



C.M.A. (MD) No. 191 of 2019

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 12.09.2023

Pronounced on : 30.11.2023

CORAM:

THE HON'BLE MR.JUSTICE K.MURALI SHANKAR

C.M.A.(MD)No.191 of 2019

National Insurance Company Limited,
Branch – II,
Jerome Building,
Fort Station Road,
Tiruchirappalli.

...Appellant/
2nd Respondent

Vs.

1. Maheswari

2. Balasubramani

...Respondents 1&2/
Petitioners

3. Peer Ahamed Sha

...Respondent-3/
Respondent-1

Prayer : This Civil Miscellaneous Appeal filed under Section 173 of the Motor Vehicles Act, to set aside and modify the judgment and decree dated 11.10.2017 and made in M.C.O.P.No.5390 of 2013 on the file of the Motor Accident Claims Tribunal / Special District Judge, Tiruchirappalli.



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For Appellant : Mr.R.Rajamani
For R1 & R2 : Mr.N.Sudhagar Nagaraj
For R3 : Mr.S.T.Sasidharan Tamilkani

JUDGMENT

The Civil Miscellaneous Appeal is directed against the award passed in M.C.O.P.No.5390 of 2013 dated 11.10.2017 on the file of the Motor Accident Claims Tribunal/Special District Court for MCOP cases, Tiruchirappalli.

2. The appellant/insurer, who was made liable to pay compensation of Rs.8,15,000/- (Rupees Eight Lakhs and Fifteen Thousand only) with interest at 7.5% per annum to the respondents 1 and 2/claimants for the death of 13 year old Harikrishnan, consequent to an accident occurred on 22.09.2012, challenged the liability mulcted on it and also the quantum of compensation awarded at, by the Tribunal.

For the sake of convenience and brevity, the parties herein after will be referred to as per their status/ranking in the Tribunal.



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3. The case of the claimants is that on 22.09.2012 at about 02.45 p.m., when the deceased Harikrishnan was travelling as a pillion rider in a motorcycle bearing Registration No.TN-63-E-2209 driven by his father in Madurai – Trichy main road, near Paganur a lorry bearing Registration No.TN-45-AF-7272 came in the same direction and its driver suddenly had overtaken the two wheeler and at that time dashed against the two wheeler and as a result of which, the pillion rider sustained serious injuries and died on the spot and that the accident was occurred only due to the rash and negligent driving of the first respondent's lorry driver.

4. It is their further case that the deceased Harikrishnan was aged 13 years at the time of accident and that he was hale and healthy and was studying 8th standard in Mary Madha Higher Secondary School, South Paganur, Trichy District.

5. The defence of the second respondent is that the second claimant-father of the deceased Harikrishnan drove his motorcycle in a rash and negligent manner without possessing valid driving licence and caused the accident, that they had issued a Liability Policy to the said lorry, that the first respondent has deliberately and consciously violated the terms and



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conditions of the policy issued to him as well as the Motor Vehicles Act by allowing his driver S.A.George to drive the lorry without valid and effective driving licence on the date of accident and that in view of the fundamental breach committed by the first respondent, the second respondent is not liable for the claim.

6. It is their further case that the compensation claimed by the claimants is exorbitant, disproportionate and without any basis.

7. During trial, the claimants have examined the second claimant Balasubramani as P.W.1 and exhibited 6 documents as Ex.P.1 to Ex.P.6. The second respondent has examined 2 witnesses as R.W.1 and R.W.2 and exhibited 4 documents as Ex.X.1 to Ex.X.4.

8. 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 11.10.2017 by holding that the first respondent's lorry driver was responsible for the accident, mulcted joint and severe liability on the respondents 1 and 2 and directed them to pay



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compensation of Rs.8,15,000/- with interest and costs. Aggrieved by the impugned award, the second respondent has preferred the present appeal.

9. The learned counsel appearing for the second respondent would submit that the Tribunal has committed error in fixing the entire liability on the second respondent as the driver of the vehicle did not hold a valid or currency of licence, which is a flagrant violation of the terms and conditions of the policy, that the second respondent has examined the staff attached to the Regional Transport Office as R.W.1, who deposed that the driver of the vehicle was not having valid and currency of licence to drive that vehicle at the time of accident and that the invocation of pay and recovery in such cases is the rule of thumb.

10. The learned counsel appearing for the second respondent would further submit that the notional income at Rs.30,000/- per annum on the death of 13 years old student is irrational, excessive and misconception of law and that the Tribunal should not have passed awards under the heads of pecuniary benefits, loss of expectation of life and mental agony at Rs.1,00,000/-.



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11. The points that arises for consideration are :

- 1) *Whether the Tribunal erred in rendering a finding that the respondents 1 and 2 are liable for the claim, despite showing that the first respondent by remaining ex parte has failed to prove that his driver was possessing valid driving licence at the time of accident and that the burden was not shifted to the second respondent?*
- 2) *Whether the quantum of compensation arrived at by the Tribunal is just and proper and is in accordance with law?*

Points 1 and 2:

12. The second respondent has summoned and examined a staff attached to the Regional Transport Office, Trichy as R.W.2 to prove that the lorry driver was not possessing valid driving licence at the time of accident. R.W.2 in his evidence would say that no driving licence was issued to S.A.George. No doubt, when R.W.2 was in witness box, the licence granted to the lorry driver by the military came to be exhibited as Ex.P.6 and wherein, it is evident that he was discharged on 31.12.2005 and was issued with Ex-Servicemen Identity Card and that his driving licence was renewed lastly on 31.12.2003, but it is not known as to whether the licence was renewed subsequently and whether the lorry driver was possessing valid driving licence on the date of accident.



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13. At this juncture, it is necessary to refer the judgment of the Hon'ble Supreme Court in ***Pappu and others Vs. Vinod Kumar Lamba and another*** reported in ***TN MAC 2018 (1) 148 SC***, wherein, the Hon'ble Apex Court has specifically held that it is the duty of the owner of the offending vehicle to furnish particulars about his driver and whether the driver was authorized to drive the vehicle in question at the relevant time and on only producing the material for the above, onus will get shifted to the insurer and the relevant passage is extracted hereunder:-

“11. The question is: whether the fact that the offending vehicle bearing No.DIL-5955 was duly insured by respondent No.2 Insurance Company would per se make the Insurance Company liable? This Court in the case of National Insurance Co. Ltd. (supra), has noticed the defences available to the Insurance Company under Section 149(2)(a)(ii) of the Motor Vehicles Act, 1988. The Insurance Company is entitled to take a defence that the offending vehicle was driven by an unauthorised person or the person driving the vehicle did not have a valid driving licence. The onus would shift on the Insurance Company only after the owner of the offending vehicle pleads and proves the basic facts within his knowledge that the driver of the offending vehicle was authorised by him to drive the vehicle and was having a valid



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driving licence at the relevant time. In the present case, the respondent No.1 owner of the offending vehicle merely raised a vague plea in the Written Statement that the offending vehicle DIL-5955 was being driven by a person having valid driving licence. He did not disclose the name of the driver and his other details. Besides, the respondent No.1 did not enter the witness box or examine any witness in support of this plea. The respondent No.2 Insurance Company in the Written Statement has plainly refuted that plea and also asserted that the offending vehicle was not driven by an authorised person and having valid driving licence. The respondent No.1 owner of the offending vehicle did not produce any evidence except a driving licence of one Joginder Singh, without any specific stand taken in the pleadings or in the evidence that the same Joginder Singh was, in fact, authorised to drive the vehicle in question at the relevant time. Only then would onus shift, requiring the respondent No.2 Insurance Company to rebut such evidence and to produce other evidence to substantiate its defence. Merely producing a valid insurance certificate in respect of the offending Truck was not enough for the respondent No.1 to make the Insurance Company liable to discharge his liability arising from rash and negligent driving by the driver of his vehicle. The Insurance Company can be fastened with the liability on the basis of a valid insurance policy only after the basic facts are pleaded and established by the owner of



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the offending vehicle - that the vehicle was not only duly insured but also that it was driven by an authorised person having a valid driving licence. Without disclosing the name of the driver in the Written Statement or producing any evidence to substantiate the fact that the copy of the driving licence produced in support was of a person who, in fact, was authorised to drive the offending vehicle at the relevant time, the owner of the vehicle cannot be said to have extricated himself from his liability. The Insurance Company would become liable only after such foundational facts are pleaded and proved by the owner of the offending vehicle.”

14. In the case on hand, admittedly, the first respondent had remained *ex parte*. The second respondent, by taking a specific defence that the first respondent's lorry driver S.A.George was not possessing any valid and effective licence on the date of accident, had summoned and examined R.W.2-staff attached to the Regional Transport Office, Trichy and shown that the driving licence obtained by the driver was not renewed subsequently and that he was not possessing valid driving licence at that time. Since the first respondent, by remaining *ex parte*, has failed to furnish the particulars nor produced any document to show that his driver was possessing valid driving licence, as held by the Hon'ble Apex Court,



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the insurance company can be made liable only after the foundational facts are proved by the owner of the offending vehicle.

15. The learned counsel appearing for the second respondent would submit that since the first respondent's lorry driver was not possessing valid driving licence, the Tribunal ought to have invoked the Doctrine of pay and recovery. In the same decision of **Pappu and others** referred (supra), the Hon'ble Apex Court has observed that,

“14. The next question is: whether in the fact situation of this case the insurance company can be and ought to be directed to pay the claim amount, with liberty to recover the same from the owner of the vehicle (respondent No.1)? This issue has been answered in the case of National Insurance Company Ltd. (supra). In that case, it was contended by the insurance company that once the defence taken by the insurer is accepted by the Tribunal, it is bound to discharge the insurer and fix the liability only on the owner and/or the driver of the vehicle. However, this Court held that even if the insurer succeeds in establishing its defence, the Tribunal or the Court can direct the insurance company to pay the award amount to the claimant(s) and, in turn, recover the same from the owner of the vehicle. The three-Judge Bench, after



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analysing the earlier decisions on the point, held that there was no reason to deviate from the said well-settled principle.”

16. This Court in the case of **Reliance General Insurance Co. Ltd. Vs. Esakkimuthu and others** reported in **2021 (1) TNMAC 390** has held as follows,

“14. The next main contention of the Appellant is that the second Respondent/First Respondent had no valid Driving License on the date of accident and that since, there is violation of main Policy condition, the Insurance Company is no way responsible for the claim. No doubt the Appellant has summoned and examined the staff attached to the Regional Transport Officer, Tirunelveli and through him proved the fact that the Second Respondent had License to drive the LMV and HTV, but he had no license to drive the Two-wheelers on the date of accident. Considering the above, the Trial Court, by relying on the decision of our Madras High Court reported in United India Insurance Co. Ltd. v. Giriprasath, 2013 (2) TN MAC 146, has rightly, applied the Doctrine of Pay and Recovery and directed the Appellant/Insurance Company to pay the claim amount to the Claimant and then to recover the same from the Owner of the vehicle.”



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17. Considering the above, this Court has no hesitation to hold that it is a fit case to apply the Doctrine of pay and recovery and is applied accordingly.

18. Now turning to the quantum of compensation, the Tribunal has fixed the notional income of the deceased at Rs.30,000/- and arrived the loss of dependency at Rs.4,50,000/-. In the case on hand, the Tribunal, taking note of the postmortem report, has fixed the age of the deceased as 13 years at the time of accident. The second respondent has not disputed the said factum. In a similar case where the deceased was aged 13 years, this Court in ***Cholamandalam MS General Insurance Co. Ltd., Chennai Vs. Dhanalakshmi and another (C.M.A.(MD)No.177 of 2018 and Cros.Obj.(MD)No.22 of 2023 dated 22.09.2023*** has observed as follows,

“12. In Lata Wadhwa Vs. State of Bihar reported in (2001) 8 SCC 197, the Hon'ble Apex Court has held that in case of death of a child, there is no actual pecuniary benefit derived by its parents during the life time of the child, but however, the parents are entitled to claim for the prospective loss they suffered, that they had a reasonable expectation of pecuniary benefit had the child lived and that the loss of the



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*child to the parents is irrecompable, and no amount of money could compensate them. The Hon'ble Supreme Court has further held that in cases of children between the age of group of 10-15 years, the annual contribution can be fixed at Rs. 24,000/- and multiplier of 15 be applied. The Hon'ble Supreme Court in **Kishan Gopal and another Vs. Lala and others** reported in **2014 (1) SCC 244**, for the death of a 10 year old boy, has fixed the notional income at Rs.30,000/- per annum and applied multiplier 15. In **Meena Devi Vs. Nunu Chand Mahto alias Nemchand Mahto and others** reported in **(2023) 1 SCC 2014**, the Hon'ble Supreme Court, for a 12 year old child, has taken the notional income at Rs.30,000/- per annum and adopted multiplier 15. In the case of **The Manager, Cholamandalam MS General Insurance Co. Ltd., Dharmapuri Vs. Muniyappan and others (C.M.A.No.1647 of 2020 dated 07.12.2020)**, a learned Judge of this Court, taking note of the facts that the accident was occurred in the year 2017 and the deceased was aged 3 years at the time of accident, has fixed the notional monthly income at Rs.3,500/-. In **P.Muthu Selvi and another Vs. The Managing Director, State Express Transport Corporation Ltd., Chennai (C.M.A. (MD)No.748 of 2019 dated 29.08.2023)**, this Court, considering the fact that the accident was occurred on 16.05.2012 and taking note of the age of the deceased at 2 years, fixed the notional monthly income at Rs.3,000/- and by applying the decision of the Hon'ble Supreme Court in*



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Reshma Kumari Vs. Madan Mohan reported in (2013) 9 SCC 65, multiplier of 15 was adopted. In the case on hand, the Tribunal has fixed the notional annual income of the deceased at Rs.30,000/-. Considering the above decisions and taking note of the fact that the impugned accident was occurred on 07.05.2013 and the age of the deceased Muthu Kamatchi at 13 years, this Court fixes the notional monthly income at Rs.4,000/- and the appropriate multiplier would be 15. Hence, the loss of dependency would be Rs.7,20,000/- (Rs. 4,000/- x 12 x 15).”

19. Considering the fact that the impugned accident was occurred on 22.09.2012 and the age of the deceased is fixed at 13 years, the above decision is squarely applicable to the case on hand. Accordingly, this Court fixes the notional monthly income of the deceased at Rs.4,000/- and by applying the appropriate multiplier 15, the loss of dependency would be Rs.7,20,000/- (Rs.4,000/- x 12 x 15).

20. The Tribunal has awarded Rs.1,00,000/- for loss of love and affection, Rs.1,00,000/- for pecuniary benefits and loss of expectation of life, Rs.1,00,000/- for mental agony, Rs.15,000/- for funeral and transportation expenses and Rs.50,000/- for loss of estate.



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21. Regarding love and affection, the Tribunal has awarded Rs.1,00,000/-. Our Hon'ble Supreme Court in ***National Insurance Company Limited Vs. Pranay Sethi and others*** reported in ***2017 ACJ 2700***, has permitted to award Rs.40,000/- towards spousal consortium. But, subsequently, the Hon'ble Supreme Court in ***Magma General Insurance Company Ltd, Vs. Nanu Ram alias Chuhru Ram and others*** reported in ***(2018) 18 SCC 130***, has held that the right to consortium would include the company, care, help, comfort, love and affection, guidance, solace, etc., which is a loss to his family. The Hon'ble Supreme Court interpreted consortium to be a compendious term, which encompasses (i) spousal consortium, to be awarded to the surviving spouse, (ii) parental consortium to be awarded to the children upon the premature death of their parents and (iii) filial consortium to be awarded to the parents for the loss of their children. Recently, the Hon'ble Apex Court in ***The New India Assurance Company Ltd. Vs. Smt.Somwati and others***, has reiterated the above position and further held that the amount to be awarded for loss of consortium will be as per the amount fixed in ***Pranay Sethi's*** case. But, at the same time, they have specifically observed



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that no amount should be awarded under the separate head of loss of love and affection.

22. Considering the above, the first claimant being the mother and the second claimant being the father of the deceased are certainly entitled to get Rs.40,000/- each towards loss of filial consortium. The claimants are also entitled to get Rs.15,000/- towards loss of estate and Rs.15,000/- towards funeral expenses under the conventional heads. Hence, the amounts awarded under the heads of love and affection, pecuniary benefits and loss of expectation of life and mental agony cannot be sustained. Accordingly, the claimants are entitled to get total compensation of Rs.8,30,000/-.

23. No doubt, the claimants have not challenged the quantum of compensation. At this juncture, it is necessary to refer the judgment of the Hon'ble Supreme Court in ***Surekha and others vs. Santosh and others*** (C.A.No.476 of 2020 dated 21.01.2020) wherein, the Hon'ble Apex Court has held as follows:-

“2. This appeal takes exception to the judgment and order dated 04.01.2019 passed by the High Court of



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Judicature at Bombay, Bench at Aurangabad in First Appeal No.2564 of 2016, whereby the High Court, even though agreed with the stand of the appellants that just compensation amount ought to be Rs.49,85,376/- (Forty-Nine Lakh Eighty-Five Thousand Three Hundred Seventy-Six Only), however, declined to grant enhancement merely on the ground that the appellants had failed to file cross-appeal.

3. By now, it is well-settled that in the matter of insurance claim compensation in reference to the motor accident, the court should not take hyper technical approach and ensure that just compensation is awarded to the affected person or the claimants.”

24. Considering the other facts and circumstances of the case, this Court further decides that the parties are to be directed to bear their own costs and the above points are answered accordingly.

25. In the result, the Civil Miscellaneous Appeal is allowed and the impugned order dated 11.10.2017 passed in M.C.O.P.No.5390 of 2013, mulcting liability on the appellant/insurer is set aside. The compensation awarded by the Tribunal at Rs.8,15,000/- (Rupees Eight Lakhs and Fifteen



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Thousand only) is hereby enhanced to **Rs.8,30,000/- (Rupees Eight Lakhs and Thirty Thousand only)** together with interest at 7.5% per annum and costs from the date of petition till the date of realization. The appellant/insurer is directed to deposit the modified enhanced amount with interest and costs to the credit of M.C.O.P.No.5390 of 2013 on the file of the Motor Accident Claims Tribunal/Special District Court (MCOP), Tiruchirappalli, after deducting the amount already deposited if any, within a period of four weeks from the date of receipt of a copy of this judgment. Thereafter, the appellant/insurer is permitted to recover the same from the third respondent/first respondent. On such deposit being made, the first respondent/first claimant is entitled to get **Rs.5,30,000/- (Rupees Five Lakhs and Thirty Thousand only)** and the second respondent/second claimant is entitled to get **Rs.3,00,000/- (Rupees Three Lakhs only)**. Accordingly, the respondents 1 and 2/ claimants are permitted to withdraw their shares along with interest and costs, less amount already withdrawn, if any, on due application before the Tribunal. If the amount was already deposited by the appellant/insurer, the amount shall be withdrawn by them. Parties are directed to bear their own costs. The respondents 1 and 2/ claimants are **directed to pay the court fee** for



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the enhanced compensation, if any, and the Registry is directed to draft the decree only after the payment of Court fee.

30.11.2023

NCC :yes/No
Index :yes/No
Internet:yes/No
csm

To

1. The Motor Accident Claims Tribunal /
Special District Court (MCOP),
Tiruchirappalli.
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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Pre-Delivery Judgment made in
C.M.A.(MD) No. 191 of 2019

Dated : 30.11.2023