



C.M.A.Nos.54 of 2024 & 2416 of 2023

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 09.02.2024

C O R A M

THE HON'BLE MR. JUSTICE **KRISHNAN RAMASAMY**

C.M.A.Nos.54 of 2024 & 2416 of 2023

and

C.M.P.No.23416 of 2023

CMA.No.54 of 2024:

- 1.Sherbunisha
- 2.Liyagath Ali
- 3.Benazir
- 4.Rasool

...Appellant

Vs

- 1.R.Utharasamy
- 2.E.P.Gurusamy
- 3.National Insurance Co., Ltd,
1st Floor, Karthikeyan Complex,
463, B-19, Mettur Main Road,
Bhavani 638 302.

... Respondents

Prayer:

Civil Miscellaneous Appeal filed under Section 173 of the Motor Vehicles Act, 1988, to enhance the award passed by the Motor Accident Claims Tribunal



C.M.A.Nos.54 of 2024 & 2416 of 2023

(In the Court of IV Additional District Judge) Erode, Bhavani dated 19.03.2020
made in MACTOP.No.341 of 2017 from Rs.10,77,800/- to Rs.52,25,000/- with
interest, cost.

For Appellant : Mr.K.V.Muthu Visakan
For Respondent : Ms.N.B.Sureka for R2

CMA.No.2416 of 2023:

National Insurance Co., Ltd,
1st Floor, Karthikeyan Complex,
463, B-19, Mettur Main Road,
Bhavani 638 302.

...Appellant

Vs

1.Sherbunisha
2.Liyagath Ali
3.Benazir
4.Rasool
5.R.Utharasamy
6.E.P.Gurusamy

... Respondents

Prayer:

Civil Miscellaneous Appeal filed under Section 173 of the Motor Vehicles Act, 1988, to set aside the decree and judgment passed in MACTOP.No.341 of 2017 dated 19.03.2020 on the file of the Motor Vehicle Accident Claims Tribunal, IV Additional District Judge, Erode at Bhavani.



WEB COPY



C.M.A.Nos.54 of 2024 & 2416 of 2023

For Appellant : Ms.N.B.Sureka

For Respondent : Mr.K.V.Muthu Visakan for R1 to R4

Notice Dispensed with for R5 and R6

COMMON JUDGMENT

The appeal in CMA.No.54 of 2024 has been filed by the claimant challenging the quantum of compensation awarded by the Tribunal vide MACTOP.No.341 of 2017.

2. The appeal in CMA.No.2416 of 2023 has been filed by the Insurance Company challenging the negligence and liability fastened against the driver of the Lorry vide MACTOP.No.341 of 2017.

3. The case of the claimant is that on 20.02.2015, while one Salmankhan @ Salman was riding his Motor Cycle bearing Registration No.TN-33-AB-9967



C.M.A.Nos.54 of 2024 & 2416 of 2023

in Anthiyur to Bhavani Main Road near Mangalam School, a Tipper Lorry bearing Registration No.TN-36-3838 was parked on the left side of the road without any indicator signal in a careless manner on the dark night hours, due to which, the said Salman dashed against the Tipper Lorry and thrown away and died on the spot. Considering all the aspects the Tribunal had awarded the following compensation:

S.No	Particulars	Compensation (Rs.)
	1 st petitioner is awarded for	
1	Loss of Dependency	4,52,800
2	Love and Affection	30,000
	Total	4,82,800
	2 nd petitioner is awarded for	
1	Loss of Dependency	2,65,000
2	Love and Affection	20,000
3	Funeral Expenses	15,000
4	Transport to Hospital	10,000
	Total	3,10,000
	4 th petitioner is awarded for	
1	Loss of Dependency	2,65,000
2	Love and Affection	20,000
	Total	2,85,000
	Grand Total	10,77,800



4. The learned counsel for the insurance company would fairly admit the fact that the Tipper Lorry was parked in the middle of the road. However, he would contend that it is not that only the Tipper Lorry had caused the accident but the two-wheeler, which came in a rash and negligent manner, had also contributed for the said accident, however, without considering this aspect, the Tribunal had fastened the entire liability against the driver of the Tipper Lorry.

5. Further, by referring the charge sheet, she would submit that the accident was occurred due to the rash and negligent driving on the part of the rider of the two-wheeler. Therefore, since the rider of the two-wheeler also contributed for the occurrence of the accident she requests this Court fix the ratio of contributory negligence against the rider of the two-wheeler and the driver of the Tipper Lorry as 50:50. In support of his contention, he also referred to the judgment of the Hon'ble Division Bench of this Court in ***CMA(MD)No.1034 of 2021 (Reliance General Insurance Company Ltd., vs. Sathya and others)***.

6. On the other hand, the learned counsel appearing for the claimants



would submit that the Tipper Lorry was parked in the middle of the left side of the road and at the time of accident, it was raining and the deceased was riding the two-wheeler in the rain without knowing whether the Tipper Lorry is parked or not and as a result, the deceased had dashed against the Tipper Lorry. Hence, he would submit that if the Tipper Lorry was not parked, the accident may not have occurred and taking this aspect into consideration, the Tribunal had rightly fixed the entire negligence against the driver of the Tipper Lorry and thus, he requests this Court to confirm the same.

7. Heard the learned counsel for the appellant and the respondent and also perused the materials available on record.

8. In the present case, there is no dispute with regard to the fact that the Tipper Lorry was parked in the left side middle of the road and at the time of accident it was raining. Further, the eye-witness/PW2 had deposed that it was rained at the time of accident and the street light was on.

9. Further, it appears that in the judgment of ***Raj Rani and others vs.***



Oriental Insurance Co.Ltd and others (Civil Appeal No.3317 and 3318 of

2009), the Hon'ble Apex Court had fixed the contributory negligence as 50:50

and held as follows:

“17. The principle of 50:50 in cases of contributory negligence has been discussed and applied in many cases before this court. In [Sri Krishna Vishweshwar Hede v. The General Manager, K.S.R.T.C.](#) (2008 ACJ 1617), this court upheld the judgment of the Tribunal assessing the ratio of liability at 50:50 in view of the fact that there was contributory negligence on the part of the appellant and fixed the responsibility for the accident in the ratio of 50:50 on the driver of the bus and the appellant. In this case, the truck was stationary. Some amount of negligence on the part of the deceased cannot be ruled out.”

10. Further, in the judgment of ***Reliance General Insurance Company Ltd.*** (referred supra), the Hon'ble Division Bench of this Court fastened the contributory negligence in 80:20 ratio and the relevant portion of the said judgment is as follows:

“13. We find from the evidence of P.W.2 that, though he claims to have been travelling on the road, 50 feet behind the



deceased's two wheeler, despite stating that he knew the deceased worked for over 10 years, in the cross examination, he admitted that he had not given the First Information Report and also that he had not given any evidence before the Court concerning the said accident. Thus, the evidence of P.W.2 is not trustworthy. The learned counsel for the appellant has stated that the appellant specifically taken a plea in the counter statement that the deceased did not possess a valid driving licence and he was not wearing a helmet. Despite the said stand taken by the appellant at the first instance, the claimants have not been able to produce any evidence to dispute contentions. On the contrary, the report of the Motor Vehicle Inspector only confirms that the deceased did not possess any valid driving licence. In view of the above discussion, we fix 20% contributory negligence on the part of the deceased."

11. A reading of the above makes it clear that the 20% contributory negligence has been fixed by the Tribunal against the deceased for not possessing the valid driving license. However, what the Hon'ble Apex Court as well as the Hon'ble Division Bench of this Court had failed to consider was that the person, who parks the vehicle in the middle of the road, put the other person



in a situation of danger, which compels him to act quickly in order to extricate himself.

12. On the other hand, in the judgment of ***K.Anusha and others vs. Regional Manager, Shriram General Insurance Co. Ltd.***, reported in ***2021 SCC OnLine SC 3339***, the Hon'ble Supreme Court had elaborately discussed about the fixation of contributory negligence and it would be apposite to extract the relevant paragraphs, which reads as follows:

“11. The first grievance of the appellants about the finding of contributory negligence is liable to be sustained for three reasons namely, (i) that even according to the Tribunal and the High Court, the spot where the lorry was parked, as indicated in Exhibits P-1 to P-6 (FIR, complaint, spot magazar etc.) and Exhibit P-22 (spot sketch), was not a parking place; (ii) that according to the High court, the driver of the lorry ought to have parked the vehicle on the left side of the road by giving proper indication/signal, but it was not done; and (iii) that as per the finding of the High court, the accident occurred at about 4.30 A.M. when the lighting should have been poor.

12. The view expressed by the High Court to effect that if



the driver of the car had been vigilant and driving the vehicle carefully following the traffic rules, the accident would not have happened, is presumptuous and not based on any evidence. There was nothing on record to indicate that the driver of the car was not driving at moderate speed nor that he did not follow traffic rules. On the contrary, the High Court holds that if the lorry had not been parked on the highway, the accident would not have happened even if the car was driven at a high speed.

13. Therefore, the entire reasoning of the High Court on Issue No. 1 is riddled with inherent contradictions. To establish contributory negligence, some act or omission, which materially contributed to the accident or the damage, should be attributed to the person against whom it is alleged. In Pramodkumar Rasikbhai Jhaveri v. Karmasey Kunvargi Tak this Court quoted a decision of the High Court of Australia in Astley v. Austrust Ltd. , to hold that “...where, by his negligence, one party places another in a situation of danger, which compels that other to act quickly in order to extricate himself, it does not amount to contributory negligence, if that other acts in a way which, with the benefit of hindsight is shown not to have been the best way out of the difficulty”. In fact, the statement of law in Swadling v. Cooper , that “...the mere failure to avoid the collision by taking some extraordinary precaution, does not in itself



WEB COPY

constitute negligence...”, was also quoted with approval by this Court. Therefore, we are compelled to reverse the finding of the Tribunal and the High Court on the question of contributory negligence.”

13. A reading of the above judgment would make it clear that the said judgment would squarely applicable to the present case, since in the present case also, the driver of the Tipper Lorry had created a situation of danger, which compels the rider of the two-wheeler to act quickly in order to extricate himself and under this circumstance, the accident was occurred. Therefore, in the present case, no contributory negligence can be fixed against the rider of the two-wheeler. On the other hand, if the Tipper Lorry was not parked in the middle of the road, the accident would have been avoided. In such view of the matter, since the accident was occurred only due the negligence of the driver of the Tipper Lorry, which was parked in the middle of the road, it would be appropriate to fasten the entire liability against the driver of the Tipper Lorry.

14. Further, a submission was made by the learned counsel for the



insurance company with regard to the non-possession of valid driving license by the rider of the two-wheeler at the time of accident. As far as this submission is concerned, since the Tribunal as well as this Court had fixed the entire negligence against the driver of the Tipper Lorry, the question of possession of valid driving license does not arise. The said aspect of possession of valid driving license and not wearing helmet would only arise if the accident was caused due to the rash and negligent driving of the rider of two-wheeler. At this juncture, the charge sheet was referred by the learned counsel for the insurance company, in which, it has been mentioned that the accident was occurred due to the rash and negligent driving of the rider of the two-wheeler, however, there is no details with regard to the deposition of the driver of the Tipper Lorry. In such case, this Court is of the view that they are supposed to have considered the deposition of driver of the Tipper Lorry while preparing the charge sheet, but the same was not done. Hence, this Court is not inclined to accept the said charge sheet.

15. In view of the above, it appears that the Tribunal had rightly fixed the entire negligence against the driver of the Tipper Lorry and hence, this Court is



inclined to confirm the same. Accordingly, the negligence fixed by the Tribunal stands confirmed.

16. As far as the quantum of compensation is concerned, it appears that the Tribunal had fixed the notional income of the deceased as a sum of Rs.6,500/-. In the present case, according to the claimant, the accident had occurred in the year 2015 and at the time of accident, the deceased, who was aged about 20 years, was working at Lathe and earned about a sum of Rs.12,000/- per month. Hence, the learned counsel appearing for the claimant would request this Court to enhance the notional income fixed by the Tribunal.

17. In reply, the learned counsel appearing for the insurance company would submit that a sum of Rs.9,000/- may be fixed as notional income.

18. Taking into consideration of the submissions made by the learned counsel for the claimant and the insurance company, this Court is inclined to fix a sum of Rs.10,500/- as notional income of the deceased. Hence, by adding 40% towards future prospects and applying '18' as multiplier and by deducting 1/2



towards personal expenses of the deceased, the loss of income will be calculated as follows:

$$\text{Rs.10,500/- (notional income) + Rs.4,200/- (40\% future prospects) * 12 (months) * 18 (multiplier) * (1/2) (personal expenses) = Rs.15,87,600/-}$$

19. Further, it appears that the compensation awarded towards the loss of consortium to the 1st and 2nd claimants for a sum of Rs.50,000/- appears to be on the lower side. Hence, the same are enhanced to a sum of Rs.80,000/- (Rs.40,000/- each). The loss of Love and Affection was only awarded to the 4th petitioner, whereas, no amount was awarded to the 3rd petitioner, who is the sister of the deceased since she was married. In this aspect, this Court is of the view that though she is married, she is the sister of the deceased and her relationship would continue and hence, this Court is inclined to award a sum of Rs.20,000/- to the 3rd petitioner towards loss of Love and Affection.

20. Further, it appears that no amount was awarded towards the loss of estate. Hence, this Court is inclined to award Rs.15,000/- towards loss of estate. Accordingly, the compensation awarded by the Tribunal is modified as follows:



WEB COPY



C.M.A.Nos.54 of 2024 & 2416 of 2023

S.No	Particulars	Compensation awarded by the Tribunal (Rs.)	Compensation awarded by this Court (Rs.)
1	Loss of Dependency	9,82,800	15,87,600
2	Loss of Love and Affection:		
	1 st claimant	30,000	40,000
	2 nd claimant	20,000	40,000
	3 rd claimant	Nil	20,000
	4 th claimant	20,000	20,000
3	Funeral Expenses	15,000	15,000
4	Loss of Estate	Nil	15,000
5	Transportation	10,000	10,000
	Total	10,77,800	17,47,600

21. Therefore, the amount awarded by the Tribunal is modified as a sum of Rs.17,47,600/-. Accordingly, the award amount stands enhanced from a sum of Rs.10,77,800/- to Rs.17,47,600/-. In all other aspects, the award of the Tribunal stands confirmed. The compensation awarded by this Court shall be distributed to the claimants in the following proportions:

- a) to the 1st claimant/mother of the deceased – Rs.8,00,000/-;
- b) to the 2nd claimant/father of the deceased – Rs.7,00,000/-;
- c) to the 3rd claimant/sister of the deceased – Rs.1,47,600/-;



C.M.A.Nos.54 of 2024 & 2416 of 2023

d) to the 4th claimant/brother of the deceased –
Rs.1,00,000/-;

WEB COPY

22. In the result, CMA.No.2416 of 2023 is dismissed and CMA.No.54 of 2024 is partly allowed and the insurance company is directed to deposit a sum of Rs.17,47,600/- along with interest and costs, less the amount already deposited, if any, within a period of 6 weeks from the date of receipt of a copy of this judgment, to the credit of MACTOP.No.341 of 2017 on the file of the IV Additional District Judge, Erode at Bhavani. As per the order dated 15.12.2023, the Insurance Company shall not pay any interest for the delayed period of 540 days in filing CMA.No.54 of 2024. Further, the claimants shall pay necessary Court fee, if any, on the enhanced compensation. Thereafter, the Tribunal is directed to immediately transfer the entire amount to the respective bank accounts of the claimants by way of RTGS, in the proportions determined by this Court, within a period of 3 weeks from the date of deposit and from the date of receipt of the Bank details obtained for the claimants or application for withdrawal from the claimants, whichever is earlier. No costs.

09.02.2024



C.M.A.Nos.54 of 2024 & 2416 of 2023

Index: Yes/No

Internet: Yes/No

Speaking order/Non-speaking order
nsa

To:

IV Additional District Judge,
Erode, Bhavani.



WEB COPY



C.M.A.Nos.54 of 2024 & 2416 of 2023

KRISHNAN RAMASAMY,J.

nsa

C.M.A.Nos.54 of 2024 & 2416 of 2023
& C.M.P.No.23416 of 2023

09.02.2024