IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 13.08.2015

CORAM :

THE HONOURABLE MS. JUSTICE K.B.K.VASUKI

C.M.A. No.2235 of 2011

&

M.P.No.1 of 2011

National Insurance Co. Ltd.,
Branch Office at No.88F,
Byepass Road,
Post Box No.23,
Bharmapuri-638 701. ... Appellant/4th Respondent

vs.

1.Mani (died)

2.Muthammal ...Respondents 1, 2/Petitioner

3.S.M.Moorthy

4.K.Shanmugam

5.The Oriental Insurance Co. Ltd.,
Branch Office at Jambubala Complex,
29B, Arcot Road,
Vellore-632 004. ...Respondents-3 to 5/
Respondents 1 to 3

PRAYER : Civil Miscellaneous Appeal is filed under Section 173 of Motor Vehicles Act, 1988, against the Decree and Judgment made in M.C.O.P No.253 of 2002 dated 12.02.2008 on the file of the Motor Accidents Claims Tribunal (Subordinate Court), Sankari.

For appellant : Mr. K.Padmanabhan
For respondents : Mr.R.Marudhachalamurthy for R1&R2
Mr.M.B.Raghavan for R4
Mr.S.Krishnamoorthy for R5

## JUDGMENT

The fourth defendant Insurance Company is the appellant herein. For the sake of convenience the parties are referred to as per their rank in the Tribunal.

2. The brief facts relevant for consideration herein are as follows :-

The claimants 1 and 2 are the husband and minor child of one Vediammal, who is one of the victims of the fatal accident. The two vehicles involved in the accident were, one ten wheeler lorry bearing Registration No. TN 23 H 3178 and one goods carrier lorry bearing Registration No. TAQ 6207. The claim petition is filed against the Owner, Driver and Insurer of the ten wheeler lorry and against the Insurer of other lorry. The owner and driver of other lorry were admittedly not impleaded as the respondents in the claim petition. The owner, driver and the two insurance companies were impleaded as the respondents 1 to 4 in the claim petition. While the respondents 1 & 2 did not appear and contest the claim petition, the claim petition was contested by the Insurer of both the vehicles. Both the Insurance Companies, in their counter denied that the driver of the vehicles were responsible for the accident and denied the liability to pay any compensation to the deceased. However, the Tribunal, after serious contest, held that the accident was a 'head on collusion' between the two vehicles and both the drivers contributed to the cause of the accident due to their negligence and accordingly apportioned 75% of the liability on the third defendant and 25% on the fourth defendant, insurance companies. The Tribunal based upon the oral and documentary evidence adduced by the claimants determined the total compensation due to the claimants at Rs.2,19,000/- and directed the third defendant Oriental Insurance Company Limited to pay 75% of the same on behalf of the owner and driver of the vehicle and directed the fourth defendant National Insurance Company Limited to pay 25% of the same on behalf of the driver and owner of the other lorry. In pursuance of the award passed, the third defendant Oriental Insurance Company Limited deposited the entire amount of compensation before the Tribunal, whereas the correctness of the award is challenged by way of present appeal, by the fourth defendant National Insurance Company Limited.



3. Heard all and perused the records.

4. The learned counsel for the appellant/ fourth defendant Insurance Company has in this appeal raised the following two grounds questioning the enforceability of the Award against them :

1. The impugned award to the extent of 25% is null and void and unenforceable on the insurance company, due to the failure on the part of the claimants to implead the owner and driver of the vehicle in question.

2. The deceased being one of the gratuitous passengers and the policy being Act Policy in the absence of any special coverage for the passengers, the insurer is not liable to indemnify the owner as per the terms of the policy.

The learned counsel for the appellant in support of his contention relied on Clause 23 (a) of the claim petition, wherein, it is categorically stated that the deceased Vediammal along with her relatives, after attending a marriage function at Komarapalayam, was returning to her native place in the goods carrier lorry and the same met with an accident at 11.30 a.m on 09.09.2002. The learned counsel for the appellant has also drawn the attention of this Court to the omission on the part of the Tribunal to consider the fact that the deceased was travelling in the goods carrier vehicle as gratuitous passenger and thereafter to decide the liability of the Insurer in the light of the finding rendered on such factual issue. This Court finds serious legal force in the argument advanced on the side of the Insurance Company. The learned counsel for the appellant also cited the following two decisions, 2007 (2) TN MAC 73 Oriental Insurance Company Limited, Dindigul vs. Pappu Servai, wherein this Court under identical circumstances following the Apex Court decision in 2005 (2) TN MAC 515 (SC) Jayadevappa M.V and Anr. vs. Oriental Fire & General Insurance Company Limited & Ors., found fault with the Tribunal in passing on the liability of the owner to the Insurer. It is decided so by the learned Brother Judge of this Court, based on the following judgments that have been relied on the side of the respondents for different legal preposition. The National Insurance Co. Ltd., vs. K. Kannan & Ors., reported in 2007 (5) CTC 831; The National Insurance Co. Ltd., vs. K. Ellammal & Ors., reported in 2007 (1) TN MAC 433; and The Divisional Manager, The United India Insurance Co. Ltd., Vellore vs. Sudha & Anr., reported in 2011(2) MWN (Civil) 778. In view of the well laid down legal position this Court is inclined to hold that the deceased having travelled in the vehicle as a gratuitous passenger, no liability can be fastened on the Insurance Company to pay any compensation on behalf of the owner and driver of the vehicle.

5. Only in this context, the first issue regarding the failure to implead the owner and driver of the goods carrier lorry in which the deceased was travelling has to be considered. When admittedly, the owner and the driver of the lorry were not impleaded as the respondents, no finding regarding the act of negligence on the part of the driver and the liability of the owner to pay any compensation, can be rendered, without giving them an opportunity to defend their case and any award passed without impleading them as parties is not in accordance with the procedure laid down and is in violation to the principles of natural justice and is not legally sustainable, not only against the owner and driver of the lorry but also against the Insurance Company. As a result, the impugned award in so far as it is against the fourth respondent National Insurance Company Limited is held liable to be set aside.

6. At this juncture, the learned counsel for the claimants/ respondents cited the judgment of a Larger Bench consisting of three Judges of the Hon'ble Supreme Court, in the case of Khenyei vs. New India Assurance Company Limited & Ors., reported in (2015) 4 MLJ 364 (SC), in support of his contention that on the failure to implead the joint tort feasors, the other tort feasor can be directed to satisfy the liability of the other in so far as the claimants are concerned and the impleaded joint tort feasor should be left if he so desires to sue the other joint tort feasor in an independent proceedings after passing of the decree or award. For better understanding this Court is inclined to extract the principles laid down by the Hon'ble Supreme Court in paragraph 18 :

i. In the case of composite negligence, plaintiff/ claimant is entitled to sue both or any one of the joint tort feasors and to recover the entire compensation as liability of joint tort feasors is joint and several.

ii. In the case of composite negligence, apportionment of compensation between two tort feasors vis a vis the plaintiff/ claimant is not permissible. He can recover at his option whole damages from any of them.

iii. In case all the joint tort feasors have been impleaded and evidence is sufficient, it is open to the court/ tribunal to determine inter se extent of composite negligence of the drivers. However, determination of the extent of negligence between the joint tort feasors is only for the purpose of their inter se liability so that one may recover the sum from the other after making whole of payment to the plaintiff/ claimant to the extent it has satisfied the liability of the other. In case both of them have been impleaded and the apportionment/ extent of their negligence has been determined by the court/ tribunal, in main case one joint tort feasor can recover the amount from the other in the execution proceedings.

iv. It would not be appropriate for the court/ tribunal to determine the extent of composite negligence of the drivers of two vehicles in the absence of impleadment of other joint tort feasor. In such a case, impleaded joint tort feasor should be left, in case he so desires, to sue the other joint tort feason in independent proceedings after passing of the decree or award.”

Applying the same principle, this Court directs the 5th respondent Oriental Insurance Company Limited to satisfy the entire award on behalf of the lorry owner and with liberty given to the 5th respondent to initiate independent proceedings to recover from him remaining 25% of the award of compensation.

7. In the result, the Civil Miscellaneous Appeal is allowed, setting aside the impugned award in so far as the appellant National Insurance Company Limited is concerned and by directing the fifth respondent Oriental Insurance Company Limited to satisfy the entire award and to recover the amount to the extent it has satisfied the liability of the owner of the goods carrier vehicle, by initiating independent proceedings against the owner and driver of the goods carrier lorry. The fifth respondent Oriental Insurance Company is directed to deposit the balance award amount, with interest and costs, after deducting the amount already deposited before the Tribunal, within eight weeks from the date of receipt of copy of this judgment. On such deposit, the respondents 1 & 2 claimants are permitted to withdraw their entire share of the award amount, with accrued interest and costs, on due cheque petition. Consequently, the connected M.P is closed. No costs.

-s/d-
Assistant Registrar(CS-III)
dt:13/10/2015

True Copy

Sub-Assistant Registrar

Avr
To

1.The Motor Accident Claims Tribunal
Subordinate Court, Sankari.
2.The Record Keeper, VR Section,
highCourt, Madras
3.The Oriental Insurance Company Ltd,
Branch office at Jumbubala Complex,
Vellore-632 004
+1 cc to M/S.R.Marudhachalamurthy Advocate sr.42615
+1 cc to M/S.N.Vijayaraghavan, Advocate sr.42957

C.M.A. No. 2235 of 2011
and
M.P.No.1 of 2011

aa14/10/2015