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**(1987) 09 MAD CK 0058**  
**In the Madras High Court**

Venkataswami Motor Service P.N. Palayam APPELLANT  
Vs  
C.K. Chinnaswamy and Others RESPONDENT

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**Date of Decision :** 01-09-1987

**Acts Referred:**

**Citation :** (1988) 1 ACC 571 : (1989) ACJ 371

**Hon'ble Judges :** Swamikkannu, J

**Bench :** Single Bench

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## Judgement

Swamikkannu, J.—This Appeal coming on for bearing on Monday the 20th July, Friday the 14th August 1987 and having stood over for consideration till this day the court delivered the following judgment:

2. This appeal is preferred by the third respondent M/s. Venkataswami Motor Service, P.N. Palayam, Coimbatore, against the award dated 1-9-1981 in M.C.O.P. No. 14 of 1980 on the file of the Motor Accidents Claims Tribunal and Principal Subordinate Judge of Coimbatore, passed on a petition u/s 110-A of the Motor Vehicles Act, praying to grant an award for Rs. 50,000/- by way of compensation on account of the death of one Kamalam alias Kamalammal in a motor accident, finding that the vehicle in question was driven in a rash and negligent manner at the time of the occurrence and also finding that the claimants were entitled to a compensation of Rs. "36,000/-. The liability of the fifth respondent Oriental Fire and General Insurance Company Limited, now known as Oriental Insurance Company Limited, Coimbatore, is restricted to Rs. 5,000/-only. The claimants, who are respondents 1 to 4 herein, have to share the award amount equally among them. The share of the minor claimants is ordered by the Tribunal to be invested in the United Commercial Bank, 443-445 Raja Street, Coimbatore, till they attain majority. The father of the minors, the first claimant C.K. Chinnaswami, will be entitled to draw the interest that accrues on the deposit amount once in six months, for the benefit of the minors. The first respondent herein, who is the father of the minors, has been declared as guardian for minor respondents 2 to 4 as per order of Court in C.M.P. No 11094

of 1981.

3. The case of the petitioners, respondents 1 to 4 herein, is that they are the husband, minor son, minor daughter and minor son of the deceased Kamalam, that on 16-7-1979 at about 7.45 am. the deceased was travelling in a town bus plying in route No. 32 C and bearing registration No. TNE 5517 along Goods Shed Road, that when the bus approached the bus stop near the junction of Big Bazaar Street and Goods Shed Road, west of St. Michael's High School, she got down from the bus, that before she could stabilize herself on the road, the conductor instructed the driver to move the vehicle and accordingly the driver started the bus rashly and negligently, with the result that Kamalam was knocked down and dragged along by the body of the bus, that in that process she had sustained multiple injuries and succumbed to them in the CMC, Hospital, that respondents 1 and 2 are the driver and conductor of the bus, while respondents 3 and 4 are the owner and insurer respectively and that they are liable to pay a compensation of Rs. 50,000/- to the petitioners, respondents 1 to 4 herein.

4. Respondents 1 and 2 are the driver and conductor of the bus and respondents 3 and 4 are the owner and insurer respectively of the bus. They are liable to pay a total compensation of Rs. 50,000/- to respondents 1 to 4 herein.

5. The first respondent/driver pleaded in his counter, which has been adopted by respondents 2 and 3, namely, the conductor and the owner of the bus, that there was no bus stop in the Goods Shed Road near St. Michael's High School, that Kamalam got down from the running bus, that she lost her balance and met with the accident, that the death had happened only on account of the fault of the deceased and that neither the driver nor the conductor acted rashly and negligently and that the compensation claimed is excessive.

6. The fifth respondent herein, namely, the Oriental Fire and General Insurance Company Limited in its counter pleaded that the first respondent was driving the bus only at a moderate speed from north to south along Goods Shed Road, that the deceased was one of the passengers travelling in the bus, that when the bus approached the junction of the Goods Shed Road and Big Bazaar Street, the first respondent slowed down the vehicle, that at this point of time, despite the warning given by the conductor, Kamalam jumped out of the bus, that since the bus was on the move at that time, she fell down and sustained injuries to which she succumbed later in the day, that the compensation claimed is excessive and that in any event, since Kamalam was a passenger in the bus, the maximum liability of the fifth respondent herein as insurer cannot exceed Rs. 5,000/-.

7. The following points were framed by the Tribunal for determination:

(1) Whether the accident took place on account of the rash and negligent driving of the bus crew ?

(2) Was there any contributory negligence by the deceased ?

(3) What is the amount of compensation, if any, to be awarded ?

(4) What is the extent of liability of the 3rd respondent ?

Before the Tribunal, PW 1 C.K. Chinnaswamy, PW 2 PW 3 Veera-swamy and PW 4 Dr. Yashothara were examined on behalf of the petitioners and Exhibit A-1 the certified copy of the first information report dated 16-7-1979 filed in C.C. No. 1540 of 1979, on the file of the Judicial Second Class Magistrate, City-I, Coimbatore, Exhibit A-2 the certified copy of charge-sheet dated 16-8-1979 filed in the said C.C. No. 1540 of 1979, Exhibit A-3 the certified copy of Motor Vehicle Inspector's report dated 16-7-1979 in the said C.C. No. 1540 of 1979 and Exhibit A-4 the copy of the post mortem certificate dated 16-7-1979 issued by the Civil Assistant Surgeon attached to CMC. Hospital, Coimbatore, were marked. RW 1 Vivekanandan, RW 2 Sundararajan and RW 3 Peter Isaac were examined and Exhibit B-1 the certified copy of the judgment dated 11-8-1980 in C.C. No. 1540 of 1979 on the file of the Judicial First Class Magistrate, Coimbatore, Exhibit B-2 the claim made by the third respondent to the fourth respondent on 25-7-1979, Exhibit B-3 the copy of the insurance policy dated 22-11-1978 for the vehicle TNE 5517 for the period from 24-11-1978 to 23-11-1979 and Exhibit B-4 the rough sketch dated 16-7 1979 filed in C.C. No. 1540 of 1979 on the file of the Judicial First Class Magistrate, Coimbatore, were marked on behalf of the respondents.

8. On a consideration of the evidence, oral and documentary, the Tribunal came to the conclusion on point Nos. 1 and 2 that the accident took place only on account of the rash and negligent act of the driver and conductor of the bus and there was no contributory negligence on the part of the deceased. On point" No. 4, the Tribunal concluded that the deceased did not cease to be a passenger within the meaning of proviso (ii) to Subsection (1) of Section 95 of the Motor Vehicles Act and so it is evident that the liability of the fourth respondent in this case is restricted to Rs. 5,000/-Under point No. 3, the Tribunal came to the conclusion that the petitioners are entitled to a compensation of Rs. 36,000/-. In the result, an award was passed with costs directing the respondents, the appellant and the fifth respondent herein, to pay the petitioners, respondents 1 to 4 herein, a sum of Rs. 36,000/- with interest at 6 per cent per annum from the date of the petition. Aggrieved by the above decision of the Tribunal, the third respondent M/s. Venkataswami Motor Service P.N. Palayam, Coimbatore, has come forward with this appeal.

9. On behalf of the appellant Mr. N. Manivannan, learned Counsel for the appellant, contended that the Tribunal has not properly appreciated the evidence available on record and as such the decision arrived at both as regards the liability of the respondent who have to pay the compensation, as well as the quantum of compensation fixed is not correct.

10. Mr. Raju, K. Lukose, learned Counsel for the insurance company and Mr. G.M. Nathan, learned Counsel for the claimants, respondents " 1 to 4 herein, have

submitted that the Tribunal had taken into consideration the entire evidence in a proper perspective and the findings given by the Tribunal are correct and in accordance with law.

11. The points for consideration in this appeal are:

(1) Whether there was rashness and negligence on the part of the driver who drove the bus at the time when the accident took place?

(2) Which respondent is liable to pay the compensation, if any ?

(3) What is the just and adequate amount of compensation that has to be awarded to the claimants, respondents 1 to 4 herein, if they are found to be entitled to it ?

12. Point Nos. (1) to (3): Even at the outset it has to be stated that the contentions raised on behalf of the appellant that it is the insurance company that has to pay the entire amount of compensation that has been awarded by the Tribunal cannot be uphold since Section 95 of the Motor Vehicles Act provides that in case of the liability for payment of compensation to a passenger is found against the insurance company, it is only liable to the tune of Rs. 5,000/- and the rest, if held" to be payable, shall be paid by the owner of the vehicle. This is because of the specific provision (ii) to Sub-section (2) of Section 95 of the Motor Vehicles Act. So, the Tribunal is correct in having held that the liability of the insurance company, the fifth respondent herein, is restricted to Rs. 5,000/-.

13, Now, let this Court consider the evidence with respect to the rashness and negligence on the part of the driver of the vehicle. As already noted, respondents 1 to 4 herein are the husband, two minor sons and a minor daughter of the deceased Kamalam. They alleged that on 16-7-1979 at about 7-45 am. the deceased was travelling in a town bus plying in route No. 32 C and bearing registration No. TNE 5517 along Goods Shed Road. When the bus approached the bus stop near the junction of Big Bazaar Street and Goods Shed Road, west of St. Michael's High School, she got down from the bus. Before she could stabilize herself on the road, the conductor instructed the driver to move and accordingly, the driver started the bus rashly and negligently, with the result that Kamalara was knocked down and dragged along by the body of the bus. In that process, she had sustained multiple injuries and succumbed to them in the C.M.C. Hospital, Coimbatore. Respondents 1 and 2 are the driver and conductor of the bus, while respondents 3 and 4 are the owner and insurer respectively. They are eligible to pay a total compensation of Rs. 50,000/- to the petitioners, the respondents 1 to 4 herein.

14. That on the morning of 16-7-1979 at about 7.45 a.m. Kamalam who was travelling in a town bus plying in route No. 32C and bearing registration No. TNE 5517 and. got involved in an accident near the junction of Big Bazaar Street and Goods Shed Road, west of St. Michael's High School, Coimbatore, with the result that she sustained multiple injuries and succumbed to them later in the C M.C.

Hospital, Coimbatore, are not in dispute, PWs 2 and 3 claim to have witnessed the occurrence. RWs 1 and 2 are the driver and conductor respectively of the bus. PW 2 Mani says that he is a weaver by profession. He knows the deceased. On 16-7-1979 at about 10 a.m. he was travelling in the town bus plying in route No 32C. The bus was proceeding "from north to south" in Goods Shed Road. It stopped in the bus stop near the junction of Goods Shed Road and Big Bazaar Street. He got down through the rear entrance. Along the front exit, three women alighted from the bus. The deceased Kamalam was one among them. When she was placing one foot on the ground and one foot on the foot-board of the bus, the conductor gave whistle. The bus began to move slowly. Kamalam was holding the post near the front exit. The bus dragged her to a distance of 10 feet. The passengers in the bus shouted. The bus was stopped. He found that Kamalam had fallen down and sustained injuries all over her body. PW 3 Veeraswami is a watchman in Kaleeswara Mills. He also knows the deceased. His evidence is to the effect that on that morning he was going to the Railway Junction from Kamarajapuram in town bus No. 32 C. The bus was stopped in the stop, east of the Convent in Goods Shed Road. The conductor announced that passengers bound for Royal Theatre and CMC Hospital could get down. Thereupon, about 5 or 6 persons got down from the bus. The woman passengers alighted through the front exit. When last of them was about to place her foot on the ground, the conductor gave whistle and the driver started the bus. The woman fell down. The bus ran over her and dragged her to some distance. All of them shouted and the bus was stopped. The injured was taken to the C.M.C. Hospital.

15. On the other hand, the conductor as RW 2 says that when the bus was proceeding slowly near the junction of Goods Shed Road and Big Bazaar Street, the passengers shouted and the bus was stopped. RW 2 who was writing a memo at that time found that a woman had fallen down. The brother of the woman took her to the C.M.C. Hospital. There is no bus stop in that junction and it is not the practice to stop the bus and allow the passengers to get down there.

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16. RW 1 says that while he was nearing the two roads junction, the passengers shouted. He stopped the bus. A woman got involved in an accident with the bus. Thus, RWs 1 and 2 had not seen the deceased alighting from the bus. Admittedly, their attention was drawn to the accident only by the shouting of the passengers in the bus. So, the driver and the conductor could not have known how the accident took place.

17. RW 3 was the Sub Inspector of Police attached to Traffic Investigation Wing, Coimbatore West, at the relevant time. He was assisting the Inspector, who investigated the accident. He recorded Section 162, Cr. P.C. statement of PW 3. According to him, PW 3 told this witness that while he was proceeding in a cycle from north to south in Goods Shed Road, he witnessed the accident. He did not tell him that he also travelled in the bus. Whereas, PW 3 categorically states in

the witness-box that he was\* a passenger in the bus. On the basis of this discrepancy, learned Counsel for the respondents argues that no reliance could be placed on the evidence of this witness. Even if we are to ignore the evidence of PW 3, in my view there is no impediment to accept the evidence of PW 2 who is an independent witness, and his is the only version regarding the manner of the accident. According to him, the conductor gave whistle even Kamalam was in the process of getting down from the bus. In the jerk caused by the sudden moving of the bus, she lost her balance and slipped. Since she was holding the post near the front exit, she was dragged to a distance of 10 feet by the bus.

18. PW 2 admits in cross examination that there is no bus stop near the junction of Goods Shed Road and Big Bazaar Street. Usually, when the bus approaches the police umbrella, it would be slowed down and the passengers would alight from the bus. On that day, the bus stopped and the conductor announced that persons bound for C.M.C. Hospital could get down. The most important question that arises for consideration in this case is, whether the crew of the bus are responsible for negligence for the occurrence took place in a place where the bus had been stopped by the driver of the vehicle and it was not a bus stop. Even at the outset this Court feels it necessary to observe that it is not necessary for a bus to stop at the bus stop only so as to assess the negligence or otherwise of the driver of the vehicle, In the instant case, it is clear from the evidence of PW 2, an independent witness, that though there is no official bus stop near the road junction, it is not uncommon for the conductor to stop the bus and allow the passengers so get down at some places. When the bus was stopped, Kamalam got down. Before she alighted, the driver started moving the bus on instructions from the conductor and Kamalam fell down. This clearly shows that the occurrence which is held to be a negligent one does not lose its rigor merely on the ground that it had taken place not at the bus stop but at a place where the bus was stopped. In other words, rashness and negligence get itself attached to the act of the driver as well as the conductor even at the place where the bus is stopped, even though it is not a bus stop. For reasons best known to the crew as well as the passengers, the bus was stopped in that place as indicated above and as disclosed by the evidence available on record. We are concerned whether the elements of rashness and negligence are available in so far as the acts of RWs 1 and 2 are concerned. Their evidence disclosed that they wanted to completely get their responsibility absolved by saying that they did not notice actually the victim getting down from the bus at the place of the occurrence. The evidence clearly discloses that it was at the time when the deceased was having one foot on the foot-board of the bus and another foot on the ground, that whistle had been given by the conductor of the bus and the driver started to move the bus It is obligatory on the part of the driver of the vehicle also to see whether any person is getting down from the bus before he starts to move the bus. In the instant case, it is clear that the driver of the vehicle ignored to take such precaution and that had resulted in the accident causing the death of the victim in this case. Rashness and negligence have been squarely proved in this case

and as such the persons responsible to pay the compensation have to pay on the basis of the finding given by the Tribunal.

19. Now Mr. Manivannan, learned Counsel for the appellant, contends that the evidence of PW 2, who is a weaver by profession, should not be believed. I am unable to uphold this contention. The test to believe or reject the evidence of a witness depends not by the mere version of the witness, but the test is the touchstone of judicial scrutiny and then come to the conclusion whether the version of the eye-witness is trustworthy or not. This should be done by the exercise of the judicial discretion. In this view, when the evidence of PW 2 is scrutinised, this Court finds that the Tribunal is correct in having believed the version of PW 2. Therefore, this Court holds that the conclusion arrived at by the Tribunal regarding rashness and negligence is quite correct and it is hereby confirmed.

20. So far as the liability is concerned the Act is specific. Section 95 of the Motor Vehicles Act provides that the word "passengers" in clause (b) of Sub-section (2) of Section 95 also includes within it any person meeting with death or bodily injury under the circumstances mentioned in the proviso (ii) to Sub-section (1) where the vehicle is one in which passengers are carried for hire or reward or under a contract of employment. The limit of the liability of the insurer will be as specified in clause (b) of Sub section (2) of Section 95 of the Motor Vehicles Act. It is evident that the deceased did not cease to be a passenger within the meaning of proviso (ii) to Sub-section (1) of Section 95 of the Motor Vehicles Act. In the instant case, we find that it was at the time when after her transit in the bus came to an end and at the time when she was getting down from the bus after completing her journey, in the bus, for which she got a valid ticket, the accident had taken place. Therefore, she comes within the purview of the definition "passenger". Mr. Manivannan wants this Court to substitute the words "getting in" wherever the words "getting down" occur in view of the "decisions mentioned by him, namely, Gobinda Prosad Mukherjee Vs. Sujit Bhowmick and Another, , Uvaraja R.V. Parvathi Ammal 99 L W 265, as well as The United Fire and General Insurance Co. Ltd. Vs. P. Parvathamma, , British India General Insurance Co. Ltd. Vs. Captain Itbar Singh and Others, and Southern Motors, Madurai Vs. C. Sivajothiammal and Others, . The facts and circumstances of the case that were discussed in the above reports are entirely different from the facts involved in the instant case before us.

21. Before parting with this case, while confirming the Tribunal's findings, this Court wants to observe for guidance of the crew of the buses. The life and limb of the passengers are to be borne in mind by the crew, namely, the driver and the conductor of a bus. It is not for merely mechanically driving the bus and for collecting the fares from passengers that both of them are employed in a bus. The driver of the bus has to look into both the entrances, front exit as well as rear exit, before actually starting the vehicle, even though whistle might have been given by the conductor inadvertently without noticing both exits due the pressure of collection of fares from the passengers or due to his noting in the

memo, as in the instant case before us. But the fundamental duty of both the driver as well as the conductor is to verify specifically whether any passenger is getting into the bus or getting down from the bus before actually the bus is moved from the bus stop where it is stopped, irrespective of the fact whether that place of stopping is a bus stop or not. In the instant case, it is clear that no such precaution was taken both by the driver as well as the conductor of the bus, resulting in the death of the deceased by not only causing injuries but also dragging her to a distance of 10 feet from the place where the deceased was getting down from the bus. The certified copy of the Motor Vehicles Inspector's report Exhibit A-3 clearly shows that the vehicle did not suffer from any mechanical defect. Exhibit A-4 the copy of the post mortem certificate issued by the Civil Assistant Surgeon PW 4 shows that very serious injuries were sustained by the deceased. We are not concerned with the case in which Exhibit A-2 Charge-Sheet had been filed against the driver of the vehicle. Ex. A. 1 certified copy of the first information report also discloses that the contents of the same were written as disclosed by the eye-witnesses in this case.

22. As regards quantum, Mr. G.M. Nathan, learned Counsel for the respondents 1 to 4, would submit that the facts in the instant case clearly shows that this Court can interfere even with respect to the quantum awarded by way of compensation- since the compensation awarded by the Tribunal is not adequate. According to him, respondents 1 to 4 need not file a separate cross-objection for enhancement of the compensation, Order 41 Rule 33 CPC gives ample power to this Court to enhance the compensation in this appeal itself though an inadequate sum might have been claimed by the parties in not having assessed the actual compensation that can be determined as a just compensation. In the instant case, it is submitted that the exercise of the discretionary power given under Order 41, Rule 33 can be invoked and exercised by this Court by enhancing the compensation as would be justified in the circumstances of the case. The respondents, 1 to 4, according to the learned Counsel, had claimed only a disproportionately small sum when they are justified in getting larger amount by way of compensation as may be determined by this Court on appeal. In this regard he has referred to the decisions in S.M.S. Subramanian Chettiar (dead) and Another Vs. Sinnammal and Others, ; Panna Lal v. State of Bombay AIR 1963 SC 1510; Giasi Ram and Others Vs. Ramjilal and Others, ; Koksingh Vs. Smt. Deokabai, and New India Assurance Co. Ltd. Vs. K. Pathumma and Others, . Finally he also referred to the headnotes in Bharatbhai Kasturchand Shah v. Mafat-Bhai Bahabhai Makwana 1980 ACJ 152.

23. Mr. N. Manivannan, learned Counsel for the appellant would submit that Order 41, Rule 33 CPC is not applicable to the proceedings under special enactments such as Motor Vehicles Act wherein the rules are framed for the procedure by the State Governments and only under certain circumstances, the provisions of the procedural law of the land, namely CPC can be looked into for the proceedings relating to accident claims u/s 110-A of the Motor Vehicles Act. In support of his argument, he had referred to the provisions of Section .1 HOC,

107, of the Motor Vehicles Act; Article 226 of the Constitution of India and Sections 100 and 115 Civil Procedure Code. He also referred and read out paragraph 12 of the decision of the Supreme Court in Charan Lal Sahu Vs. Neelam Sanjeeva Reddy, . Mr. N. Manivannan, learned Counsel next referred to the following observation in paragraph 19 at page-430 of the decision in Patna Electric Supply Workers Union Vs. A. Hassan and Another, in support of his argument."19. It is well settled law that the powers of a tribunal of special jurisdiction are circumscribed by the statute under which it is constituted. Such Tribunal must act within its powers conferred on it by the statute, which creates it. Such Tribunal must act within its powers and so long as it does, its orders whether right or wrong, cannot be challenged. But where, and in so far as, its actions are in excess or in contravention of the powers conferred on it, they are ultra vires and of no legal effect."In support of his argument, learned Counsel for the appellant further refers to the decision reported in Shardaben Vs. M.I. Pandya and Another, . From the above decisions, according to him, it is clear that over and above what is asked for by the claimants as compensation, the Court is not obliged to grant. He also referred to the judicial discretion that is vested under Order 41 Rule 33 of the CPC and refers to the decision in Venukuri Krishna Reddi and Another Vs. Kota Ramireddi and Others, .

24. Learned Counsel for the Insurance Company Mr. Raju K. Lukose, referred to Multe's Code of Civil Procedure, eleventh edition, page 916 and page 917 to show that for certain specific purpose only the provision of Order 41 Rule 33 of the CPC can be invoked. The said passage reads as follows:

Though Order 41 Rule 33, confers wide and unlimited jurisdiction on Courts to pass a decree in favour of a party who has not preferred any appeal, there are however certain well-defined principles in accordance with which that jurisdiction should be exercised. Normally a party who is aggrieved by a decree should if he seeks to escape from its operation, appeal against it, within the time allowed after complying with the requirements of law. But there are well recognised exceptions to this rule. One is where as a result of interference in favour of the appellant it becomes necessary to readjust the rights of other parties. A second class of cases based on the same principle is where the question is one of settling mutual rights and obligations between the same parties. A third class of cases in which this rule has been applied is when the relief prayed for is single and indivisible but is claimed against a number of defendants. These are well recognised classes of cases in which it would be legitimate to exercise the power under that rule even though there was no appeal relating to the subject-matter. This however is not intending to be an exhaustive enumeration of the classes of cases in which Courts could interfere under Order 41 Rule 33.

This Court has carefully gone through the decisions cited by the learned Counsel for the appellant, respondents 1 to 4 and the Insurance Company and is of the opinion that the instant case is not one in which it would be legitimate to exercise the power under Order 41 Rule 33 CPC. In this view, I reject the

argument advanced by the learned Counsel for the respondents 1 to 4. This Court is also of the opinion that the Award passed by the Tribunal is correct and is hereby confirmed. In view of the specific provisions made in the Act, the Tribunal is also correct in having restricted the liability of the Insurance Company only to Rs. 5,000/-. The rest of the compensation amount that had been awarded by the Tribunal is necessarily to be paid by the appellant. There is no merit in the appeal and it is dismissed with costs.