**(2012) 02 MAD CK 0172**

**In the Madras High Court**

**Case No :** Civil Miscellaneous Appeal No. 429 of 2009 and M.P. No. 1 of 2009

National Insurance Co., Ltd., 74/A, Paramathy Road, Namakkal - 637001 — APPELLANT

Vs

K. Rupashanthini and Others — RESPONDENT

**Date of Decision :** 23-02-2012

**Acts Referred:**
Penal Code, 1860 (IPC) — Section 279, 304

**Citation :** (2012) 02 MAD CK 0172

**Hon'ble Judges :** S. Vimala, J;R. Banumathi, J

**Bench :** Division Bench

**Advocate :** Arunkumar, for the Appellant; N. Manoharan, for the Respondent

**Final Decision :** Allowed

## Judgement

R. Banumathi, J.—Challenge in this appeal is the award in M.C.O.P. No. 330 of 2007 (dated 29.04.2008) on the file of the Motor Accident Claims Tribunal, Additional District Judge, (Fast Track Court-IV), Bhavani, in which the Tribunal has awarded compensation of Rs.26,38,000/- for the death of the deceased Vijayakumar. Brief facts are that on 23.10.2006 at about 5.30 p.m., Vijayakumar was riding the motorcycle bearing Registration No.TN 45 P 7273 in Erode to Gobi Road. When the two wheeler was nearing Othakuthirai, the lorry bearing Registration No.TN 28 K 8729 driven by the fourth respondent in a rash and negligent manner came in the opposite direction and dashed the motorcycle. Due to the accident, the deceased Vijayakumar was thrown away and fell down on the southern edge of the road and sustained grievous injuries in head, left thigh and all over the body. The deceased Vijayakumar was taken to Gobi Government Hospital and he died on his way to the hospital. Regarding the accident, criminal case was registered against the fourth respondent in Crime No.759 of 2006 on the file of Gobi Town Police Station for the offence under Sections 279 and 304 I.P.C. From 01.04.2005 to 23.10.2006, the deceased was working as Supervisor in M/s.Star Tyre Retreading, Erode and was getting salary of Rs.5,000/- and bonus of Rs.5,000/- . The deceased Vijayakumar was also working as commission agent in TVS Finance and Services Limited and earning Rs.22,000/- per month. Alleging that the accident was due to the rash and negligent driving of the lorry driver and that the family has lost the support, wife, minor son and mother of the deceased have filed claim petition, claiming compensation of Rs.53,30,000/- .

2. The appellant insurance company resisted the claim petition, denying the manner of accident and also rash and negligent driving of the lorry by the fourth respondent. According to the appellant-insurance company, the fourth respondent was driving the lorry slowly and cautiously in a moderate speed and only Vijayakumar was riding the motorcycle carelessly, rashly and negligently and invited the accident and thus contributed to the accident. The insurance company has also denied the age, occupation and income of the deceased Vijayakumar.

3. Before the Tribunal, the first claimant examined herself as P.W.1. Partner of M/s.Star Tyre Retreading, in which the deceased worked, was examined as P.W.2. Eye witness - Venkatachalam was examined as P.W.3. R.Balaji, Sales Executive of the TVS Finance and Services Limited was examined as P.W.4. Exs.A1 to A21 were marked on the side of the claimants. On the side of appellant-insurance company and the owner of the vehicle, fourth respondent/driver of the vehicle was examined as R.W.1 and Exs.B1 to B5 were marked.

4. Upon consideration of oral evidence of P.W.3 and other documentary evidence, the Tribunal held that the accident was due to the rash and negligent driving of the lorry driver - fourth respondent. Insofar as the quantum, based upon the evidence of P.Ws.2 and 4, the Tribunal has taken the income of the deceased at Rs.18,000/- , deducting 1/3rd amount for personal expenses, the Tribunal has taken the loss of contribution at Rs.12,000/- . As the deceased Vijayakumar was aged 28 years, the Tribunal has adopted multiplier 18 and awarded Rs.25,92,000/- for loss of dependency. The Tribunal has awarded total compensation of Rs.26,38,000/- as under:

Loss of dependency

(Rs.18,000/- x 1/3 x 12 x 18)

..

Rs.25,92,000.00

Loss of love and affection

(Rs.10,000/- x 3)

..

Rs. 30,000.00

Loss of consortium

 

..

Rs. 10,000.00

Funeral expenses

..

Rs. 5,000.00

Transport expenses

..

Rs. 1,000.00

Total

..

Rs.26,38,000.00

5. Mr. S. Arunkumar, learned counsel for the appellant has contended that the Tribunal ought to have relied on the evidence of R.W.1 and appreciated the efforts taken by him to avoid the accident and the Tribunal ought to have held that the deceased was riding the two wheeler in a rash and negligent manner and that the deceased was responsible for the accident. It was further submitted that the Tribunal erred in placing reliance upon the interested version of P.W.3 - eye witness, who has been working as security in Lotus company. Reiterating the findings of the Tribunal, the learned counsel for the claimants would submit that a criminal case was registered against the lorry driver indicating that the driver of the lorry was negligent.

6. Upon consideration of the contentions and the award of the Tribunal, the following points arise for determination in this appeal:

(1) Whether the accident was due to the rash and negligent driving of the lorry driver? Whether the deceased contributed to the accident as contended by the appellant Insurance Company?

(2) Whether the quantum of compensation awarded to the claimants is just and reasonable?

7. Point No.1:- On 23.10.2006, one Prabhu working in TVS Finance and Services Limited went for collection to Sathyamangalam and P.W.3 also went with him in the said Prabhu''s two wheeler bearing Registration No.TN 36 J 1910. When P.W.3 along with Prabhu was returning from Erode and when they were proceeding near Othakuthirai from west to east, the lorry driven by the fourth respondent in a rash and negligent manner overtook their two wheeler and proceeded fast and hit against the two wheeler coming in the opposite direction i.e. east to west on the southern side. In his evidence, P.W.3 would state that the mudguard of the lorry hit against the two wheeler and the deceased Vijayakumar had fallen down

 

and the driver of the lorry ran away from the place. P.W.3 would further state that the deceased was taken to the hospital and that the deceased died on his way to the hospital and that the accident was only due to the rash and negligent driving of the lorry driver.

8. Learned counsel for appellant contended that since the lorry overtook P.W.3 and went ahead of him, P.W.3 could not have witnessed the accident and while so the Tribunal erred in placing reliance upon the evidence of P.W.3. It was further submitted that the Tribunal did not appreciate evidence of R.W.1/ Respondent No.4 in proper perspective.

9. In his evidence, R.W.1 has stated that the two wheeler came in the opposite direction driven very fast and in that process two wheeler hit against the lorry and rider of the two wheeler had fallen from the two wheeler and that the accident was only due to the negligence of the rider of the two wheeler.

10. We have considered the evidence of P.W.3 and R.W.1 in the light of the documents - Ex.A.2 - Observation Mahazar and Ex.A.3 - rough sketch. The two wheeler bearing Registration No.TN 45 P 7273, which the deceased was riding, was proceeding from east to west. The lorry driven by R.W.1 was proceeding from west to east. Erode-Gobi road is East-West road measuring 24 feet Tar road in width apart from 5 feet mud road on both sides. By perusal of Ex.A.3 - rough sketch, it is seen that the two wheeler, which was proceeding to east to west, was proceeding in southern side maintaining its correct direction. From Ex.A.3- rough sketch, it is seen that the point of impact was on the southern side. Even though R.W.1 claimed that he was maintaining the correct direction, Ex.A.3 - rough sketch does not reflect his evidence. The point of impact, being on the southern side, indicates that the lorry went to the southern side and hit against the two wheeler prima facie showing the negligence of the lorry driver.

11. When the Appellant Insurance Company and the insured have taken the plea of contributory negligence, burden lies upon the insurer and the insured to substantiate the defence plea of contributory negligence. Excepting the evidence of R.W.1, no other evidence was adduced to substantiate the defence plea of contributory negligence. If really the deceased also contributed to the accident, in normal course, R.W.1 would have gone to the police station and lodged a police complaint. But that was not to be so; after the accident, the lorry driver ran away from the place. Ex.A.1. - F.I.R. was registered against the lorry driver (4th respondent). Charge sheet - Ex.A.7 was also filed against the driver - 4th respondent. Filing of charge sheet against the lorry driver would show that a prima facie case has been made out against the lorry driver. In the absence of convincing evidence and materials, upon appreciation of P.W.3 and R.W.1, the Tribunal rightly negatived the defence plea of contributory negligence. The conclusion of the Tribunal holding that the accident was due to the rash and negligent driving of the lorry driver is based upon the evidence on record and we do not find any ground to interfere with the said finding. This point is answered accordingly.

 

12. Point No.2:- In her evidence, P.W.1 has stated that from 2004-2005 her husband was working as Executive in Capital Services, Chennai and getting salary of Rs.2,500/- and incentive of Rs.5,000/- . P.W.1 would further state that from 01.04.2005 till 23.10.2006 Vijayakumar was working as Supervisor in M/s.Star Tyre Retreading and getting salary of Rs.5,000/- per month and another Rs.5,000/- and he was getting income of Rs.5,000/- and Rs.5,000/- per annum as bonus. Even while working in Star Tyre Retreading, the deceased Vijayakumar was working as collection agent in TVS Finance and Services Limited and getting salary of Rs.22,000/- per month and after his death, she and the second claimant aged only two months and the mother of the deceased have lost the support.

13. The partner in M/s.Star Tyre Retreading was examined as P.W.2. In his evidence, P.W.2 has stated that Vijayakumar was working as Supervisor in M/s.Star Tyre Retreading from 01.04.2005 to 23.10.2006 and was getting salary of Rs.5,000/- and getting bonus of Rs.5,000/- . To prove the salary of the deceased, P.W.2 has produced the salary certificate Ex.A13 and also produced Exs.A14 and A15 income tax returns of M/s.Star Tyre Retreading for the financial years 2005-2006, 2006-2007. From the evidence of P.W.2, it is seen that the deceased was getting salary of Rs.5,000/- till October, 2006.

14. In this evidence, P.W.4 Balaji Sales Executive of TVS Finance and Services Limited has stated that the deceased Vijayakumar was their collection agent for Gobichettipalayam and also Sathyamangalam. The deceased Vijayakumar was entrusted with the responsibility of collection and also to seize the vehicles of the defaulters. Ex.A10 contains the terms and conditions of the appointment of Vijayakumar as Collection Agent. Ex.A.11 is the Repossession Agent agreement appointing Vijayakumar as Repossession Agent. Ex.A12 is the appointment order issued to Vijayakumar authorising him to function as the agent of TVS Finance and Services Limited, which again contains the terms and conditions.

15. In his evidence, P.W.4 has stated that the deceased Vijayakumar was functioning as their collection agent from 12.06.2006 to 23.10.2006 and that based upon the collection the deceased Vijayakumar was paid the commission. Ex.A20 is the collection cum commission report for the period from 13.07.2006 to 11.10.2006 and that the deceased Vijayakumar was getting average of Rs.14,000/- per month as commission. In his evidence, P.W.4 would further state that had the deceased been alive he would have earned more income. To substantiate his evidence P.W.4 has produced Ex.A20 and A.21.

16. From evidence of P.Ws.2 and 4, it is thus sought to be stated that deceased Vijayakumar was working as Supervisor in Star Retreading Company from 1.4.2005 to 23.10.2006. At the same time, deceased Vijayakumar is also stated to have been employed as Commission and Repossession Agent by T.V.S.Finance and Services Limited, Erode. Since deceased Vijayakumar is said to have been simultaneously employed by two companies, the evidence adduced regarding his employment at two places has to be carefully analysed. In his evidence, P.W.2

 

has stated that the deceased Vijayakumar was employed as Supervisor in Star Retreading Company and that his duty time was from morning 9.00 a.m to 5.00 p.m. Being a Supervisor in Star Retreading Company working for the whole day, the deceased Vijayakumar would have bestowed his full attention and efforts only in the Company in which he was employed viz., Star Retreading Company.

17. Learned counsel for claimants contended that Star Retreading Company has paid the income tax for the year 2005-2006 (Ex.A.15) and 2006-2007 (Ex.A.16) and that income tax returns - Exs.A.15 and A.16 would show that the salary was paid in the name of deceased Vijayakumar. Placing reliance upon a Division Bench judgment of this Court in the case of United Insruance Company Ltd. and Another V. Dr. Sujjanna AL. Manuel and Others, (2010(1) TNMAC 1), the learned counsel would contend that even though the income tax returns - Exs.A.15 and A.16 were filed subsequent to the accident, the same could be taken into account to calculate the monthly income of the deceased.

18. By perusal of Exs.A.15 and A.16, it is seen that the income tax returns for 2005-2006 and 2006-2007 were filed on 4.1.2007 i.e., three months after the accident and after the death of deceased Vijayakumar. To substantiate the payment of salary, Star Retreading Company has not produced any salary disbursement register and not produced any voucher evidencing the payment of salary to deceased. P.W.2 has only produced the ledger - Ex.A.18 which contains the entries regarding payment of salary. Even Ex.A.18 - Ledger account was not produced in the first instance, but only produced when subsequently P.W.2 was recalled and further examined. Much reliance cannot be placed upon the evidence of P.W.2, who is the Partner of Star Retreading Company.

19. Yet another aspect regarding the alleged employment is to be pointed out. As pointed out earlier, in his evidence, P.W.4 - Balaji, Sales Executive of T.V.S.Finance and Services Limited has clearly spoken about Exs.A.10 and A.11 and Ex.A.12 - appointment order, which contains the terms and conditions of employment Vijayakumar as a Commission Agent and vehicle Repossession agent. By perusal of Exs.A.10 and A.11, it is seen that the Collection Agent has to carry out his obligations and functions strictly in accordance with the terms and conditions and also the guidelines. As seen from Ex.A.12, the Collection Agent is to visit the premises of the customers for effecting collection of amounts due from customers and to maintain accurate accounts. Ex.A.12 also stipulates that the amount collected has to be deposited with Coimbatore office within 24 hours of the actual collection. Likewise, the deceased Vijayakumar was to perform his duties as Repossession agent strictly as per the terms and conditions of Ex.A.11 - Repossession Agent agreement. By going through the terms and conditions of Ex.A.10 - Collection Agreement and Ex.A.11 - Repossession agreement and Ex.A.12 - appointment order, we find that from June, 2006, the deceased Vijayakumar must have spent his whole time only as Collection agent and Repossession agent of TVS Company. Considering the stringent terms and conditions of Exs.A.10 and A.11 and Ex.A.12, we do not think that after Exs.A.10

 

and A.11 - Agreements in June, 2006, the deceased Vijayakumar could have continued his employment in Star Retreading Company. Therefore, we are not inclined to accept the evidence of P.W.2, who has inclined to accept the evidence of P.W.2, who has stated that the deceased was working as Supervisor in Star Retreading Company.

20. As seen from the evidence of P.W.4, the commission amount payable to Vijayakumar was paid by Cheques. On various dates, the Commission amount/ Repossession charges was paid to deceased Vijayakumar as under:

Date

Cheque No.

Amount in Rs.

13/07/2006

123650

14014

24/08/2006

146029

15171

111006

155077

11885

All the vouchers evidencing payment of commission by the above cheques were marked as Ex.A.21 series.

21. The learned counsel for the appellant Mr.Arunkumar would submit that Ex.A.12 communication was sent to deceased Vijayakumar, "C/o.Sri Murugan Associates", which would indicate that only "Sri Murugan Associates" was the collection agent and that Sri Murugean Associates must have entered into collection agent agreement and Repossession agent agreement and therefore it cannot be said that the entire commission amount of Rs.14,014/- , Rs.15,171/- and Rs.11,885/- would have been paid to deceased Vijayakumar alone on the above said dates. It was further submitted that the Court should take note of the fact that for being Repossession Agent, the deceased would have employed persons and therefore Ex.A.20 - collection cum commission report cannot be taken as the basis for calculating the income of the deceased at Rs.14,000/- . It was further submitted that Ex.A.20 are only the vouchers and those vouchers have been prepared after filing of the petition on 9.2.2008 and filed into the Court and while so the Tribunal ought not to have placed reliance upon Ex.A.20. It was further submitted that to substantiate Ex.A.20 vouchers, TDS certificate

 

was not produced and if really TDS has been deducted, claimants could have very well produced the TDS certificate. The above contention does not merit acceptance.

22. There is no merit in the contention raised assailing agreements - Exs.A.10 and A.11 and the Cheque vouchers - Ex.A.21 series. As pointed out earlier, Ex.A.10 - Collection Agreement and Ex.A.11 - Repossession Agent agreement were entered between TVS Finance and Services Limited with deceased Vijayakumar. Based on Exs.A.10 and A.11, appointment order - Ex.A.12 was issued to Vijayakumar. If really such agreement was entered into with any partnership firm or group of individuals, certainly, it would have been indicated in Exs.A.10 and A.11 and in Ex.A.12. In fact, Ex.A.12 communication was addressed only to deceased Vijayakumar, C/o.Sri Murugan Associates. Mere mention of "C/o.Sri Murugan Associates" would not indicate that the agreement was entered with any partnership firm. We do not find any merit in the contention raised assailing Ex.A.21 vouchers. By perusal of Ex.A.21 series, it is seen that all the commission/recovery charges were paid only by way of Cheques and TDS was also deducted on contract payments. While so, when the payments were made by cheques, substantiated by vouchers, the correctness of Ex.A.21 series cannot be doubted.

23. Based on Ex.A.21 series and the evidence of P.W.4, it is clearly established that the deceased was earning an average of Rs.14,000/- per month. In his evidence, P.W.4 has stated that the deceased Vijayakumar might have employed sub-staff for collecting the amount and also for seizure of the two wheelers of the defaulters. From out of the commission amount, the deceased would have spent some amount towards his travel expenses and also for employing other persons for assisting him. Over the years, the deceased would have earned more. Considering the future prospects of the deceased, we deem it fit to fix the income at Rs.15,000/- per month. Deducting 1/3rd for personal expenses, the loss of dependency is calculated at Rs.10,000/- per month. The deceased Vijayakumar was aged 28 years. As per the Second Schedule, the proper multiplier to be adopted is 18, which the Tribunal has adopted and the same is maintained. The loss of dependency is calculated at Rs.10,000 x 12 x 18 = Rs.21,60,000/- .

24. In so far as conventional damages, the Tribunal has awarded Rs.30,000/- for loss of love and affection; Rs.10,000/- for loss of consortium; Rs.5,000/- for funeral expenses and Rs.1,000/- for transport expenses. In our considered view, the quantum of compensation awarded for the conventional damages are just and reasonable and the same is maintained.

25. Accordingly, the compensation awarded to the claimants is reduced to Rs.22,06,000/- and the details of which are as under:-

?Loss of dependency ( Rs.10,000 x 12 x 18 )

: Rs.21,60,000.00

 

Loss of love and affection (Rs.10,000/- x 3)

: Rs.

30,000.00

Loss of consortium

: Rs.

10,000.00

Funeral expenses

: Rs.

5,000.00

Transport expenses

: Rs.

1,000.00

Total

= = = = = = = : Rs.22,06,000.00 = = = = = = =

The Tribunal has awarded interest at the rate of 7.5% per annum and the said is maintained. The above reduced compensation of Rs.22,06,000/- with interest at 7.5% per annum from the date of petition has to be apportioned amongst the claimants in the same proportion as ordered by the Tribunal.

26. In the result, the appeal is allowed in part and quantum of compensation awarded to the claimants in M.C.O.P.No.330 of 2007 on the file of Motor Accident Claims Tribunal, Additional District Judge, (Fast Track Court-IV), Bhavani is reduced to Rs.22,06,000/- together with interest at 7.5% per annum from the date of petition. It was stated that pursuant to the order of this Court dated 25.03.2009 in M.P.No.1 of 2009, the appellant Insurance Company has deposited Rs.18,15,000/- and from out of which the first claimant- wife of deceased was permitted to withdraw a sum of Rs.8,15,000/- and the 3rd claimant - mother of deceased was permitted to withdraw a sum of Rs.1,85,000/- and the balance compensation amount was directed to be deposited in a nationalised Bank by permitting the 1st claimant - wife of deceased to withdraw the interest accrued once in three months. The Appellant Insurance Company is directed to deposit the balance compensation amount within a period of eight weeks from the date of receipt of copy of the judgment. On such deposit, Claimants 1 and 3 are permitted to withdraw their respective share of balance reduced compensation amount with proportionate interest at the rate of apportionment ordered by the Tribunal. The compensation amount payable to the minor - claimant No.2 shall be invested in a nationalised bank till the minor attains majority and from the said deposit, the 1st claimant - mother is permitted to withdraw interest directly

 

from the Bank once in three months. However, there is no order as to costs in this appeal. Consequently, the connected M.P. is closed.

 