BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 07.03.2023

CORAM:

THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR

C.M.A.(MD)No.544 of 2022

M/s.United India Insurance Co.Ltd.,
Divisional Office,
No.1, Post Office Road,
Palayamkottai,
Tirunelveli District ... Appellant/2nd respondent

Vs.

1.Paulraj
2.Shenpagavalli
3.Kumutha ... Respondents 1 to 3/Claimants

4.P.Mariammal ... Respondent No.4/1st Respondent

5.National Insurance Company Ltd.,
1st Floor, No.135-1, Rose Building,
Main Road,
Kovilpatti,
Tuticorin District ...Respondent No.5/3rd Respondent

PRAYER: This Civil Miscellaneous Appeal is filed under Section 173 of the Motor Vehicles Act, to set aside the judgment and decree dated 16.09.2021 made in M.C.O.P.No.319 of 2016 on the file of the Motor Accident Claims Tribunal (Special Sub Court) Tirunelveli.

For Appellant : Mr. B.Rajesh Saravanan

For R1 to R3 : Mr. V.Esakki Muthu

JUDGMENT

Challenging the judgment and decree made in M.C.O.P.No.319 of 2016 on the file of the Motor Accident Claims Tribunal (Special Sub Court) Tirunelveli, this Civil Miscellaneous Appeal has been filed. The appellant herein is the insurer of the lorry bearing Reg.No.TN-67-A-6424.

2.The deceased Marikannan is the unmarried son of the respondents 1 and 2 and the 3rd respondent is the sister of the deceased. The deceased was Carpenter by profession. On 01.02.2016, at about 20.30 hours, while he was riding his motorcycle bearing Reg.No.TN-69-AQ-1261 from Madurai to Tirunelveli in the National Highways Road, Lorry bearing Reg.No.TN-67-A-6424 insured with the appellant/Insurance Company, came from the same direction and hit the motorcycle from behind, as a result, the deceased succumbed to injuries on the spot itself. The First information Report came to be registered in this regard in Crime No.45 of 2016 under Section 304(A) IPC.

3. It is the contention of the appellant/Insurance Company that the accident occurred on account of rash and negligent driving of the deceased and the deceased drove the motorcycle in the opposite direction and hit against the lorry. Though a criminal case was registered, after completion of enquiry the same has been closed as 'mistake of fact'.

4. Before the Tribunal, on the side of the claimants, P.W.1 and P.W.2 were examined and Exs.P.1 to P.9 were marked. On the side of the respondents, R.W.1 to R.W3 were examined and Exs.R1 to R5 were marked.

5. Based on the evidence adduced before it, the Tribunal had come to the conclusion that the accident had occurred on account of the negligence of the driver of the lorry. By holding so, the Tribunal also fixed the notional income of the deceased at Rs.8,000/- (Rupees Eight Thousand only) per month and 40% for future prospects has been added and finally, the Tribunal has passed the compensation as follows:

SL.NO.	HEADS	CALCULATION

1.	Salary	Rs.8,000/- p.m
2.	Future Prospects at 40%	Rs.8000 + Rs.3200/- = Rs.11,200
3.	½ of the income (i)deducted as personal expenses of the deceased	Rs.11,200/- - Rs.5600/- = Rs.5600/-
4.	Compensation after multiplier of 17 is applied	Rs.5600 X 12 X 17= Rs.11,42,400/-
5.	Loss of Consortium to the parents	Rs.40,000/-
6.	Loss of Estate	Rs.15,000/-
7.	Funeral Expeses	Rs.15,000/-
	Total Compensation Awarded	**Rs.12,12,400/-**

6. Challenging the same, the insurer of the lorry has preferred the present Civil Miscellaneous Appeal.

7. Though various grounds have been raised in this appeal, the learned counsel appearing for the appellant mainly submitted that there was contributory negligence on the part of the deceased. It is his submission that the accident is not occurred as stated in the First Information Report, whereas the accident took place in a different manner. It is his contention that the deceased drove the motorcycle from the opposite direction and hit against the lorry, which has been probabilized by the Motor Vehicle Inspector's report. It is his contention that if the lorry hit the motorcycle from behind, there would have been damages on the rear-side of the motorcycle, whereas the Motor Vehicle Inspector's report would clearly show that

the entire damage to the motorcycle is on the front side. The Motor Vehicle Inspector's report clearly substantiates the above version of the appellant/ Insurance Company. P.W.1 in his evidence has admitted to the effect that the police has closed the case as 'mistake on fact' finding negligence on the part of the deceased. Pointing out the same, the learned counsel for the appellant submitted that the deceased also contributed for the accident.

8. That apart, it is his further contention that from the insurer of the motorcycle, the claimants have also received Rs.1,00,000/- (Rupees One Lakh only) and that has not been taken into consideration by the Tribunal. Hence, he submitted that the award passed by the Tribunal is not according to law. He would submit that percentage of contributory negligence has to be fixed by this Court and a sum of Rs.1 lakh given to the claimants by the insurer of the two wheeler has to be taken into consideration.

9. Per contra, the learned counsel appearing on behalf of the respondents 1 to 3/claimants would submit that except the submissions and mere pleadings, there is no evidence adduced on the part of the appellant/Insurance Company to prove the contributory negligence on the part of the deceased. The driver of the lorry has not been examined, though he was very much available at the relevant

point of time. His further contention is that while fixing negligence, damages of the vehicle are irrelevant. He would also submit that even the damages on the front side is possible when the vehicle was coming behind and hit the motorcycle in such a speed, possibility of the motorcycle turning in the same direction cannot be ruled out. The specific submission of the learned counsel for the appellant is that when the appellant/Insurance Company has an opportunity to prove their case before the Tribunal, the appellant/Insurance Company has not adduced any evidence in this regard. Therefore, now the theory of contributory negligence cannot be advanced merely on the basis of surmises and conjectures.

10. It is further submission of the learned counsel for the respondents 1 to 3/claimants that merely because a sum of Rs.1 lakh was received from the insurer of the motorcycle based on the insurance policy, which is purely a contract, the same cannot be deducted in the compensation.

11. I have given my anxious consideration to the submissions made on either side and carefully perused the materials available on record.

12. In respect of the monthly income fixed by the Tribunal for arriving at compensation, the appellant/Insurance Company has not raised any dispute. In the

light of the submissions made by the learned counsel for the appellant with regard to the contributory negligence, it is stated in the counter filed by them that accident took place in a different manner other than the place mentioned in the First Information Report. However, to substantiate the same, no evidence was let- in by the Insurance Company. Though the Motor Vehicle Inspector's reports which are exhibited as Exs.R3 and R4, would indicate that the damages on the motorcycle are only on the front side, merely on the basis of the damages found in the vehicle, this Court is unable to come to the conclusion that the accident only took place as pleaded by the appellant. The damages in various parts of the vehicle depend upon the speed and velocity of the particular vehicle. There cannot be any certainty in damages. Even in some cases, damages may not be apparently visible. With regard to the place where the vehicle hit first and impact of the same, there may be possibility for the vehicle turning its direction, rolling down and throwing out. Therefore, merely on the basis of the damages found in the vehicle, it is highly difficult to fix contributory negligence unless the contributory negligence on the part of the deceased is established by cogent evidence. There was no reason as to why the appellant/Insurance Company has not examined the driver of the lorry. That apart, P.W.1 one of the eye witnesses has clearly spoken that the accident took place in the same direction. The evidence is not dented to substantiate the version of the Insurance Company.

13. In such view of the matter, this Court is of the view that unless the concrete evidence to prove that there is contributory evidence, merely on the basis of the damages alone it is highly difficult to countenance the submission of the learned counsel for the appellant to hold that there was contributory negligence on the part of the deceased. With regard to other submissions that the respondents 1 to 3/claimants have received a sum of Rs.1 lakh as compensation from the insurer of the two wheeler and therefore the same has to be deducted from the entire compensation, this Court is unable to appreciate the said submission also. A sum of Rs.1 lakh was paid under the insurance policy based on the statutory liability and contractual terms between the insurer and insured i.e purely based on the contract entered into between the owner and the insurer and merely because the said amount has been paid, it cannot be said that the amount has also to be deducted in the compensation.

14. In respect of other aspects, the Tribunal has in fact fixed the notional income at Rs.8,000/- and added future prospects at 40% as per the law declared by the Hon'ble Apex Court in **the National Insurance Co. Ltd** Vs. **Pranay Sethi** reported in **2017(2) TNMAC 609** and adopted '17' multiplier considering the age of the deceased, who was aged about 26 years at the time of death. Following the ratio of the Apex Court and based on the other conventional damages, the Tribunal

awarded the compensation. In such view of the matter, as far as quantum awarded by the Tribunal, this Court finds no illegality and accordingly, this Court is of the view that the contributory negligence as pleaded has not been established by the appellant/Insurance Company. Hence, the contention of the appellant before this Court cannot be countenanced.

15.In fine,this Civil Miscellaneous Appeal is dismissed and the judgment and decree dated 16.09.2021 made in M.C.O.P.No.319 of 2016 on the file of the Motor Accident Claims Tribunal(Special Sub Court)Tirunelveli, is confirmed.No costs.

16. It is represented that 50% of the compensation amount has already been deposited. Remaining 50% of the amount shall be deposited within a period of 1 month from the date of receipt of a copy of this order with interest as ordered by the Tribunal. Apportionment made by the Tribunal is well balanced and does not warrant any modification. While ordering payment to the claimants, the Tribunal shall also ensure that proper court fee is paid and if not, the same would be properly recovered.

07.03.2023

Index : Yes/No
Internet : Yes/No
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To

1.The Motor Accident Claims Tribunal (Special Sub Court) Tirunelveli.

2.The Section Officer,
Vernacular Records,
Madurai Bench of Madras High Court,
Madurai.

N.SATHISH KUMAR, J.

CM

Judgment made in

C.M.A.(MD)No.544 of 2022

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