



C.M.A(MD)No.239 of 2021

WEB COPY BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 17.10.2022

Pronounced on : 13.12.2022

CORAM

THE HONOURABLE MR.JUSTICE K.MURALI SHANKAR

C.M.A(MD)No.239 of 2021

and

C.M.P.(MD)No.2024 of 2021

United India Insurance Company Limited,
Rep.by its Manager,
(Third Party Hub)
Door No.74, North Veli Street,
Madurai, Madurai District.

: Appellant/2nd Respondent

Vs.

1.M.Sithik Sabitha Begum

2.S.Mohamed Rafiq : Respondents 1 & 2 /Petitioners 1 & 2

3.Jeevana School,
Represented through its Transport Manager,
Ponmeni, Jayanagar,
Madurai - 625 010. : 3rd Respondent/1st Respondent

PRAYER:- Civil Miscellaneous Appeal filed under Section 173 of the Motor Vehicles Act, 1988, challenging the judgment and decree, dated 31.01.2020 passed in M.C.O.P.No.423 of 2018 on the file of the Motor Accident Claims Tribunal and VI Additional District Court, Madurai.



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For Appellants : Mr.I.Suthakaran
For Respondents : Mr.C.Godwin, for R1 and R2
: No Appearance, for R3.

J U D G M E N T

The Civil Miscellaneous Appeal is directed against the award passed in M.C.O.P.No.423 of 2018, dated 31.01.2020, on the file of the Motor Accident Claims Tribunal/ VI Additional District Court, Madurai.

2. The appellant/insurer, who was made liable to pay compensation of Rs.21,52,500/- with interest at 7.5% per annum and costs to the respondents 1 and 2/claimants for the death of one Mohamed Salik, consequent to an accident occurred on 22.11.2017, challenged the liability mulcted on it and the quantum of compensation awarded at by the Tribunal.

3. The case of the claimants is that on 22.11.2017, at about 04.00 pm, the deceased Mohamed Salik was travelling as a pillion rider in a motor cycle bearing Registration No.TN-58-H-7383, driven by one Shiek Ibrahim Ali, from west to east in TPK road and while coming down towards eastern side of the Thevar bridge, a school van bearing Registration No.TN-37-



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AK-7005, which was proceeding in front of the motor cycle in a rash and negligent manner and without giving any signal, turned towards south of the TPK road so as to enter into the service road, adjacent to the Thevar bridge; that due to sudden turn of the van, the motor cycle dashed against the right middle side of the van and as a result of which, the rider and the pillion rider sustained severe injuries; that the said Mohamed Salik was immediately taken to Government Rajaji Hospital, Madurai, that the accident was occurred only due to the rash and negligent driving of the van driver and hence, a case was registered against the van driver in Crime No. 205 of 2017 under Sections 279 and 337 of IPC on the file of the Traffic Investigation Wing-I, Madurai City and that subsequently, despite treatment, Mohamed Salik succumbed to the injuries on 24.11.2017 at Government Rajaji Hospital, Madurai.

4. It is the further case of the claimants that the claimants are the parents of the deceased; that the deceased was aged about 18 years and he was hale and healthy at the time of accident; that the deceased was working as juice master in Nainar Juice Corner and was getting Rs.500/- per day. The third respondent/first respondent had remained ex-parte before the Tribunal.



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5. The defence of the appellant/second respondent is that the school van was driven by its driver on the left side of the road at slow speed and after showing the necessary signal, the vehicle was taking a turn to the right to enter into the service road to the right of the bridge; that the rider of the motor cycle in which, the deceased was travelling without wearing the protective headgear, was driving the two wheeler at a high speed and lost control over his vehicle, which skidded and fell down resulting in injuries to the deceased; that the two wheeler rider alone was responsible for the accident and that the van driver was not at fault.

6. During trial, the claimants have examined the second claimant as P.W.1 and three other witnesses Dr. Manikandan, Tmt.Jeyasilin Lionora and Thiru.Chellapandian as P.W.2 to P.W.4 respectively and exhibited 10 documents as Ex.P.1 to Ex.P.10. The insurer has examined the van driver as R.W.1 and exhibited the driving license of the van driver as Ex.R.1

7. The learned trial Judge, upon considering the evidence, both oral and documentary and on hearing the arguments of both the sides, has passed the impugned award, dated 31.01.2020, holding that the first respondent's van driver was responsible for the accident and directed the insurer to pay



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compensation of Rs.21,52,500/- with interest and costs. Aggrieved by the said award, the insurer has come forward with the present appeal.

8. The points that arise for consideration are :

(i) Whether the Tribunal erred in deciding that the van driver was responsible for the accident, despite the facts that the claimants have miserably failed to prove the accident by adducing sufficient evidence and that the insurer had established that the accident was occurred only due to the rash and negligent driving of the two wheeler rider ?

(ii) Whether the Tribunal erred in not fixing the contributory negligence on the part of the deceased, as it was established that the deceased was not wearing protective headgear ?

(iii) Whether the Tribunal erred in fixing the monthly income at Rs.13,700/- in the absence of any legal and acceptable evidence, showing avocation and income of the deceased ?

(iv) Whether the compensation awarded at by the Tribunal is just and proper and is in accordance with law ?

9. The claimants, in order to prove the accident, have examined one Chellapandian alleged to be the occurrence witness as P.W.4. P.W.4 would



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say in his chief examination that he was proceeding in his two wheeler TVS XL from west to east in Thevar bridge, that another two wheeler bearing Registration No.TN-58-H-7383 was proceeding in front of him, that a school van which came behind in a rash and negligent manner, had over taken the two wheeler and without showing any signal turned towards right so as to enter into the service road and at that time, the two wheeler had dashed against the right center portion of the van and that the rider and the pillion rider had sustained injuries.

10. In cross examination, he would say that the accident was occurred while the van was taking 'U' turn, that there was 10 feet gap between the van and the two wheeler at the time of taking 'U' turn; that the front portion of the two wheeler had dashed against the right center portion of the van and as a result, both the rider and the pillion rider fell down, that both of them were not wearing helmets; that there was a gap of 25 feet between his two wheeler and the other two wheeler; that the van has not over taken him, that the van driver by showing his hands had turned towards right side and that if the two wheeler rider on seeing the signal, had stopped the two wheeler, the accident would not have occurred.



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11. As already pointed out, the insurer has examined the van driver as R.W.1 and R.W.1 would say that he was proceeding down in Andalpuram Railway bridge, that he was turning the van towards right side by showing the indicator, that two persons in a two wheeler were proceeding in a rash and negligent manner, that the two wheeler had dashed against the right side diesel tank portion of the van and as a result of which, both of them fell down and that they were not wearing helmets. In cross examination, he would say that he does not know about the directions that he was proceeding down in the Andalpuram bridge at the time of accident; that he was turning the van towards right side at the time of accident and that a criminal case was registered against him. No doubt, he would deny the suggestion that the accident was occurred due to his rash and negligent driving.

12. The claimants have summoned and examined the head constable attached to the Traffic Investigation Wing No.I, Madurai City. Tmt.Jeyasilin Lionora as P.W.3 and exhibited the copies of Motor Vehicle Inspection Report relating to the vehicle bearing Registration No. No.TN-37-AK-7005 and the rough sketch as Ex.P.6 and Ex.P.7 respectively. P.W.3 would say that the documents including the driving license relating to the second two



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wheeler were not produced before the Police Station till now and that the charge sheet has not been filed in the above case, despite the lapse of more than two years.

13. In Ex.P.6 Motor Vehicle Inspection Report, it has been stated that the right hand side body pressed inwards (near diesel tank) and that the accident was occurred not due to any mechanical defect.

14. It is evident from Ex.P.7 rough sketch prepared by the Police during the investigation that the accident road is an east-west road and the accident was occurred at the middle of road and more particularly, at the end of the bridge. It is not in dispute that the two wheeler and the van were proceeding in the same direction at the time of accident.

15. As rightly pointed out by the learned counsel for the insurer, the claimants' witness P.W.4 in his cross examination would admit that the van driver had turned the van towards right side so as to enter into the service road by showing signal with his hands. But, as already pointed out by the learned counsel for the claimants, R.W.1 van driver in his chief examination would say that by operating indicator, he has turned the van towards the right side of the road for entering into the service road.



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16. Admittedly, FIR was lodged against R.W.1 van driver. Though the insurer has alleged that the two wheeler rider alone was responsible for the accident and van driver was not at fault, neither the driver R.W.1 nor the third respondent/first respondent has taken any steps to lodge the complaint against the two wheeler rider or to make any complaint against the Police officials for falsely registering FIR against him. At this juncture, it is necessary to refer the decision of the Hon'ble Supreme Court in ***Kamalesh and others Vs. Attar Singh and others*** reported in **2015(2) TN MAC 577 (SC)** and the relevant passage is extracted hereunder :

“8. We have heard learned counsel for the parties and perused, inter alia, the evidence on record of Ram Parshad PW2 and Devender PW.3. The method and manner in which the accident has taken place leaves no room for doubt that it was a case of composite negligence of drivers of both the vehicles, that is the driver of Maruti car and driver of tempo. Though Police has registered a case against driver of the tempo Attar Singh and has filed a chargesheet but the same cannot be said to be conclusive. Though, Attar Singh has stated that it was in order to oblige the driver of the Maruti car, a case was registered against him. Be that as it may. It appears both the drivers have tried to save their liability. In such circumstances, the version of eye-witnesses, PW.2 and PW.3 assumes significance. The fact



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remains that car had dashed the tempo on the middle portion near footstep. Thus the method and manner in which the accident has taken place leaves no room for doubt that both the drivers were negligent. Man may lie but the circumstances do not is the cardinal principle of evaluation of evidence. No effort has been made by the High Court to appreciate the evidence and method and manner in which the accident has taken place. Both the aforesaid witnesses have stated Maruti Car was in excessive speed. However, it appears driver of tempo also could not remove his vehicle from the way of Maruti Car. Thus, both the drivers were clearly negligent. It appears from the facts and circumstances that both the drivers were equally responsible for the accident. Thus, it was a case of composite negligence. Both the drivers were joint 'tort-feasors', thus, liable to make payment of compensation."

17. In the present case also, the fact remains that the two wheeler dashed against the right middle portion of the van. Considering the place and the manner in which the accident was occurred, this Court has no hesitation to hold that both the two wheeler rider as well as the van driver were negligent and both of them were equally responsible for the accident.

18. The learned counsel for the appellant would contend that since the owner and the insurer of the two wheeler were not added as parties, the



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claim petition itself is liable to be dismissed for non-joinder of necessary parties. To counter the said arguments, the learned counsel for the insurer has relied on the judgment of the Hon'ble Supreme Court in ***Khenyei Vs. New India Assurance Company Ltd and others*** reported in **2015 (1) TN MAC 801 (SC)**, wherein the Hon'ble Apex Court, after elaborate discussion, has formulated the position which as follows :

(i) In the case of composite negligence, plaintiff/claimant is entitled to sue both or any one of the joint tort feasons and to recover the entire compensation as liability of joint tort feasons is joint and several.

(ii) In the case of composite negligence, apportionment of compensation between two tort feasons vis a vis the plaintiff/claimant is not permissible. He can recover at his option whole damages from any of them.

(iii) In case all the joint tort feasons have been impleaded and evidence is sufficient, it is open to the court/tribunal to determine inter se extent of composite negligence of the drivers. However, determination of the extent of negligence between the joint tort feasons is only for the purpose of their inter se liability so that one may recover the sum from the other after making whole of payment to the plaintiff/claimant to the extent it has satisfied the liability of the other. In case both of them have been impleaded and the apportionment/ extent of their negligence has been determined by the court/tribunal, in main case one joint



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tortfeasor can recover the amount from the other in the execution proceedings.

(iv) It would not be appropriate for the court/tribunal to determine the extent of composite negligence of the drivers of two vehicles in the absence of impleadment of other joint tortfeasors. In such a case, impleaded joint tortfeasor should be left, in case he so desires, to sue the other joint tortfeasor in independent proceedings after passing of the decree or award.

19. Applying the legal position above referred and taking note of the finding of this Court that the case on hand was a case of composite negligence and both the two wheeler rider and van driver were joint tortfeasors, the claimants are entitled to sue both or any one of the joint tortfeasors, as the liability of joint tortfeasors is joint and several and as such, the objection with regard to non impleadment of owner and insurer of two wheeler rider is absolutely devoid of substance and is liable to be rejected.

20. The learned trial Judge, in the impugned award, has stated that in view of the evidence of P.W.1 and P.W.2 and Ex.P.1 FIR, he came to the decision that the accident was occurred only due to the negligent driving of the first respondent driver. As already pointed out, P.W.1 is one of the claimant and is not the occurrence witness. P.W.2 is an Assistant Professor



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in Government Rajaji Hospital, Madurai, who was summoned for production of post-mortem certificate of the deceased Mohamed Salik.

21. As rightly contended by the learned counsel for the appellant/insurer, the learned trial Judge has nowhere dealt with the evidence of the occurrence witness P.W.4 and R.W.1 driver of the van driver and other documents produced such as rough sketch, Motor Vehicle Inspection Report. Considering the above, this Court has no hesitation to hold that the Tribunal, without considering the relevant evidence available, has recorded a finding in a mechanical fashion that the accident was occurred only due to the negligence of the first respondent's driver and as such, the finding of the Tribunal is liable to be set aside.

22. Now turning to the quantum of compensation, as already pointed out, it is the specific case of the claimants that the deceased was aged 18 years and that he was working as Juice Master at Nainar Juice Corner and was earning Rs.500/- per day. Admittedly, the claimants have not produced any materials or evidence to substantiate the same.



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23. The Tribunal, by relying the judgment of this Court in *Andall and others Vs. Avinav Kannan, New India Assurance Company Limited, Chennai* reported in **2019(1) TN MAC 54 (DB)**, has fixed the notional income of the deceased at Rs.6,500/- per month and taking note of the cost of inflation index, has arrived at Rs.13,700/- per month. The learned counsel for the appellant would submit that the Tribunal in the absence of any evidence to show the avocation and the income, has mechanically fixed the monthly income at Rs.13,700/-.

24. To counter the said argument, the learned counsel for the claimants has relied on another judgment of this Court in *Shriram General Insurance Company Limited Vs. Ravikumar and others* reported in **2022(1) TN MAC 542 (DB)**, wherein the Division Bench of this Court has approved the method of arriving income on the basis of inflation index and as such, the method adopted by the Tribunal in the case on hand, cannot be found fault with.

25. The Tribunal relying on the postmortem certificate has fixed the age of the deceased as 19 years at the time of accident. The Tribunal, after



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fixing the age of the deceased as 19 years, as per the decision of the Hon'ble Supreme Court in **National Insurance Company Limited vs. Pranay Sethi and others** reported in **2017 ACJ 2700**, has rightly added 40% income towards future prospects. Considering the facts that the parents of the deceased are the claimants and the deceased was a bachelor, the Tribunal has rightly deducted 50% of the income towards personal and living expenses of the deceased.

26. The Tribunal, as per the judgment of the Hon'ble Supreme Court in **Smt.Sarla Varma and others Vs. Delhi Transport Corporation and another** reported in **AIR 2009 SC 3104**, has rightly adopted the multiplier of 18 and arrived at Rs.20,71,440/- as compensation under the head of loss of dependency. The Tribunal has rightly awarded Rs.15,000/- towards funeral expenses and Rs.15,000/- towards loss of estate under the conventional heads. The Tribunal has also awarded Rs.1,000/- for the damages caused to the articles and Rs.50,000/- for pain and sufferings. Since the injured had already died and the parents have laid the above claim, they are certainly entitled to get Rs.40,000/- each for loss of filial consortium. But, at the same time, granting of Rs.50,000/- towards pain and sufferings cannot be accepted. Moreover, the claimants have not challenged



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the quantum of compensation. The appellant has not raised any other reason or ground to impugn the award. Hence, this Court concludes that there is nothing to interfere with the quantum of compensation awarded at by the Tribunal.

27. In the result, the Civil Miscellaneous Appeal is partly allowed and the finding of the Tribunal that the accident was occurred only due to the negligence of the van driver, is set aside. Since it was a case of composite negligence, the appellant/insurer is directed to satisfy the award and then to sue the owner and insurer of the two wheeler in independent proceedings, after passing of decree. The compensation awarded at by the Tribunal stands confirmed. The parties are directed to bear their own costs. Consequently connected Miscellaneous Petition is closed.

13.12.2022

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To

- 1.The Motor Accident Claims Tribunal/
VI Additional District Court, Madurai.
- 2.The Record Keeper,
Vernacular Section,
Madurai Bench of Madras High Court,
Madurai.



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K.MURALI SHANKAR,J.

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