BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 05.03.2024

CORAM :

THE HONOURABLE MRS.JUSTICE V.BHAVANI SUBBAROYAN
and
THE HONOURABLE MR.JUSTICE K.K.RAMAKRISHNAN

CMA(MD)Nos.398 and 718 of 2021
and
CMP(MD)No.6582 of 2021 in CMA(MD)No.718 of 2021

CMA(MD)No.398 of 2021:

1. A.Chidambaram
2. C.Valarmathi ... Appellants

vs.

1. D.Moorthy
2. M/s.National Insurance Co. Ltd., Through its Divisional Manager, 3, North Veli Street, Madurai-625 001. ... Respondents

PRAYER: Appeal filed under Section 173 of the Motor Vehicles Act, 1988, against the fair and decreetal order passed in MCOP.No.981 of 2016 on the file of the Motor Accidents Claims Tribunal/IV Additional District Judge, Madurai, dated 25.09.2020 for enhancement of compensation.

For Appellant : Mr.K.Kumaravel

For R1 : No appearance

For R2 : Mr.J.S.Murali

CMA(MD)No.718 of 2021:

M/s.National Insurance Company Limited,
Through its Divisional Manager,
3, North Veli Street,
Madurai-625 001. ... Appellants

vs.

1. A.Chidambaram
2. C.Valarmathi
3. D.Moorthy ... Respondents

PRAYER: Appeal filed under Section 173 of the Motor Vehicles Act, 1988, against the judgment and decree in MCOP.No.981 of 2016, dated 25.09.2020 on the file of the Motor Accidents Claims Tribunal, IV Additional District Judge, Madurai.

For Appellant : Mr.J.S.Murali

For R1 & R2 : Mr.K.Kumaravel

For R3 : No appearance

COMMON JUDGMENT

(Order of the Court was made by K.K.RAMAKRISHNAN, J.

Challenging the judgment and decree dated 25.09.2020 made in MCOP.No.981 of 2016 on the file of the Motor Accidents Claims Tribunal, IV Additional District Judge, Madurai, the insurance company filed CMA(MD)No.718 of 2021. Seeking enhancement of compensation and to set aside 30% negligence fixed on the deceased, the claimants have filed CMA(MD)No.398 of 2021.

2. On 29.01.2016 about 03.45 p.m., the son of the claimants namely, Elavarasan was riding a motorcycle bearing registration No.TN-59-BV-5060 on Trichy-Madurai main road on the first track road. While he was nearing Soorakudipatti pirivu vilakku nearby 'U' turn, a Tipper Lorry bearing registration No.TN-48-S-9599 came on the second track in the same direction in a rash and negligent manner and without giving proper signal turned towards west i.e., right side in order to take 'U' turn. In this process, the Lorry hit the motorcycle, in which, the motorcyclist sustained fatal injuries and he died on the way to hospital. A case in Crime No.24/2016 under Sections 279, 337 and

304(A) of IPC was registered on the file of Manikandam Police Station, Trichy. Parents of the deceased filed claim petition claiming compensation of Rs.1,20,00,000/- contending that the deceased was a B.E graduate and successfully running transport operating business in the name and style of "Pugalendhi Transport" and he owned 10 Lorries for the said business and through the said business, he earned Rs.1,00,000/- per month. The insurance company with which the offending Tipper Lorry was insured, contested the claim petition stating that the deceased was solely responsible for the accident and also disputed the income of the deceased and seeks dismissal of the claim petition.

3. In order to prove the claim, on the side of the claimants, two witnesses were examined as PW1 and PW2 and Exs.P1 to P21 were marked. On the side of the insurance company, two witnesses were examined as RW1 and RW2 and Ex.R1 was marked.

4. The Tribunal after considering the oral and documentary evidence adduced on either side, fixed the negligence in the ratio of 70:30 between the Lorry driver and deceased and awarded compensation of Rs.55,29,509/-. However, considering the fact that the insured Lorry

was operated without valid fitness certificate, the Tribunal directed the insurance company to pay the compensation and then recover the same from the owner of the Lorry. Challenging the judgment and decree, the present appeals are filed as stated above.

5. Learned counsel for the insurance company submitted that the Tribunal has erroneously fixed the annual income of the deceased at Rs.9,21,095/- solely based on Ex.P11 which is the income tax returns of the deceased for the assessment year 2015-2016. Learned counsel further submitted that the said document was filed after the death of the deceased and further, Exs.P9 to P11 are income tax returns of the deceased for the assessment years 2013-2014, 2014-2015 and 2015-2016 respectively, and therefore, the average income of all these years has to be taken for the purpose of fixing the annual income of the deceased and consequently, the quantum requires reduction. Hence, he seeks for interference in the award. Except the above, learned counsel did not dispute the award on the grounds and under other heads.

6.1. Per contra, learned counsel for the claimants submitted that even the evidence of PW2-eye witness discloses that the Lorry driver drove the same in a rash and negligent manner and without giving signal, he had suddenly overtaken the motorcycle of the deceased and took 'U' turn, in which, the deceased fell down and sustained fatal injuries. Therefore, when there is no negligence on the part of the deceased, the Tribunal ought not to have fixed 30% negligence on the deceased. Hence, the finding regarding negligence requires interference by this Court by setting aside 30% negligence fixed on the deceased.

6.2. As far as the quantum of compensation is concerned, learned counsel submitted that the Tribunal has rightly fixed the annual income of the deceased as per Ex.P11. However, no amount was given for future prospects and love and affection. Hence, he seeks enhancement on the quantum of compensation.

7.1. We have considered the rival submissions and also perused the documentary evidence marked before the Tribunal and also perused the impugned judgment of the Tribunal. From the above submission, this Court frames the following points for determination:-

7.2. Whether the tribunal correctly fixed 30% contributory negligence on the deceased?.

7.3. Whether the tribunal is correct in fixing the annual income of the deceased on the basis of Ex.P.11which was filed after the death?.

7.4. Whether the tribunal is correct in awarding the compensation without calculating future prospects?.

8.Discussion of Negligence:

Perusal of the impugned judgment shows that the Tribunal considered Exs.P1-FIR and Ex.P2-rough sketch prepared in the place of accident and also the evidence of PW2-eye witness who deposed that without taking abundant caution, the Lorry driver took 'U' turn and hit the motorcycle of the deceased. Similarly, the tribunal also observed that the motorcyclist should have waited and allowed the Lorry to turn right, but the fact remains that the rider of the motorcycle was also riding in a negligent and this fact cannot be ruled out by this Court. As such, 30% negligence fixed on the deceased cannot be said to be erroneous and therefore, it does not require interference by this Court. In claims cases, the test to find out negligence is by way of preponderance of probability. Applying the said test to the case on hand, this Court finds no infirmity or perversity in the finding of the Tribunal regarding negligence, and hence it is confirmed.

9. **Discussion on quantum**:

Coming to the quantum of compensation, it is the contention of the insurance company that the Tribunal ought to have taken the average income of last three years of income tax returns of the deceased instead of fixing exorbitant annual income as per Ex.P11 which according to the company, was filed after the death of the deceased, and therefore, it cannot be relied upon. On facts, we find some force in the said contention. In this regard, we have perused Ex.P.9 to Ex.P.11 which are the income tax returns of the deceased for the assessment years 2013-2014, 2014-2015 and 2015-2016 respectively. Upon consideration of those documents, we deem it fit that a sum of Rs.6,00,000/- which is the average sum of three years of income tax returns, can be fixed as annual income of the deceased. The deceased was aged 29 years at the time of accident. Had he been alive, he would have successfully run his business and earned more income. However, the Tribunal has failed to add future prospects. Thus, after adding 40% towards future prospects i.e., Rs.2,40,000/-, the income of the deceased works out to Rs.8,40,000/-. Since the deceased was a bachelor at the time of accident, 50% of his income has to be deducted towards his personal expenses.

After doing so, the annual income of the deceased comes to Rs.4,20,000/-. After applying multiplier 17, the dependency compensation works out to Rs.71,40,000/-. The award of Rs.15,000/- towards loss of estate and Rs.15,000/- towards funeral expenses are confirmed. The Tribunal has awarded a sum of Rs.40,000/- towards filial consortium to the father of the deceased, whereas, it omitted to award some amount under that head to the mother of the deceased who is the second claimant and she also lost the filial consortium of his son/deceased. Hence, a sum of Rs.40,000/- is awarded to the mother of the deceased towards filial consortium.

10. The total compensation is modified and apportioned as hereunder:-

Loss of income	=	Rs.71,40,000/-
Loss of estate	=	Rs. 15,000/-
Funeral expenses	=	Rs. 15,000/-
Filal consortium	=	Rs. 80,000/-
Total	=	Rs.72,50,000/-

11.1. After deducting 30% of compensation in the total arrived compensation of Rs.72,50,000/- *(i.e., Rs.21,75,000/- towards the liability of the deceased, on the account of his contributory negligence),* the claimants are entitled only Rs.50,75,000/- and the same would be the total compensation the claimants are entitled to withdraw. The insurance company is directed to deposit the modified compensation of Rs.50,75,000/- with 7.5% interest per annum from the date of petition till the date of deposit, within a period of 6 weeks from the date of receipt of a copy of this judgment after deducting any amount if already deposited.

11.2. **Apportionment of compensation** :

The claimants are parents and permitted to withdraw the modified compensation of Rs.50,75,000/- in the ratio of 50% each apportioned by the Tribunal with respective proportionate accrued interest and costs by making necessary application before the Tribunal.

12.Pay and Recovery:

The insured lorry was operated without valid fitness certificate and the same amounts to the violation of policy. Therefore the learned tribunal Judge has directed to pay the compensation and then recover the same from the owner of the lorry. There was no appeal on the side of the owner of the insured vehicle. Hence this Court confirms the said direction of Court below. Therefore, the insurance company is entitled to recover the *modified compensation* from the owner of the Lorry insured with them as per the mode incorporated in paragraph 7 of the judgment in the case of **Oriental Insurance Co.Ltd., Vs. Shri Nanjappan and others,** reported in **I (2004) ACC 524 (SC),** which reads as follows:-

> "(7) ....For the purpose of recovering the compensation amount from the insured, the insurer shall not be required to file a suit. It may initiate a proceeding before the concerned Executing Court as if the dispute between the insurer and the insured was the subject matter of determination before the Tribunal and the issue is decided against the owner and in favour of the insurer. A notice shall be issued to the insured to furnish security for the entire amount. The offending vehicle shall be attached as a part of the security. If necessity arises, the Executing Court shall take assistance of the concerned Regional Transport Authority. The Executing Court shall pass appropriate orders in accordance with law as to the manner in which the insured, owner of the vehicle shall make payment to the insurer. In case there is any default it shall be open to the Executing Court to direct realisation by disposal of the securities to be furnished or from any other property of the insured. ..."

13.1. Accordingly, CMA(MD).No.398 of 2021 is partly allowed in the following terms:-

13.1.(i) the award amount granted in MCOP. No.981 of 2016 by the Motor Accidents Claims Tribunal/IV Additional District Judge, Madurai, dated 25.09.2020 is reduced to Rs.50,75,000/- from Rs.55,29,509/- with interest from the date of the claim petition.

13.1.(ii) the insurance company is directed to deposit the said amount of Rs.50,75,000/- within period of 6 weeks from the date of receipt of copy of this Order after deducting any amount if already deposited and recover the same, from the owner of the insured vehicle in the same execution proceedings as stated in the Paragraph 7 of the Hon'ble Supreme Court Judgment in the case of ***Oriental Insurance Co.Ltd., Vs. Shri Nanjappan and others,*** reported in ***I(2004) ACC 524 (SC).***

13.2. CMA(MD)No.718 of 2021 filed by the insurance company is hereby dismissed.

No costs. Consequently, connected miscellaneous petition is closed.

(V.B.S., J.) **(K.K.R.K., J.)**
05.03.2024

Index : Yes / No
Neutral Citation : Yes / No
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To

1.The IV Additional District Judge,
Motor Accident Claims Tribunal, Madurai.

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

V.BHAVANI SUBBAROYAN, J.
and
K.K.RAMAKRISHNAN, J.

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COMMON JUDGMENT MADE IN
CMA(MD)Nos.398 and 718 of 2021

DATED : 05.03.2024