



C.M.A(MD)No.176 of 2018

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

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Reserved on	27.11.2023
Delivered on	09.01.2024

CORAM

THE HONOURABLE MRS.JUSTICE L.VICTORIA GOWRI

C.M.A(MD)No.176 of 2018
and CMP(MD)No.2609 of 2018

M/s.United India Insurance Company Ltd.,
Tenkasi

... Appellant/3rd respondent

Vs

1. Pommi

2. Rajeshwari

3. Dhanalakshmi

4. Nirmala

5. Minor. Shekha

6. Minor Sajitha
(5th and 6th minor respondents represented by their
natural guardian and mother, 4th respondent)

... 1 to 6 Respondents/Petitioners

7. Deen Badhusa

8. Jenifer Fathima

... 7, 8 Respondents/1 & 2 Respondents



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Prayer : Civil Miscellaneous Appeal filed under Section 173 of Motor Vehicle Act, 1988, praying this Court to set-aside the Judgment and decree in M.C.T.O.P.No.50 of 2017 on the file of Motor Accident Claims Tribunal (Additional District Court), Tenkasi, dated 12.12.2017.

For Appellant : Mr. S.Vijayakumari Natarajan

For Respondents : Mr.R.J.Karthick (R1 to R4)

No Appearance (R7, R8)

ORDER

This Civil Miscellaneous Appeal has been filed to set aside the Judgment and decree in M.C.T.O.P.No.50 of 2017, on the file of Motor Accidents Claims Tribunal (Additional District Court), Tenkasi, dated 12.12.2017.

2.Challenging the quantum of liability fixed against the appellant by the learned Tribunal this appeal has been filed.

3.For the sake of convenience, the parties are arrayed as ranked in the M.C.T.O.P.



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4.The brief facts of the case in nutshell is as follows:

The first petitioner is the wife, the 2nd and 3rd petitioners are the daughters, 4th petitioner is the widowed daughter-in-law and petitioners 5 and 6 are the grand daughters of the deceased one Kandasamy, who died on 26.09.2013. The said deceased was 58 years old at the time of accident. On 26.09.2013, at about 09.30a.m., on Kollam to Shencottah Main road, near Kandhapushpam wood shop, while the deceased was travelling as a passenger in Ape Auto-rickshaw bearing Reg.No.TN 76 B 7531, a dog unexpectedly crossed the road, due to which, the auto driver applied the brake suddenly and lost his control over the Auto and the auto capsized on the roadside. In the said accident, the said Kandasamy sustained grievous injuries, following which, he was taken to Government Hospital, Shencottah for treatment. Later, he was referred to TVMC Hospital for further treatment. However, he died on the way to hospital. The Puliyarai Police has registered a case in Cr.No.78 of 2013 u/s.279, 337, 304(A) of IPC against the driver of the auto/1st respondent. The second respondent is the owner of the auto and the third respondent is the Insurance Company, with whom the second respondent has insured the auto bearing Reg.No.TN 76 B 7531.



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5. Seeking to compensate for the death of the said Kandasamy, the petitioners have filed M.C.T.O.P.No. 50 of 2017 before the learned Tribunal, Tenkasi and the Tribunal was pleased to allow the said petition and passed an award of Rs.13,89,200/- with interest @ 9% p.a. from the date of filing of the claim petition till the date of deposit. Challenging the same, the third respondent has filed this Appeal.

6. The second respondent has filed a counter before the learned Tribunal and submitted that the first respondent, drove the auto slowly at the time of accident by following all the traffic rules and the accident had happened due to the unexpected crossing of dog in the road, therefore, the first respondent applied brake suddenly, as a result of which, the auto got capsized. However, without prejudice to the said defence, the second respondent submitted that the auto involved in the accident has been duly insured with the 3rd respondent Insurance Company. It is for the 3rd respondent to indemnify the same.

7. The 3rd respondent had filed a counter by rebutting every allegation set forth in the petition. Further, it was submitted that



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overload is the reason for capsizing. As per the Registration Certificate and permit, the auto can carry maximum of three passengers, apart from the driver. At the time of the accident, there were seven persons travelling the said auto rickshaw. The overload is the reason for the auto to capsize on the roadside. It amounts to violation of policy condition. Hence, the 3rd respondent is not liable to pay any compensation to the petitioners. The petitioners have to prove that they are the dependents of the deceased Kandasamy. The claim made under various heads are very high and exorbitant.

8.While adjudicating, the petitioners have claimed Rs.25 lakhs. The learned Tribunal has examined PW1 to PW3 on the side of the petitioner and marked Ex.P.1 to Ex.P.9. RW1 was examined on the side of the third respondent and marked Ex.R.1 and Ex.R.2 as documents.

9.After carefully perusing the evidence and documents and on the basis of arguments submitted on both parties, before proceeding to finalise, two issues were framed by the learned Tribunal. On the basis of



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that, the case before the Tribunal was adjudicated. The learned Tribunal came to the conclusion that the accident had happened only due to the rash and negligent driving of the auto-rickshaw by its driver. Further concluded that the first petitioner being the wife, the 2nd and 3rd petitioners being the unmarried daughters, the 4th petitioner is the widowed daughter-in-law and the petitioners 5 and 6 are the grand daughters of the deceased, there cannot be any dispute as to the relationship or dependency or entitlement to claim compensation.

10. Though the petitioners claimed that the age of the deceased as 58 years at the time of accident, no proof of age is produced by the petitioners. On the basis of the age mentioned in the Post Mortem Certificate the age of deceased was taken as 58 years. Though the petitioners claimed the monthly income as Rs.16,000/- per month, no proof of income has been produced. The learned Tribunal has notionally fixed the petitioner income as Rs.400/- per day ie., Rs.12,000/- per month. The deceased person was a Building Contractor and running a petty shop. Following the Judgment of the Apex Court in ***National Insurance Company Ltd Vs Pranay Sethi's & Others reported in***



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2013(9) SCC 54, the learned Tribunal held that the future prospects has to be added irrespective of the fact that whether the deceased is getting fixed wages or he is a seasonal employee. Since the deceased was above 55 years and below 60 years at the time of his death and self-employed in terms of *Pranay Sethi's* case, 10% of his monthly income was added towards future prospects. Hence, the monthly income + 10% future prospects = (Rs.12,000/- + Rs.1,200 (10%) = Rs.13,200/-). Considering the fact that the deceased was married and had left six dependents at the time of accident, the Tribunal following the case of *Sarala Varma and others vs Delhi Transport Corp.& Anr reported in 2009(6) SCC 121* observed that $\frac{1}{4}$ th income should be deducted towards the personal and living expenses of the deceased and calculated the monthly contribution to his family is Rs.13,200/- - Rs.3,300 ($\frac{1}{4}$) = Rs.9,900/-. As per the Sarala Varma's case, the Tribunal applied multiplier '9', based on the age of the deceased was 58 years at the time of accident. Loss of dependency is Rs.9,900 x 12 x 9 = Rs.10,69,200/-. In the light of the same, the Tribunal found that the claimants were entitled to the following compensation under the heads:



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S. No.	Description	Amount awarded by Tribunal (Rs.)
1.	Loss of dependency	10,69,200/-
2.	Loss of estate	15,000/-
3.	Loss of consortium (first petitioner)	40,000/-
4.	Loss of Love and affection (petitioners 2 to 6)	2,50,000/-
5.	Funeral and Transportation expenses	15,000/-
	Total	13,89,200/-

The Tribunal allowed the claim petition by awarding a sum of Rs. 13,89,200/- with interest @ 9% from the date of filing of claim petition till the date of deposit. Towards apportionment, considering the nature of dependency, the Tribunal was inclined to grant Rs.3,89,200/- to the first petitioner and Rs.2 lakhs each to the petitioners 2 to 6.

11.Challenging the same, this appeal has been filed by the third respondent on the ground that the driver instead of the permitted three passengers has permitted six passengers to travel and it has been proved. That being so, statutory violation and violation of permit and policy condition, the liability cannot be fastened on the Insurance Company. It was further submitted that the factum of carrying 6 passengers has been proved by RC Book and Insurance Policy and FIR,



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apart from the available oral evidences. The learned counsel vehemently argued that the Tribunal's conclusion that only overloading has caused the accident and that the Insurance Company will not be held liable is a misnomer. Even there is no nexus with the cause of accident, violation of the stipulated condition itself exonerates the Insurance Company. It is quite probable that it is the over loading by double the permitted number of passengers that made the driver unable to balance the Tri-wheeler Auto and which has resulted in tilting and capsizing. Hence, it can be precisely concluded that overloading is the proximate cause for the accident. Having concluded that the negligence of the driver of the auto was the cause for the accident, the learned Tribunal ought not to have excluded the owner/second respondent from the liability. The learned counsel for the appellant vehemently contended that the learned Tribunal had erred in passing a decree against the Insurance Company. That apart, the amount fixed towards love and affection to each petitioners 2 to 6 is also exorbitant. Considering the age of the deceased being 58 years at the time of accident, the factum of allowing future prospects is also unreasonable.

12.Per contra, the learned counsel for the petitioners



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submitted that though the deceased was working as a Building Contractor and was running a petty shop, considering the fact that it was not duly proved by way of documents, the learned Tribunal has rightly fixed the notional income at Rs.400/- per day, ie., Rs.12,000/- per month. That apart, though he was age of 58 years at the time of accident, he was the head of the big family consisting his wife, two unmarried daughters, one widowed daughter-in-law and two minor grand daughters. That apart, the normal longevity of human life raised to 70 years. Hence, there is no error on the part of the learned Tribunal for having calculated the future prospects and the fixation of notional income. Considering the larger number of dependents, the learned counsel for the petitioners prays not to interfere with the award passed by the Tribunal.

13.As far as the question of liability is concerned, the learned counsel for the third respondent/appellant vehemently contended that the overloading by number of passengers in the auto at the time of accident had made the driver unable to balance the tri-wheeler, resulted in capsizing and has caused the death of the deceased and hence, the Insurance Company shall not be made liable.



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14.However, the Tribunal has gone into this issue and has observed that on the side of the third respondent, an official attached with the third respondent one Madasamy was examined as RW1. In his evidence, RW1 has deposed that at the time accident, auto was carrying 7 persons, which is against the permit condition. The number of passengers allow to travel in the auto-rickshaw is three persons apart from the driver. The accident happened only due to overloading of persons, which is violation of policy condition and permit. In support of the same, RC book of auto as Ex.R.1 and Policy of Insurance Company as Ex.R.2 were marked.

15.The eye-witness to the accident, PW2 has deposed that sudden crossing of the dog is the reason for the accident. However, FIR confirms that seven persons were travelling in the auto and also confirmed that a dog had suddenly crossed the road. But the Tribunal has concluded that the auto driver could have avoided the accident and the rash and negligent driving of the vehicle by the first respondent has caused the accident. The Police has fixed the first respondent as



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responsible for the accident and hence, the Tribunal concluded that the accident had happened due to the rash and negligent driving of the first petitioner. He further proceeded that though overloading was argued as a violation of policy condition by the Insurance Company, the learned Tribunal has also observed that there was no proof that overloading was the reason for the accident. Hence, the third respondent is liable to pay the compensation to the claimants.

16. Even assuming without conceding to the argument of the third respondent that the accident had happened only because of the overloading of the auto, the question to be decided is that will the said factum will absolve the appellant Insurance Company from indemnifying the second respondent. The Apex Court in a similar case of over loaded passengers in a Transport Corporation bus, in the case of ***National Insurance Company Vs Anjana Shyam and others*** reported in has dealt with the issue of overloaded passengers. The relevant portion is extracted as follows.

“15. In spite of the relevant provisions of the statute, insurance still remains a contract between the owner and the insurer and the parties are governed by the terms of their



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contract. The statute has made insurance obligatory in public interest and by way of social security and it has also provided that the insurer would be obliged to fulfil his obligations as imposed by the contract and as overseen by the statute notwithstanding any claim he may have against the other contracting party, the owner, and meet the claims of third parties subject to the exceptions provided in [Section 149\(2\)](#) of the Act. But that does not mean that an insurer is bound to pay amounts outside the contract of insurance itself or in respect of persons not covered by the contract at all. In other words, the insured is covered only to the extent of the passengers permitted to be insured or directed to be insured by the statute and actually covered by the contract. The High Court has considered only the aspect whether by overloading the vehicle, the owner had put the vehicle to a use not allowed by the permit under which the vehicle is used. This aspect is different from the aspect of determining the extent of the liability of the insurance company in respect of the passengers of a stage carriage insured in terms of [Section 147\(1\)\(b\)\(ii\)](#) of the Act. We are of the view that the insurance company can be made liable only in respect of the number of passengers for whom insurance can be taken under the Act and for whom insurance has been taken as a fact and not in respect of the other passengers involved in the accident in a case of overloading.

16. Then arises the question, how to determine the compensation payable or how to quantify the compensation since there is no means of ascertaining who out of the overloaded passengers constitute the passengers covered by



the insurance policy as permitted to be carried by the permit itself. As this Court has indicated, the purpose of the Act is to bring benefit to the third parties who are either injured or dead in an accident. It serves a social purpose. Keeping that in mind, we think that the practical and proper course would be to hold that the insurance company, in such a case, would be bound to cover the higher of the various awards and will be compelled to deposit the higher of the amounts of compensation awarded to the extent of the number of passengers covered by the insurance policy. Illustratively, we may put it like this. In the case on hand, 42 passengers were the permitted passengers and they are the ones who have been insured by the insurance company. 90 persons have either died or got injured in the accident. Awards have been passed for varied sums. The Tribunal should take into account, the higher of the 42 awards made, add them up and direct the insurance company to deposit that lump sum. Thus, the liability of the insurance company would be to pay the compensation awarded to 42 out of the 90 passengers. It is to ensure that the maximum benefit is derived by the insurance taken for the passengers of the vehicle, that we hold that the 42 awards to be satisfied by the insurance company would be the 42 awards in the descending order starting from the highest of the awards. In other words, the higher of the 42 awards will be taken into account and it would be the sum total of those higher 42 awards that would be the amount that the insurance company would be liable to deposit. It will be for the Tribunal thereafter to direct distribution of the money so deposited by the insurance company



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proportionately to all the claimants, here all the 90, and leave all the claimants to recover the balance from the owner of the vehicle. In such cases, it will be necessary for the Tribunal, even at the initial stage, to make appropriate orders to ensure that the amount could be recovered from the owner by ordering attachment or by passing other restrictive orders against the owner so as to ensure the satisfaction in full of the awards that may be passed ultimately.”

Though it is claimed by the Insurance Company that the auto insured by the second respondent and in terms of the permit condition only three number of passengers were allowed to travel in the auto, apart from the driver. However, at the time of accident, there were seven passengers travelling in the auto-rickshaw.

17.A critical perusal of the facts and circumstances of the case would reveal that though the travelling of more number of passengers cannot alone be the reason for capsizing of the auto involved in the accident and that a dog suddenly/unexpectedly cross the road necessitating the first respondent to apply sudden brake has also to be taken into consideration. The third respondent cannot refuse the fact that the permitted number of passengers were covered by the Insurance Company, ie., three number of passengers are covered by the Insurance



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Company. However, in the said accident, it is only the said Kandasamy had died.

18.In view of the same, the Insurance Company would not be justified in taking the defence of violation of policy condition. Though the owner of passenger carrying vehicle must have paid premium for the risk of passengers, if liability other than for providing enhanced under Insurance Policy additional premium is required to be paid. In the instant case in hand, it is only one passenger, who had died in the accident. Though a defence which is available to the third respondent is that the vehicle in question had violated the condition of the policy by allowing more than three passengers to travel in the said vehicle. The same would not be of much avail to the Insurance Company considering the fact that the person deceased would be certainly be covered under the policy condition, since only one passenger out of seven passengers died.

19.In view of the same, even if seven passengers have travelled in the said auto, the fact that only one passenger died in the accident and the insurance policy fairly covers three passengers liability



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can be fastened on the Insurance company/third respondent, in which, the second respondent has insured the auto in the accident.

20.As far as the question of quantum is concerned, the claimants have not proved the monthly income as Rs.16,000/- and the deceased was a Building Contractor and running a petty shop. Though the same was not proved by documentary evidence, considering the oral evidence adduced by PW1 Rajeswari, who is the unmarried daughter of the deceased, the deceased was working as a building Contractor and running a petty shop, the Tribunal had rightly fixed the notional income of deceased as Rs.400/- per day, ie., Rs.12,000/- per month.

21.Considering the age of the deceased was above 55 years and below 60 years and that he was self-employed, only 10% of monthly income was added towards future prospects by the Tribunal and following the *Sarala Varma's* case. Considering the larger number of dependents $\frac{1}{4}$ of his monthly income was deducted towards his expenditure and the multiplier '9' was also applied by the Tribunal. Hence, this Court is of the considered view that it is not necessary to



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interfere with the amount under the head of loss of dependency and loss of estate. Even for the loss of estate Rs.15,000/- has been awarded.

22.For loss of consortium, the Tribunal has rightly awarded Rs.40,000/- to the first petitioner following the case of ***Magma General Insurance Co. Ltd vs Nanu Ram Alias Chuhru Ram*** case. For love and affection, for respondents 2 to 6, Rs.2,50,000/- has been awarded by fixing Rs.50,000/- per head. I am of the considered view that Rs. 50,000/- has to be reduced to Rs.40,000/- per head following the ***Magma General Insurance Co. Ltd vs Nanu Ram Alias Chuhru Ram*** case. I am not inclined to interfere with the amount awarded for funeral and transport expenses and the same stands confirmed. However, the Tribunal has passed the award with interest 9% p.a and the same is reduced to 7.5% interest from the date of filing of the claim petition till the date of deposit.

23.In view of the same, towards apportionment, considering the facts and circumstances and considering the nature of dependency, I am inclined to grant Rs.3,89,200/- to the first petitioner and Rs.



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1,90,000/- each to the petitioners 2 to 6.

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24.Hence, the claimants/respondents are entitled to get total compensation of Rs.13,39,200/- and the compensation awarded by the Tribunal is modified as follows:-

S. No.	Description	Amount awarded by Tribunal (Rs.)	Amount awarded by this Court (Rs.)	Award confirmed or enhanced or granted or reduced
1.	Loss of dependency	10,69,200/-	10,69,200/-	Confirmed
2.	Loss of estate	15,000/-	15,000/-	Confirmed
3.	Loss of consortium (first petitioner)	40,000/-	40,000/-	Confirmed
4.	Loss of Love and affection (petitioners 2 to 6)	2,50,000/-	2,00,000/-	Modified
5.	Funeral and Transportation expenses	15,000/-	15,000/-	Confirmed
	Total	13,89,200/-	13,39,200/-	Reduced by Rs.50,000/-

25. In the result, this Civil Miscellaneous Appeal is partly allowed and the compensation awarded by the Tribunal is hereby reduced to ***Rs.13,39,200/- (Rupees Thirteen Lakhs Thirty Nine Thousand and Two Hundred only)*** from Rs.13,89,200/-. The third respondent is directed to deposit the modified amount with interest at ***7.5% per annum***

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from the date of claim petition till the date of deposit to the credit of M.C.O.P.No.50 of 2017, on the file of Motor Accidents Claims Tribunal/Additional District Court, Tenkasi, after deducting the amount already deposited, if any, within a period of four weeks from the date of receipt of a copy of this order. On such deposit being made, the claimants/respondents are permitted to withdraw the award amount as apportioned supra, with accrued interest and costs, less the amount already withdrawn, if any, on due application before the Tribunal. The appellant is permitted to withdraw the excess award amount, if any, with proportionate accrued interest. No costs. Consequently, connected miscellaneous petition is closed.

09.01.2024

NCC : Yes / No
Index : Yes / No
Internet : Yes

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To

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

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L.VICTORIA GOWRI, J.

PNM

**PRE-DELIVERY ORDER IN
C.M.A(MD)No.176 of 2018
and CMP(MD)No.2609 of 2018**

09.01.2024