car was found to have consumed alcohol, by no stretch of imagination can it be said that the co-passenger will not be entitled for compensation."*

13.On perusal of the above ruling, it reveals that when the Insurance Company took a defence that the deceased consumed alcohol, the consumption of alcohol must be proved by way of blood and urine test. In this case, the above procedure was not followed. It is to be noted that mere mentioning of breach of smell in the AR copy will not amounts to hold that at the time of accident, the deceased was in intoxication mood. Hence, the argument put forth on the side of the appellant Insurance Company/2nd respondent in CMA(MD)No.1115 of 2018 stating that the deceased was in intoxicate mood, is not at all acceptable. But on perusal of the Ex.X2 Rough Sketch, it is seen that the accident occurred in the middle of the road. Hence, it shows composite negligence on the part of the rider of both the two wheelers.

14.In respect of the accident, FIR was registered as against the 6th respondent/1st respondent in CMA(MD)No.1115 of 2018. He is the owner-cum-rider of the offending vehicle. The driver-cum-owner was examined as RW1. RW1 is the owner of the two wheeler TN-63-AF-3487 XL SUPER. RW1 during his cross examination admitted that at the time of accident, he has no valid driving licence to drive his two wheeler. In respect of the accident, the criminal case was registered as against RW1 Sundararasu. It is to be noted here that RW1 has not given any complaint to the police stating that only due to the negligence on the part of the deceased, the accident occurred. Further, he has not sent any petition to the superior police officials, objecting registration of the FIR against him. Hence, RW1 has no right to question the registration of FIR against him at this stage.

15.The learned counsel appearing for the Insurance Company vehemently argued that the deceased drove his vehicle in a drunken mood and hence, the entire negligence can be fixed on the deceased and not on RW1. But on perusal of the Ex.X2, rough sketch, it reveals that the accident occurred in the middle of the road. Hence, it shows that the accident occurred due to the composite negligence on the part of riders of both two wheelers, one belonged to the deceased and another belonged to RW1. Already, it was decided that it was not proved on the side of the Insurance Company that the deceased was in drunken mood at the time of accident.

16.On careful perusal of the evidence of PW1, RW1 and Ex.X2, it reveals that the accident occurred due to composite negligence on the part of the riders of both two wheelers I.e., the deceased and RW1. But the tribunal has wrongly come to the conclusion that that at the time of accident, the deceased was in drunken mood and without any basis, fixed the negligence on the part of the deceased and RW1 at the ratio of 40: 60. But this court found that as per Ex.X2, the accident occurred in the middle of the road. Hence, the negligence is fixed at the ratio of 50:50 on the part of the deceased and RW1, the rider of the offending vehicle.

17.It is not in dispute that at the time of accident, the deceased was 43 years. Based on the evidence, the tribunal has rightly fixed the income of the deceased at Rs.15,000/- per month. It is settled law that in case the deceased was self-employed or on a fixed salary, an addition of 25% of the established income should be the warrant where the deceased was between age of 40-50 years. Hence, this court is of the considered view that 25% has to be added towards future prospects to calculate the income of the deceased, as per the decision of the Hon'ble Supreme Court reported in **2017 (6) CTC 493 *(National Insurance Company Limited vs. Pranay Sethi and others)*.** By doing so, the monthly loss of income of the deceased is calculated at Rs.18,750/- (Rs.15,000/- + Rs.3,750/-). After deducting 1/4th towards his personal and living expenses and thereby the monthly income is arrived at Rs.14,062/- (Rs.18,750/- Less Rs.4,687/-). By applying proper multipler '14', this court awards **Rs.23,62,416/-** (Rs.14,062/- x 12 x 14) towards loss of income. In addition to that, under the conventional heads, as per the decisions in **Pranay Sethi's case and Magma General Insurance's case**, this Court awards Rs.40,000/- towards loss of consortium to the 1st claimant; Rs.40,000/- each to the claimants 2 to 5; Rs.15,000/- towards loss of estate and Rs.15,000/- towards funeral expenses, totalling Rs.25,92,416/-. As this court fixed the negligence at 50% on the side of the driver of the offending vehicle and 50% on the side of the deceased, the claimants would be entitled to **Rs.12,96,208/-** together with interest @ 7.5% p.a.

18.In the result, these Civil Miscellaneous Appeals are disposed of. The negligence is fixed at 50% on the part of the driver of the offending vehicle and 50% on the part of the deceased, who is the rider of the two wheeler. The award of the tribunal is reduced to **Rs.12,96,208/-** from Rs.14,59,450/-. The Appellant

Insurance Company is directed to deposit the modified award amount together with interest @ 7.5% p.a. from the date of claim petition till the date of deposit, less the amount already deposited, within a period of six weeks from the date of receipt of a copy of this judgment. On such compliance, the 1st appellant/1st claimant is entitled to withdraw Rs.5,39,658/- and the the 5th appellant/6th claimant is entitled to withdraw Rs.1,00,000/- together with accrued interest and costs, without filing any formal petition before the trial court. The minor claimants 2 to 4 are each entitled to Rs.2,18,850/- together with accrued interest and cost. The share of the minor claimants 2 to 4 shall be deposited in any one of the Nationalized Bank on a fixed deposit scheme, till they attained majority. The 1st claimant, being the mother and guardian of the minors is entitled to withdraw the interest accrued on the fixed deposit once in three months for the welfare of the minors. Excess amount, if any, the Oriental Insurance Company is at liberty to get back the same from the tribunal by filing necessary application. No costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-

Assistant Registrar (CO)

// True Copy //

/ /2021

Sub Assistant Registrar(CS)

er

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/
The Additional District Judge,
Madurai.

2.The Record Keeper,(2C)
VR Section,
Madurai Bench of Madras High Court,
Madurai.

+1 CC to M/s.K.KUMARAVEL, Advocate (SR-21678[F] dated 08/07/2021)

+1 CC to M/s.S.T.SASITHARAN TAMILKANI, Advocate (SR-21790[F] dated 08/07/2021)

+1 CC to M/s.K.BHASKARAN, Advocate (SR-21824[F] dated 09/07/2021)

CMA(MD)Nos.1170 and 1115 of 2018
08.07.2021

SE(CO)
KB(02.09.2021) 8P 7C