IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 19.07.2023

Coram:

THE HONOURABLE MR. JUSTICE P.VELMURUGAN

C.M.A. No.966 of 2018
and
C.M.P. No.7871 of 2018

Cholamandalam MS General
Insurance Company Ltd.,
2nd Floor, Alagar Building,
551, D.B.Road, R.S.Puram, Coimbatore ... Appellant

Vs.

1. Kanikkai Mary
2. Minor Nivash
3. Minor Nithisha Vincy
4. Lilly Mary
(Minor respondents represented by their
Mother and next friend Tmt.Kaikkai Mary)
5. N.Santhosh Kumar
6. N.Malarvizhi
7.G.Sundarraj
8.R.Sethumadhavan
9.The New India Assurance Company Limited
Pollachi, 5, Raja Mill Road, Pollachi having
Regional Office at Hub 3rd Party claim,
1st Floor, Obli Towers, R.S.Puram, Coimbatore. ... Respondents

Prayer: This Civil Miscellaneous Appeal is filed under Section 173 of the Motor Vehicles Act, 1988, to set aside he decree and judgment dated 25.04.2017, made in M.C.O.P. No.527 of 2012, on the file of the Motor Accident Claims Tribunal (III Additional District Court), Coimbatore.

For Appellants	:	Mr.Elveera Ravindran
For Respondents	:	Mr.I.Abrar M.Abdullah For R1 to R4 Mr.S.Dhakshnamoorthy for R9 R7-Vacated R5, R6 and R8-Vacated

JUDGMENT

This Civil Miscellaneous Appeal has been filed to set aside he decree and judgment dated 25.04.2017, made in M.C.O.P. No.527 of 2012, on the file of the Motor Accident Claims Tribunal (III Additional District Court), Coimbatore.

2. The respondents 1 to 4 are the claimants. The respondents 5, 6 and the appellant are the driver, owner and insurer of TATA ACE vehicle bearing Regn. No.TN-37-BQ-4189 in which, the deceased was travelling at the time of accident. The respondents 7 to 9 are the driver, owner and insurer of TATA 909 vehicle bearing Regn. No.TN-41-Q-0523 which is involved in the accident.

3. The case of the claimants is that on 03.09.2011, the deceased who is a Coolie worker, after finishing a marriage Pandhal work at Palani, was returning to Coimbatore along with the decoration materials, in the TATA ACE vehicle bearing Regn. No.TN-37-BQ-4189, driven by its driver/5th respondent herein. At about 3.15 p.m., near Ravi Hollow Blocks on Udumalai-Palani Road, a TATA 909 vehicle bearing Regn. No.TN-41-Q-0523, which was driven by its driver/7th respondent herein, in a rash and negligent manner, dashed against the TATA ACE vehicle in which the deceased was travelling, due to which, the deceased and few others were thrown out of the said vehicle and suffered severe injuries. Initially, they were taken to Udumalai Government Hospital where they were given first aid and subsequently, they were shifted to Coimbatore Medical College Hospital, Coimbatore, for further treatment. Despite further treatment, the deceased breathed his last. FIR was registered against the driver of the TATA ACE vehicle.

4. The wife, son, daughter and parents of the deceased filed a claim petition M.C.O.P. No.527 of 2012, on the file of the Motot Accident Claims Tribunal (III Additional District Court), Coimbatore, claiming compensation of Rs.5,00,000/- for the death of the deceased.

5. In order to substantiate the claim before the Tribunal, on the side of claimants, two witnesses were examined as P.W.1 and P.W.2 and 10 documents were marked as Ex.P.1 to Ex.P.10. On the side of the respondents, one witness was examined as R.W.1. However, no documentary evidence was let in.

6. The drivers and owners of both the vehicles/the respondents 5 to 8 herein remained ex-parte before the Tribunal.

7. The Tribunal, after hearing the arguments on either side and upon considering the oral and documentary evidence found that the accident had occurred due to the rash and negligent driving on the part of the driver of the TATA ACE vehicle bearing Regn. No.TN-37-BQ-4189 and thereby, fixed the liability on the respondents 5 and 6 herein who are the driver and owner of TATA ACE vehicle and granted compensation of Rs.5,00,000/- to the claimants and directed the appellant who is the insurer of TATA ACE vehicle to pay the compensation to the claimants at the first instance and to recover the said amount from the respondents 5 and 6 herein, in the execution proceedings arising in the claim itself. Further, the Tribunal dismissed the

petition as against the respondents 7 to 8 herein who are the driver, owner and insurer of the TATA 909 vehicle bearing Regn. No.TN-41-Q-0523.

8. Aggrieved by the award passed by the Tribunal, the insurer of TATA ACE vehicle, has filed the present Appeal.

9. The learned counsel for the the appellant/Insurance Company submitted that though P.W.2 has stated that the accident had occurred due to the rash and negligent driving of the driver of the opposite vehicle i.e. TATA 909 bearing Regn. No.TN-41-Q-0523, the Tribunal failed to appreciate the same and fastened the liability on the TATA ACE vehicle bearing Regn. No.TN-37-BQ-4189 which is erroneous. Further, the seating capacity of the TATA ACE vehicle is driver + 1, whereas, at the time of accident, 4 persons have travelled in the said vehicle which is a clear violation of policy condition. As per the various decisions of the Hon'ble Supreme Court and also this Court, the driver, cleaner and owner of the goods or authorized agent of the goods alone are entitled to travel in the goods vehicle and if any other person traveled in the goods vehicle, he will be considered as an unauthorized occupant and he will not be covered under the insurance policy

and therefore, the Insurance Company is not liable to pay that person. In this case, the deceased has travelled in the said vehicle as a gratuitous person and the claimants have not proved that the deceased had travelled in the vehicle as a owner or authorized agent of the goods. In the absence of the same, the appellant/Insurance Company is not liable to pay any compensation. Therefore, the findings of the Tribunal is erroneous. Though the Tribunal has ordered pay and recovery, merely because the claimants could not recover from the owner of the vehicle, the liability should not be fastened on the Insurance Company. It is a clear case of violation of policy condition and the deceased is not covered under the Insurance Policy and that there is no privity of contract to indemnify the loss caused by the owner of the vehicle other than the persons covered under the insurance. Therefore, the appellant/Insurance Company is not liable to pay. Therefore, the Award passed by the Tribunal is liable to be set aside and the appellant/Insurance Company has to be exonerated from the liability or otherwise, since two vehicles are involved in the accident, the Tribunal ought to have equally fixed contributory negligence on both the vehicles. Since because the FIR was registered against the driver of the TATA ACE vehicle, the liability was fixed on the TATA ACE vehicle. Further, the quantum of compensation awarded by the Tribunal is also exorbitant. Therefore, in any angle the Award passed by the Tribunal and the liability fixed by the Tribunal is erroneous which warrants interference. The learned counsel placed reliance of the following judgments to substantiate his contention;

1. 2018 (2) TN MAC 731 (DB) (Bharati AXA General Insurance Co. Ltd. Vs. Aandi reported in)

2. 2009 (1) CTC 1 (BranchManager, United India Insurance Co. Ltd. Vs. Nagammal and 2 others reported in)

10. The respondents 1 to 4/claimants alone contested this appeal. The learned counsel for the claimants submitted that the accident had occurred due to the rash and negligent driving of the driver of the TATA ACE vehicle in which the deceased had traveled and the FIR was also registered against the driver of the TATA ACE vehicle and that no contra evidence was produced by the appellant/Insurance Company to show that the accident had occurred due to the rash and negligent driving of the driver of the opposite vehicle which belongs to the 8th respondent herein. The Tribunal based on the materials, rightly arrayed at a conclusion that due to the rash and negligence on the part of the driver of the TATA ACE vehicle the accident had occurred and rightly fixed the liability on the TATA ACE

vehicle and as a insurer, the appellant is liable to pay the compensation and if there is any violation of policy condition, they can recover the amount from the owner of the vehicle at the later point of time. Therefore, there is no merit in the appeal and the same is liable to be dismissed. He also placed reliance of the Judgment of the Hon'ble Supreme Court in *Shivaraj Vs. Rajendra and Another reported in (2018) 10 SCC 432.* The learned counsel further submitted that the claimants/ respondents 1 to 4 are the wife, son, daughter and mother of the deceased and they are the dependents of the deceased. During pendency of the claim petition before the Tribunal, the father of the deceased/4th respondent therein, died and during pendency of this appeal before this Court, the mother of the deceased/5th respondent herein died. The deceased was working as a Coolie and he was earning not less than Rs.400/- per day. However, since there was no material, the Tribunal fixed only Rs.2,000/- as the notional income of the deceased. Though the income fixed by the Tribunal is very low, the claimants have not filed any appeal and they accepted the same. However, if the appellate Court feels that the Award passed by the Tribunal does not reflect the 'just compensation', the appellate Court has power to enhance the compensation without filing of appeal.

11. Heard the learned counsel for the appellant and the learned counsel for the respondents 1 to 4 and perused the materials available on record.

12. As far as liability against the TATA ACE vehicle is concerned, admittedly, in this case, two vehicles are involved. At the time of accident, the deceased had travelled in the TATA ACE vehicle. The driver of the TATA ACE vehicle was examined as P.W.2. On behalf of the appellant/Insurance Company, one P.Kowsikan was examined as R.W.1 through whom the copy of the Insurance Policy in respect of TATA ACE vehicle was marked as Ex.R1. The claimants have stated that the accident had occurred due to the rash and negligent driving of the driver of the TATA ACE vehicle and the FIR is also registered against the driver of the TATA ACE. Ex.P5/rough sketch and Ex.P.10/observation mahazar clearly show that the TATA ACE vehicle in which the deceased was travelling and which was driven by the 5th respondent herein, came from west to east from Palani and the road is of 32 feet wide and that the accident had occurred on the northern side of the road at 6 feet from the north end of the road. In other words, the TATA ACE vehicle in which the deceased was travelling had crossed the middle of the road and after crossing almost 10 feet, the collision between the

TATA ACE vehicle and the TATA 909 vehicle which was coming from the east to west towards Palani, had happened. The FIR which was registered against the driver of the TATA ACE vehicle based on the complaint given by a bystander, is also to that effect. The final report filed by the Investigating Officer also supports the above said fact and that the final report was not challenged by the appellant/Insurance Company or by the respondents 5 and 6 herein who are the driver and owner of the TATA ACE vehicle. Though P.W.2 has stated that the accident happened due to the rash and negligent driving of the driver of the opposite vehicle, the materials shows otherwise.

13. This Court, as an appellate Court and final Court of fact finding, while re-appreciating the entire materials finds that the accident had occurred only due to rash and negligent driving of the driver of the TATA ACE vehicle in which the deceased was travelling and due to the accident, the deceased sustained injuries and subsequently, succumbed to the injuries. Therefore, the Tribunal rightly fixed the liability on the TATA ACE vehicle.

14. As far as liability against the appellant/Insurance Company is concerned, admittedly, the Tribunal has ordered pay and recovery. The contention of the learned counsel for the appellant/Insurance Company is that since the deceased had travelled as a gratuitous passenger, the appellant/Insurance company is not liable to pay the compensation to the claimants. Further, just because the claimants could not recover the compensation from the owner of the vehicle, the liability cannot not be fastened on the Insurance Company. He also placed reliance of the Judgment of Hon'ble Supreme Court in the case of ***Bharati AXA General Insurance Co. Ltd. Vs. Aandi reported in 2018 (2) TN MAC 731 (DB),*** wherein, the Division Bench has set aside the liability fixed against the Insurance Company by holding that mere difficulty in realizing the Award amount from the owner of the vehicle, cannot impel the Court to do something against the provisions of Statutes and Apex Court dictum.

15. However, in this case, the claimants have clearly stated that the deceased was working as a Coolie and on the date of accident, after finishing marriage pandhal work at Palani, he was returning to Coimbatore along with the decoration materials in the TATA ACE vehicle during which, the

accident had occurred, which clearly shows that the deceased was not travelling as a gratuitous or unauthorized person. There is no material to show that the owner of the goods was also travelling in the said vehicle at the time of accident. The law says, even in the goods vehicle, other than the owner of the goods, any authorized person of the goods can travel. In this case, being a Coolie worker, the deceased has travelled in the said vehicle along with goods. Therefore, this Court finds that the deceased had not traveled in the said vehicle as unauthorized occupant or gratuitous passenger. The appellant/Insurance Company has not proved contra to the evidence of the claimants and they have also not examined the owner of the goods to show that the deceased had not traveled in the said vehicle as a owner of the goods or authorized agent of the goods. Therefore, the decisions referred to by the counsel for the appellant/Insurance Company is not applicable to the present case on hand. There is no proposition of law that if other than the persons covered under the insurance policy traveled in a goods vehicle, they may be termed as a gratuitous passengers or unauthorized passengers and the Insurance Company is not liable to pay them and only the owner of the vehicle has to compensate them. Therefore, as discussed by this Court in various cases and by the Tribunal, the Insurance Company is liable to pay the compensation to the claimants and if any deviation or violation of policy condition, the Insurance Company can recover the same from the owner of the vehicle. In this case, as stated above, the deceased has traveled in the said vehicle as a Coolie worker along with materials and therefore, he has not traveled as a gratuitous passenger. Even assuming that the deceased had traveled as a gratuitous passenger, since the accident had occurred due to the rash and negligent of the driver of the TATA ACE vehicle, the driver and owner of the said vehicle is liable to pay. However, since the vehicle was insured with the appellant/Insurance Company at the time of accident, the appellant/Insurance Company is liable to pay the compensation and then can recover the same from the owner of the vehicle if there is any deviation or violation of policy. In this case, the Tribunal has rightly ordered pay and recovery. This Court finds no perversity in the findings of the Tribunal with regard to pay and recovery.

16. As far as quantum of compensation is concerned, the learned counsel for the appellant/Insurance Company contended that the quantum of compensation awarded by the Tribunal is exorbitant. However, at the time of accident, the deceased was aged 28 years and he is alleged to have been

working as a Coolie and therefore, there is possibility of earning minimum of Rs.2,000/- per month. Therefore, the income fixed by the Tribunal is reasonable in the absence of any proof of income. Further, the deceased died in the accident leaving behind his wife, children and parents which is not in dispute and therefore, the claimants are entitled to compensation. The compensation awarded under the other heads viz., funeral expenses, loss of consortium and love and affection are also reasonable. Therefore, this Court finds that the quantum arrived by the Tribunal is not exorbitant and it is a 'just compensation'.

17. As far as enhancement of compensation is concerned, though the learned counsel for the claimants submitted that even if the claimants have not filed any appeal for enhancement of compensation, in appropriate cases, if the appellate Court feels that the Award passed by the Tribunal does not reflect the "just compensation", the compensation may be enhanced by the appellate Court. Since the Motor Vehicle Act is a beneficial Legislation and that it is also a social security Legislation, no doubt, even without filing of appeal, in appropriate cases, the appellate Court can fix a 'just and reasonable compensation' if the Tribunal had not awarded the 'just compensation'.

However, in this case, in the absence of any material to prove the income of the deceased, the Tribunal has rightly fixed the notional income of Rs.2,000/- and awarded Rs.4,59,000/- towards loss of income. Further, the Tribunal has awarded a sum of Rs.1,00,000/- towards loss of consortium and Rs.50,000/- each to the minor children towards love and affection and Rs.10,000/- towards funeral expenses. In total, a sum of Rs.6,69,000/- has been awarded. This Court finds that the Award passed by the Tribunal is a 'just compensation' there is no material to show that the compensation awarded by the Tribunal is not a 'just compensation' and the claimants are entitled to higher compensation. Therefore, the contention of the learned counsel for the claimants for the enhancement of compensation, is rejected.

18. This Court finds no perversity in the appreciation of evidence and the findings of the Tribunal. Therefore, there is no merit in the appeal. The same is liable to be dismissed.

19. Since it is stated that during pendency of the appeal, the mother of the deceased died/4th respondent herein, the Tribunal is directed to credit the share of the mother of the deceased/4th respondent herein, to the wife of the deceased/1st respondent herein.

20. With the above directions, this Civil Miscellaneous Appeal is dismissed. Consequently, connected Miscellaneous Petition is closed. There shall be no order as to costs in the present appeal.

19.07.2023

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Index : Yes / No
Speaking Order : Yes / No
Neutral Citation Case : Yes/No

To

1. The Motor Accident Claims Tribunal
   (III Additional District Court), Coimbatore.

2. The Section Officer,
   VR Section,
   High Court,
   Madras.

P.VELMURUGAN. J.

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C.M.A. No.966 of 2018

19.07.2023