IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED :: 18-09-2015

CORAM

THE HONOURABLE MR.JUSTICE S.MANIKUMAR

AND

THE HONOURABLE MR.JUSTICE M.VENUGOPAL

C.M.A.No.2615 OF 2009 & 2274 TO 2277 OF 2015

C.M.A.No.2615/2009 :

The New India Assurance Co.Ltd.,
Third Party Claims Office,
Anna Salai,
Chennai ...Appellant/4th Respondent

-vs-

1.Gracelyn Davidson
2.KPN Travels Limited,
20/1, Swamy Complex, A.V.Road,
Kalasipalayam, Bangalore District.

3.A.Jaya
4.National Insurance Co.Ltd.,
33, Promenade Road, Contonment,
Trichy-1. ...Respondents/Petitioner
1,2,3 Respondent

C.M.A.No.2274 OF 2015 :

The National Insurance Company Ltd.,
Motor Third Party Claims Office,
No.751, Mount Road (Opp.TVS),
3rd Floor, Chennai-600 002. ...Appellant/2nd Respondent

-vs-

1.T.S.Pradeep
2.The Managing Director,
M/s.KPN Travels India Limited,
No.20/1, Swamy Complex, Kalaripalayam,
Bangalore-2.
3.Mrs.A.Jaya
4.The New India Assurance Company Limited,
Motor Third Party Claim Cell,
Moore Street, Chennai. ...Respondents/Petitioner/
Respondent

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C.M.A.No.2275 OF 2015 :

The National Insurance Company Ltd.,
Motor Third Party Claims Office,
No.751, Mount Road (Opp.TVS),
3rd Floor, Chennai-600 002. ...Appellant/2nd Respondent

-vs-

1.K.S.Prakash
2.The Managing Director,
M/s.KPN Travels India Limited,
No.20/1, Swamy Complex, Kalaripalayam,
Bangalore-2.
3.Mrs.A.Jaya
4.The New India Assurance Company Limited,
Motor Third Party Claim Cell,
Moore Street, Chennai. ...Respondents/Petitioner Respondents

C.M.A.No.2276 OF 2015 :

The National Insurance Company Ltd.,
Motor Third Party Claims Office,
No.751, Mount Road (Opp.TVS),
3rd Floor, Chennai-600 002. ...Appellant/2nd Respondent

-vs-

1.M.E.Sarath Chander
2.The Managing Director,
M/s.KPN Travels India Limited,
No.20/1, Swamy Complex, Kalaripalayam,
Bangalore-2.
3.Mrs.A.Jaya
4.The New India Assurance Company Limited,
Motor Third Party Claim Cell,
Moore Street, Chennai. ...Respondents/Petitioner Respondent

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C.M.A.No.2277 OF 2015 :

The National Insurance Company Ltd.,
Motor Third Party Claims Office,
No.751, Mount Road (Opp.TVS),
3rd Floor, Chennai-600 002. ...Appellant/2nd Respondent

-vs-

1.Kamala Kannan

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2.The Managing Director,
M/s.KPN Travels India Limited,
No.20/1, Swamy Complex, Kalaripalayam,
Bangalore-2.
3.Mrs.A.Jaya
4.The New India Assurance Company Limited,
Motor Third Party Claim Cell,
Moore Street, Chennai. ...Respondents/Petitioner/
Respondent

C.M.A.No.2615 of 2009 is filed against the judgment and decree, dated 06.08.2008, made in M.C.O.P.No.4295 of 2005, on the file of Motor Accident Claims Tribunal, (II Court of Small Causes), Chennai.

C.M.A.No.2274 of 2015 is filed against the judgment and decree, dated 05.10.2012, made in M.C.O.P.No.4680 of 2004, on the file of Motor Accident Claims Tribunal, (III Court of Small Causes), Chennai.

C.M.A.No.2275 of 2015 is filed against the judgment and decree, dated 05.10.2012, made in M.C.O.P.No.4964 of 2004, on the file of Motor Accident Claims Tribunal, (III Court of Small Causes), Chennai.

C.M.A.No.2276 of 2015 is filed against the judgment and decree, dated 05.10.2012, made in M.C.O.P.No.4965 of 2004, on the file of Motor Accident Claims Tribunal, (III Court of Small Causes), Chennai.

C.M.A.No.2277 of 2015 is filed against the judgment and decree, dated 05.10.2012, made in M.C.O.P.No.1771 of 2005, on the file of Motor Accident Claims Tribunal, (III Court of Small Causes), Chennai.

For appellant in C.M.A.No.2615/2009 &
for respondent No.4 in C.M.A.Nos.2274
to 2277 of 2015 : Mr.M.Krishnamoorthy

For appellants in C.M.A.Nos.2274
to 2277 of 2015 & respondent No.4
in C.M.A.No.2615/2009 : Mrs.N.B.Surekha

For respondent 1 in C.M.A.No.2615/2009
: Mr.R.Rajmohan

J U D G M E N T

(Judgment of the Court was delivered by S.MANIKUMAR,J.)

In the accident, which occurred on 23.06.2004, between a KPN Travels Bus, bearing registration No.KA-38-A0001 and a lorry, bearing registration No.MDA 6069, drivers

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of both the vehicles and some passengers died. Some other passengers sustained injuries. Bus was insured with National Insurance Company Limited, Trichy. Lorry was insured with the New India Insurance Assurance Company Limited, Chennai, appellant herein.

2. M.C.O.P.No.4295 of 2005, on the file of Motor Accident Claims Tribunal, (II Court of Small Causes), Chennai, has been filed by M/s.Gracelin Davidson, an injured person. M.C.O.P.Nos.4680,4818,4964 and 4965 of 2004 have been filed by the injured, before the III Court of Small Causes, Chennai. Legal representatives of the deceased have filed M.C.O.P.Nos.1222,1223 and 1771 of 2005 on the file of the same Tribunal. Some of the claim petitions have been filed in M.C.O.P.Nos.192 to 194 of 2005 on the file of Motor Accident Claims Tribunal, Ponneri.

3. M.C.O.P.No.4295 of 2005, on the file of Motor Accident Claims Tribunal, (II Court of Small Causes), Chennai, has been decided on 06.08.2008, by fixing contributory negligence on both the drivers of the bus and lorry, involved in the accident, in the ratio of 50:50. After considering the nature of injuries, extent of disablement, pain and suffering and other aspects, awarding compensation of Rs.9,85,070/-.

4. Being aggrieved by the finding, fixing negligence to the extent of 50% on the driver of the lorry, its insurer, The New India Assurance Company Limited, Chennai, has filed C.M.A.No.2615 of 2009. In M.C.O.P.Nos.192 to 194 of 2005, while adjudicating the aspect of negligence, the Motor Accident Claims Tribunal/ learned Subordinate Judge, Ponneri, vide judgment, dated 23.12.2010, fixed negligence, on the driver of the bus, bearing registration No.KA-38-A0001, and insured with the National Insurance Company Limited, and accordingly, awarded compensation to the claimants therein, to be paid by the insurer. In so far as the M.C.O.P.No.4680 of 2004, the learned III Judge, III Court of Small Causes, Chennai, vide order, dated 05.10.2012, fixed negligence on the driver of the bus, bearing registration No.KA-38-A0001.

5. For brevity, details of the cases filed by the injured/deceased in various Tribunals, arising out of the accident, which occurred on 23.06.2004, and the finding of the Tribunals, in the claim petitions, filed by the injured/legal representatives of the deceased, is tabulated hereunder :

MCOP No./Tribunal	Date of Judgment	Negligence Fixed
4295/2005/II Court of Small Cause, Chennai.	06.08.2008	Against the drivers of the lorry and the bus, equally.
4680/2004, III Court of Small Causes, Chennai.	05.10.2012	Against The National Insurance Company Limited

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MCOP No./Tribunal	Date of Judgment	Negligence Fixed
4964/2004, III Court of Small Causes, Chennai.	05.10.2012	Against The National Insurance Company Limited
4965/2004, III Court of Small Causes, Chennai.	05.10.2012	Against The National Insurance Company Limited
1771/2005, III Court of Small Causes, Chennai.	05.10.2012	Against The National Insurance Company Limited

6. From the details extracted from the judgments of the Tribunals, which adjudicated the claim petitions, on the aspect of negligence, except the Tribunal in M.C.O.P.No.4295 of 2005, the other Tribunals have fixed the entire negligence on the driver of the bus. Aggrieved over the same, the New India Assurance Company Limited has filed C.M.A.No.2615 of 2009. On the other hand, National Insurance Company Limited also filed appeals in C.M.A.Nos.2274 to 2277 of 2015, seeking for a prayer of reversal of the finding, fixing negligence entirely on the driver of the bus, bearing registration No.KA-38-A0001, insured with them.

7. On this day, when the above appeal C.M.A.No.2615 of 2009, along with C.M.A.Nos.2274 to 2277 of 2015, came up for hearing, attention of this Court was drawn to a decision, rendered by one of us (Mr.Justice S.Manikumar), in C.M.A.Nos.3032 to 3034 of 2012, which arose out of the common judgment in M.C.O.P.Nos.192 to 194 of 2005, dated 23.12.2010, on the file of Motor Accident Claims Tribunal, Ponneri. The said C.M.As.3032 to 3034 of 2012 were filed by National Insurance Company Limited, Insurer of the bus, questioning the finding of the Claims Tribunal, fixing negligence entirely on the driver of the bus.

8. Mr.M.Krishnamurthy, learned counsel for the appellant in C.M.A.No.2615 of 2009, submitted that, after considering the material available on record, one of us (Mr.Justice S.Manikumar) dismissed all the appeals, filed by National Insurance Company Limited, confirming negligence fixed on the driver o the bus. He further submisted that the decision made in the said appeals, has reached finality, as there was no further challenge, to the Hon'ble Supreme Court, by National Insurance Company Limited, and that, therefore, on the basis of the findings confirmed in C.M.A.Nos.3032 to 3034 of 2012, dated 07.11.2012, prayed that the present appeal C.M.A.No.2615 of 2009 filed by The New India Assurance Company Limited, insurer of the lorry, has to be allowed, reversing the finding made by the Tribunal in M.C.O.P.No.4295 of 2005, fixing contributory negligence in the ratio of 50:50, on the drivers of the bus and the lorry respectively.

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9. He also prayed that consequent to the reversal of finding, fixing negligence on the lorry driver, insurer, namely, The New India Assurance Company Limited, Chennai, has to be absolved of its liability, to pay the compensation, determined by the Tribunal, to Ms.Gracelyn Davidson.

10. Per contra, inviting the attention of this Court to variance in the decisions of the Tribunals, as regards the finding of negligence, and placing reliance on a decision of this Court in Thiruvallur Transport Corporation, rep. by its Managing Director, Madras, v. D.Narayanan and another, reported in 200-1-L.W.272, and drawing the attention to paragraph 9 of the counter affidavit filed by The New India Assurance Company Limited, insurer of the lorry, in M.C.O.P.No.4295 of 2005 on the file of Motor Accident Claims Tribunal, II Court of Small Causes, Chennai, and to the oral testimony of P.W.1, Gracelyn Davidson, claimant in the said claim petition and first respondent in C.M.A.No.2615 of 2015, wherein she has deposed that the drivers of both the vehicles were responsible for the accident, Mrs.N.B.Surekha, learned counsel for National Insurance Company Limited, insurer of KPN bus, bearing registration No.KA-38-A0001, appellant in C.M.A.Nos.2274 to 2277 of 2015, and fourth respondent in C.M.A.No.2615 of 2009, contended that on the basis of testimony of P.W.1, and the counter affidavit of The New India Assurance Company Limited, contributory negligence should be fixed on both the drivers.

11. We have heard learned counsel appearing for the insurers,namely, The New India Assurance Company Limited, insurer of the lorry, represented by Mr.M.Krishnamoorthy; and National Insurance Company Limited, insurer of the bus, represented by Mrs.N.B.Surekha, and perused the material available on record.

12. Since National Insurance Company Limited, insurer of the bus, has made an attempt to take advantage of the averments made in the counter affidavit, filed in M.C.O.P.No.4295 of 2005, on the file of Motor Accident Claims Tribunal, II Court of Small Causes, Chennai, against which order, C.M.A.No.2615 of 2009 has been filed, let us consider the averments made in paragraph 9 of the counter affidavit, wherein it is stated as under :

> "9.This respondent put the petitioner to strict proof that the accident was caused due to the rashand negligent driving on the part of the driver of the lorry bearing registration NO.MDA 6069 and the driver of the bus bearing registration No.KA.38.A.0001 in which the petitioner was travelling as a passenger at the time of alleged accident was neither guilty of

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negligence nor guilty of contributory negligence to the occurrence if the driver of the bus was guilty no compensation under law of torts and if guilty of contributory negligence, liability has to be apportioned."

13. Reading of the above paragraph extracted from the counter affidavit, filed by The New India Assurance Company Limited, does not indicate admission of liability on the part of the insurer. What all the The New India Assurance Company Limited, insurer of the lorry, has stated is, that if contributory negligence is fixed, then, liability has to be apportioned.

14. Scrutiny of the averments does not, at any stretch of imagination, indicate admission of negligence of the lorry driver. Testimony of Gracelyn Davidson, extracted in the judgment in M.C.O.P.No.4295 of 2005, is as follows :

விபத்தை நான் பார்த்தேன், எங்கள் பஸ், முன்பறம் சென்ற வாகனத்தை ஒவர்டேக் செய்த நேரத்தில் எதிர் திசையில் வந்த வண்டி மோதியது, விபத்திற்கு இரு வாகன ஒட்டுனர்களும் காரணம்

15. Earlier, when National Insurance Company Limited, Insurer of the bus, chellenged the finding of the Tribunal in M.C.O.P.Nos.192 to 194 of 2005, dated 23.12.2010, and contended that the said Tribunal ought to have fixed negligence on the lorry driver, this Court, after considering the arguments of the learned counsel for The New India Assurance Company Limited, insurer of the bus, and the materials on record, in C.M.A.Nos.3032 to 3034 of 2012, by order, dated 07.11.2012, at paragraph 8, summarised the arguments as under :

"Assailing the correctness of the finding of the Claims Tribunal, Ms. R. Sreevidhya, learned counsel appearing for the appellant submitted that the Claims Tribunal has failed to consider that there is a collision between the bus and lorry and due to the impact, the acid carried by the lorry spilled over the claimants and caused injuries to them. According to her, the driver of the lorry, carrying hazardous goods, ought to have exercised due care and caution in preventing the hazardous substance from spilling over, in the event of any untoward incident. Inviting the attention of this Court to the cross examination of Mrs.Sabastin Mary/PW3 in M.C.O.P. No.194 of 2005, she further submitted that the said witness has deposed that the accident could have been averted had the lorry driver

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attempted to avoid the accident and in such circumstances, contributory negligence ought to have been fixed on the drivers of both the vehicles in the accident."

At para 10, it is further held as follows :

"10. The only challenge made in these appeals is regarding the correctness of the finding made by the Claims Tribunal in fixing negligence on the driver of the bus bearing Registration No.KA-38-A1, insured with the appellant. All the four witnesses have deposed that the accident has occurred due to the rash and negligent driving of the bus driver. Perusal of the oral testimony of PW3/Mrs.Sabastin Mary, the claimant in M.C.O.P. No.194 of 2005 shows that when the bus was proceeding from Bangalore to Chennai, near Pennalur Power Grid, there was a Government bus, proceeding ahead of the bus, involved in the accident, owned by M/s.KPN Travels India Limited, Bangalore. The lorry carrying hazardous substance was coming from the opposite direction. As per the version of PWs 1 to 3, claimants in M.C.O.P. Nos.192 to 194 of 2005, the lorry was driven in a proper direction and in a normal speed, but there was an attempt by KPN bus driver to overtake the Governmment bus. From the reading of the testimony of PW3, it is clear that it was only due to the fault of KPN Travels, in overtaking the Government bus, an head on collision had occurred. Merely because there was a head on collision of two vehicles, contributory negligence cannot be fixed. From the above, it is evident that KPN bus driver, involved in the accident, had not taken due care and caution, in driving the vehicle on the highway, attempted to overtake a Government bus and dashed against the lorry, carrying hazardous substance and due to the impact, the hazardous substance acid, had spilled over the claimants, causing injuries. Ex.P1/FIR has been registered against the driver of KPN Travels bus, insured with the appellant company. Testimony of PWs1 to 3 corroborated the contents of Ex.P1/FIR. In addition, they have also filed Ex.P8/Rough Sketch, reflecting the manner of the accident. As rightly pointed out by the Claims Tribunal that neither the contents of the FIR nor the details of the rough sketch/Ex.P8 had been contradicted by the appellant/insurance company by examining the

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driver of KPN travels. No witness has been examined and no oral or documentary evidence has been let in by the appellant/insurance company, Therefore, as rightly observed by the Claims Tribunal, the legal presumption, as regards the manner of accident, has to be decided only in favour of the first respondent in both the appeals/claimants. Though the learned counsel for the appellant made an attempt to take advantage of the testimony of the cross examination of PW3 contending that had the lorry driver attempted to avoid the accident, it could have been prevented, is not sufficient to fix contributory negligence on the part of the lorry driver, particularly when the other portion of the testimony of PW3, clearly shows that KPN bus driver came on the wrong side of the road, collided with the lorry and thus caused the accident. Based on the relevant materials and on the preponderance of probabilities, this court is of the view that there is no perversity in the finding recorded by the Claims Tribunal fixing negligence on the part of the driver of KPN Travels. The Civil Miscellaneous Appeals are dismissed."

16. Thus, the finding, fixing negligence on the driver of the bus, bearing registration No.KA-38-A0001, insured with National Insurance Company Limited, has been confirmed, of course, by a judgment of a single Judge of this Court, in C.M.A.Nos.3032 to 3034 of 2012, dated 07.11.2012, and that the said finding has attained finality.

17. Though the accident which occurred on 23.06.2004 has given rise to several claim petitions, filed in different forums, the finding confirmed by this Court in other appeals is binding on the Tribunals, and applicable to other appeals also. The decision relied upon by Mrs.N.B.Surekha, learned counsel for the National Insurance Company Limited, insurer of the bus, appellant in C.M.A.Nos.2274 to 2277 of 2015, is not applicable to the cases on hand.

18. In the light of the above discussion, this Court is of the view that the finding of the file of Motor Accident Claims Tribunal, (II Court of Small Causes), Chennai, dated 06.08.2008, made in M.C.O.P.No.4295 of 2005, fixing contributory negligence, on both the drivers of the bus and the lorry, in equal proportions, in the ratio of 50:50, requires reversal. Therefore, the said finding is reversed. We reiterate that it is the driver of the bus, bearing registration No.KA-38-A0001, and insured with National Insurance Company Limited, Trichy, alone was negligent, in

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causing the accident. Consequently, The New India Assurance Company Limited, insurer of the lorry, bearing registration No.MDA 6069, is discharged from its liability, to pay compensation. Finding of negligence and liability fastened on National Insurance Company Limited, Trichy, insurer of the bus, are sustained.

19. C.M.A.No.2615 of 2009, filed by The New India Assurance Company Limited, Chennai, is allowed. C.M.A.Nos.2274 to 2277 of 2015, filed by The National Insurance Company Limited, are dismissed. No costs. Consequently, the connected M.P.Nos.1 of 2009 and 1 of 2013 in C.M.A.No.2615 of 2009 and 1 of 2015 in C.M.A.Nos.2274 ot 2277 of 2015 are closed.

Sd/-
Assistant Registrar(CS IV)

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Sub Assistant Registrar

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To

1. The Motor Accident Claims Tribunal,
(II Court of Small Causes),
Chennai.

2. The Motor Accident Claims Tribunal,
(III Court of Small Causes),
Chennai.

3. The Section Officer, VR Section,
High Court, Madras.104.

+ 5 ccs to M/s. N.B. Surekha, Advocate Sr Nos.51693 in CMA Nos.2615 of 2009, 251694, 51695, 51696, 51697 in CMA Nos. 2274 to 2277/2015

+ 1 cc to Mr.r. Rajmohan, Advocate Sr.51242

C.M.A.No.2615 OF 2009 &
2274 TO 2277/2015

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