IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 21.06.2022

CORAM:

THE HONOURABLE **MS.JUSTICE V.M.VELUMANI**
and
THE HONOURABLE **MR.JUSTICE S.SOUNTHAR**

C.M.A.No.2696 of 2021
and C.M.P.No.15481 of 2021

The Branch Manager
The New India Assurance Company Limited
Krishnagiri – 635 001. ... Appellant

Vs.

1.Unnamalai

2.Murugamma

3.C.Sadiq Basha ... Respondents

Prayer: This Civil Miscellaneous Appeal is filed under Section 173 of Motor Vehicles Act, 1988, against the judgment and decree dated 07.11.2020 made in M.C.O.P.No.209 of 2019 on the file of Motor Accident Claims Tribunal, Special District Court, Krishnagiri.

For Appellant : Mr.K.Vinod

For R1 and R2 : Mr.SP.Yuaraj

For R3 : No appearance

J U D G M E N T

(Judgment of the Court was delivered by V.M.VELUMANI,J.)

This Civil Miscellaneous Appeal has been filed by the appellant/Insurance Company against the judgment and decree dated 07.11.2020 made in M.C.O.P.No.209 of 2019 on the file of Motor Accident Claims Tribunal, Special District Court, Krishnagiri.

2.The appellant/Insurance Company is the 2nd respondent in M.C.O.P.No.209 of 2019 on the file of Motor Accident Claims Tribunal, Special District Court, Krishnagiri. The respondents 1 and 2 filed the said claim petition claiming a sum of Rs.50,00,000/- as compensation for the death of one C.Mariyappan, who died in the accident that took place on 26.08.2016.

3.According to the respondents 1 and 2, on the date of accident i.e., on 26.08.2016 at about 19.50 hours, while the deceased Mariyappan was riding in his TVS star city motorcycle bearing Registration No.TN 70 H 8734 in Kelamangalam to Denkanikottai Road towards Peramandapatti i.e., from North to South direction, on the left hand side of the road, near Rajalakshmi Theatre and Pappannam Coconut mandy, the driver of the lorry belonging to the 3rd respondent bearing Registration No.TN 24 AE 5252, who was coming from coconut mandy, suddenly entered into the main road, drove the same in a rash and negligent manner, dashed against the motorcycle driven by the said Mariyappan on the left hand side and caused the accident. In the accident, the deceased Mariyappan sustained injuries and in spite of treatment given, he died in the hospital. Therefore, the respondents 1 and 2, mother and sister of the deceased Mariyappan filed the above claim petition claiming compensation for his death against the 3rd respondent, owner of the lorry and appellant/Insurance Company, insurer of the said lorry.

4.The 3rd respondent, owner of the lorry filed counter statement and denied the averments made in the claim petition and stated that driver of the lorry belonging to the 3rd respondent drove the same with due care and caution. The deceased Mariyappan alone rode the motorcycle without observing the rules, proceeded before the lorry and invited the accident. The deceased Mariyappan did not possess valid driving license at the time of accident. The driver of the lorry possessed valid driving license at the time of accident and therefore, the appellant/Insurance Company is liable to indemnify the 3rd respondent as the lorry is insured with them. In any event, the compensation claimed by the respondents 1 and 2 is excessive and prayed for dismissal of the claim petition.

5.The appellant/Insurance Company filed counter statement denying the averments made in the claim petition and stated that the driver of the lorry belonging to the 3rd respondent does not possess valid driving license to drive the vehicle, valid Fitness Certificate and Permit at the time of accident. The deceased Mariyappan, knowing fully well that the lorry was already proceeding before him in the main road, rode the motorcycle in a rash and negligent manner and invited the accident. The deceased did not wear helmet at the time of accident, which is in violation of policy condition and contributory negligence has to be fixed on the deceased. The appellant/Insurance Company has also denied the age, avocation and income of the deceased. In any event, the compensation claimed by the respondents 1 and 2 is excessive and prayed for dismissal of the claim petition.

6.Before the Tribunal, the 1st respondent, mother of the deceased, examined herself as P.W.1, one Gowran, eye-witness to the accident was examined as P.W.2 and one Muthu, Proprietor, Shri Amman Engineering Works, employer of the deceased, was examined as P.W.3 and 13 documents were marked as Exs.P1 to P13. The appellant/Insurance Company did not let in any oral and documentary evidence.

7.The Tribunal considering the pleadings, oral and documentary evidence, held that the accident occurred due to rash and negligent driving by the driver of the lorry belonging to the 3rd respondent, fixed 90% negligence on the part of driver of the lorry and 10% contributory negligence on the part of deceased, as he did not possess valid driving license at the time of accident, arrived at a sum of Rs.40,21,200/- as compensation to the respondents 1 & 2 and directed the appellant/Insurance Company being insurer of the said lorry to pay a sum of Rs.36,19,080/- being 90% of the award amount as compensation to the respondents 1 and 2.

8.Against the said award dated 07.11.2020 made in M.C.O.P.No.209 of 2019, the appellant/Insurance Company has come out with the present appeal.

9.The learned counsel appearing for the appellant/Insurance Company contended that the deceased Mariyappan, knowing fully well that the Lorry was already proceeding before him in the main road, rode the motorcycle in a rash and negligent manner and invited the accident. The Tribunal ought to have fixed entire negligence on the deceased. The Tribunal failed to appreciate that the deceased did not wear helmet and did not possess valid driving license at the time of accident and erred in fixing only 10% negligence on the part of the deceased. The deceased died due to head injury. He did not wear helmet at the time of accident. Had the deceased used helmet while riding the motorcycle, it would have reduced the impact of the accident. The learned counsel further contended that except marking of Ex.P3/salary certificate of the deceased, the respondents 1 and 2 did not file any documents to prove the avocation and income of the deceased. In the absence of any valid documents such as attendance register, wage register or bank statement, with regard to avocation and income of the deceased, the monthly income of Rs.19,500/- fixed by the Tribunal is excessive. The deceased died as a bachelor and the Tribunal ought to have deducted 50% instead of 1/3rd towards personal expenses. The amounts awarded by the Tribunal under different heads are excessive and prayed for setting aside the award of the Tribunal.

10.In support of his contentions, the learned counsel appearing for the appellant relied on the judgment reported in **2021 (2) TNMAC 681 [Panneerselvam @ Panneer and another vs. Two Distribution and another),** wherein it has been held as follows:

> "14. .. .. We also conclude that in the given circumstance, the extent of contribution of the Driver of the Car appears to be less. At the same time, major portion of the contribution to the accident is on the part of the deceased. This is more so that the deceased did not wear

helmet at the time of accident. Further, on the date of accident, the deceased was a minor and not in possession of a Driving License to drive the Two-wheeler. Therefore, it is appropriate to fix 25% liability of the part of the Driver of the Car and 75% on the part of the deceased himself. ”

11.Per contra, the learned counsel appearing for the respondents 1 and 2 contended that the accident has occurred only due to rash and negligent driving by the driver of the lorry belonging to the 3rd respondent. The respondents 1 and 2 examined the eye-witness to the accident as P.W.2 and marked the F.I.R., which was registered against the driver of the lorry as Ex.P1 and proved the negligence on the part of the driver of lorry. The learned counsel further contended that the deceased was working as Welder in Shri Amman Engineering Works, Hosur and also was doing flower business and was earning a sum of Rs.25,000/- per month. The respondents 1 and 2 examined the Proprietor of the deceased company as P.W.3, marked the salary certificate as Ex.P3 and proved the avocation and income of the deceased. The total compensation awarded by the Tribunal is not excessive and prayed for dismissal of the appeal.

12.Though notice has been served on the 3rd respondent and his name is printed in the cause list, there is no representation for him either in person or through counsel.

13.Heard the learned counsel appearing for the appellant as well as the learned counsel appearing for the respondents 1 and 2 and perused the entire materials on record.

14.It is the case of the respondents 1 and 2 that the deceased Mariyappan was riding his two wheeler on the left hand side of the road, at that time, the driver of the lorry belonging to the 1st respondent drove the same in a rash and negligent manner, suddenly entered into the main road, dashed against the motorcycle on its left side and caused the accident. In the accident, said Mariappan sustained injuries and died. To substantiate their contention, the 1st respondent examined herself as P.W.1 and one Gowran, eye-witness to the accident, was examined as P.W.2 and marked F.I.R., which was registered against the driver of the lorry as Ex.P1. P.W.2 deposed that accident has occurred only due to rash and negligent driving by the driver of the lorry belonging to the 3rd respondent. On the other hand, it is the case of the appellant/Insurance Company that driver of the lorry was not negligent and not responsible for the accident. The deceased alone rode the motorcycle in a rash and negligent manner, dashed on the lorry and invited the accident. At the time of accident, the deceased did not wear helmet and did not possess valid driving license and entire negligence has to be fixed on the deceased. The appellant has not let in any evidence or mark any document to substantiate their case. They have not given any complaint against the deceased. The Tribunal considering Ex.P1 and uncontroverted evidence of P.W.2, held that the accident occurred due to rash and negligent driving by the driver of the lorry. Further, it is the case of the appellant that deceased was not having driving license and did not wear helmet at the time of accident. The respondents 1 and 2 did not deny that deceased was not wearing helmet at the time of accident. The Tribunal considering the fact that deceased did not possess driving license at the time of accident, fixed 10% contributory negligence on the deceased. Contributory negligence cannot be fixed on the part of the deceased for not possessing driving license alone. It must be proved by acceptable evidence that the deceased or injured person contributed to the accident. On the failure of the appellant to prove that deceased was also negligent and responsible for the accident, 10% contributory negligence fixed on the deceased for not possessing driving license on the deceased is set aside. At the same time, it is the statutory duty on the part of the rider of two wheeler to wear helmet in order to avoid serious head injury, which in most cases result in death of rider or pillion rider of the motorcycle. The Tribunal held that accident occurred due to negligence of lorry driver. Having held so, fixed 10% negligence on the deceased for not possessing driving license. We have set aside that portion of the award. In view of not wearing helmet by the deceased at the time of accident, 10% contributory negligence is fixed on the deceased. The award of the Tribunal fixing 90% of the liability on the appellant and directing the appellant to pay 90% of the award amount is not interfered with.

15.As far as quantum of compensation is concerned, it is the case of the respondents 1 and 2 that deceased was aged 23 years at the time of accident, he was working as Welder in Shri Amman Engineering Works at Hosur and was also helping his mother in flower vending business as part time job and was earning a sum of Rs.25,000/- per month. To substantiate their case, the appellant examined one Muthu, Proprietor of Shri Amman Engineering Works at Hosur as P.W.3 and marked Ex.P3/salary certificate. P.W.3 deposed that the deceased was working as Welder in his workshop and was paid Rs.650/- per day. P.W.3 did not produce any document to show that deceased was working in his workshop in all 30 days or 25 days in a month. The deceased was only a daily wager and being a welder, he would not have worked in all 30 days or 25 days in a month. The Tribunal taking into consideration Ex.P3/salary certificate, fixed a sum of Rs.19,500/- (Rs.650/- X 30) as monthly income of the deceased. In the interest of justice, we are of the considered opinion that monthly income fixed by the Tribunal is excessive and it would be just and proper to hold that the deceased would have worked for 20 days in a month and earned Rs.650/- for 20 days i.e. Rs.13,000/- per month (Rs.650/- X 20). The deceased was aged 23 years at the time of accident as per Ex.P2/Post-mortem certificate. The Tribunal, following the judgments of the Hon'ble Apex Court reported in **2017 (2) TN MAC 609 (SC) [National Insurance Co. Ltd., Vs. Pranay Sethi and others]** and **2009 (2) TNMAC 1 SC (Sarla Verma and others vs. Delhi Transport**

Corporation and another), has rightly granted 40% enhancement towards future prospects and applied multiplier '18'. The deceased died as a bachelor at the time of accident. The Tribunal erroneously deducted 1/3rd towards personal expenses. As per the judgment of the Hon'ble Apex Court reported in **2009 (2) TNMAC 1 SC** cited supra, the Tribunal ought to have deducted 50% towards personal expenses. By fixing Rs.13,000/- per month as notional income of the deceased and deducting 50% towards personal expenses, the amount awarded by the Tribunal towards loss of dependancy is modified to Rs.19,65,600/- (Rs.13,000/- + 5200 (Rs.13,000/- X 40%) X 12 X 18 X 1/2). The amounts awarded by the Tribunal under all other heads are just and reasonable and hence, the same are hereby confirmed. 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 or reduced
1.	Loss of dependency	39,31,200	19,65,600	Reduced
2.	Loss of estate	15,000	15,000	Confirmed
3.	Funeral expenses	15,000	15,000	Confirmed

4.	Parental consortium to the 1st respondent	40,000	40,000	Confirmed
5.	Loss of love and affection to the 2nd respondent	20,000	20,000	Confirmed
	Total **90% of the award amount**	**40,21,200** **36,19,080**	**20,55,600** **18,50,040**	**Reduced by Rs.17,69,040/-**

16.With the above modification, the Civil Miscellaneous Appeal is partly allowed. The compensation of Rs.36,19,080/- granted by the Tribunal is hereby reduced to Rs.18,50,040/- together with interest at the rate of 7.5% per annum (excluding the default period, if any) from the date of petition till the date of deposit. The appellant/Insurance Company is directed to deposit the award amount now determined by this Court along with interest and costs, less the amount already deposited if any, within a period of six weeks from the date of receipt of a copy of this judgment. On such deposit, the respondents 1 and 2 are permitted to withdraw their respective share of the award amount, as per the apportionment fixed by the Tribunal, along with proportionate interest and costs, after adjusting the amount if any, already withdrawn. The appellant/Insurance Company is permitted to withdraw the excess amount lying in the deposit to the credit of M.C.O.P.No.209 of 2019 on the file of Motor Accident Claims Tribunal, Special District Court, Krishnagiri, if the entire award amount has already been deposited by them. Consequently, connected Miscellaneous Petition is closed. No costs.

(V.M.V., J) **(S.S., J)**
21.06.2022

Index : Yes / No
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To

1.The Special District Judge
Motor Accident Claims Tribunal
Krishnagiri.

2.The Section Officer
VR Section
High Court
Madras.

V.M.VELUMANI,J.
and
S.SOUNTHAR,J.

kj

C.M.A.No.2696 of 2021
and C.M.P.No.15481 of 2021

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