

IN THE HIGH COURT OF JUDICATURE AT PATNA
Miscellaneous Appeal No.389 of 2013

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1. Ajay Kumar Son Of Shri Ram Kripal Thakur Resident Of Village- Barahi Jiwan, P.S.- Bathnaha, District- Sitamarhi

2. Narbadeshwar Pandey @ Narmadeshwar Pandey Son Of Gautam Pandey Resident Of Village- Gundi, P.S.- Krishna Nagar Dewariya, District- Bhojpur.(Owner And Driver Of Bus No. BR- 30P/2289 Respectively) (Opposite Party No. 4 and 6 respectively).

.... Appellant/s

Versus

1. Most. Ruby Devi W/O Late Sanjay Kumar Resident Of Village- Laruyari, P.S.- Parihar, District- Sitamarhi

2. Nandani Kumari Minor Daughter Of Late Sanjay Kumar Under The Guardian Ship Of Her Mother- Most. Ruby Devi Resident Of Village- Laruyari, P.S.- Parihar, District- Sitamarhi

3. Sanjeev Kumar S/O Uma Shankar Prasad Resident Of Village And P.S.- Sursand, District- Sitamarhi. (Owner Of Truck No. Br-06g-1748)

4. Oriental Insurance Company Ltd. Motijheel, Muzaffarpur (Insurer Of Truck No. BR-06G-1748)

5. Jay Narayan Mahto S/O Saryug Mahto Resident Of Village- Jogwana, P.O. Majholia, P.S. Bathnaha, District- Sitamarhi. (Driver Of Truck No. BR-06G-1748)

6. Divisional Manager, The New India Assurance Company Ltd. Muzaffarpur (Insurer Of Bus No. BR-30P-2289)

.... Respondent/s

Appearance :

For the Appellant/s : Mr. Mukesh Pd. Singh, Advocate

For the Respondent No.4: Mr. Barun Kr. Chaudhary, Advocate

For the Respondent No.6: Mr. Durgesh Kumar Singh, Advocate

For the Respondent No.3: Mr. Alok Kumar, Advocate

For Respondent No. 1 & 2: Mr. Ashok Kr. Sinha No.2. Advocate

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
CAV ORDER

16 27-07-2016

With the consent of the respective parties as well

as considering pendency of this appeal since 2013, the matter is being decided at the stage of admission itself.

2. It has been perceived that this appeal happens to be barred by limitation of 64 days and for condoning the same, I.A. No.7773/2015 has been filed.

3. In the facts and circumstances of the case and the grounds enumerated therein, the same is condoned. Consequent thereupon, I.A. No. 7773/2015 is allowed.

4. The appellants who are owner as well as driver of Bus bearing Registration no. BR30P-2289 have challenged the judgment dated 25.03.2013 as well as award dated 28.11.2013 passed by Adhoc Additional Motor Vehicle Accidents Claims Tribunal-cum-Adhoc Additional Sessions Judge-2nd, Sitamarhi in Claim Case No. 25/2006 whereby and whereunder the learned Tribunal had identified Rs. 4,41,500/- as claim amount along interest at the rate of 8% from the date of framing of issue (21.04.2010) till final payment with a further direction to share the burden half and half.

5. As pleaded by the Respondents No.1 and 2/claimants, while the deceased Sanjay Kumar, husband of Most. Ruby Devi and father of Nandini Kumari was travelling by Bus No. BR30P-2289 on 20.06.2006 and as soon as the bus reached near Village-Rampur Inerva, one Truck bearing Registration No. BR06G-1748 came from opposite side being driven in rash and negligent manner and dashed against the bus as a result of which so many passengers became injured. Deceased, Sanjay Kumar sustained head injury and died instantaneously. One of the passengers, Hari Krishna Ranjan gave his Fard-e-beyan on the basis of which Bathnaha P.S. Case no. 79/2006 was registered and accordingly, after preparing inquest report, dead body of Sanjay Kumar was sent for postmortem, on account thereof, the claimants filed instant claim case.

6. Drivers as well as owners including respective Insurance Company were made parties, out of whom, appellant no.2, driver of Bus No. BR30P-2289 had not appeared whereupon the proceeding gone against him ex parte. Appellant No.1/owner of Bus No. BR30P-2289 appeared and filed WS denying his liability. Furthermore, it has been pleaded that from perusal of Fard-e-beyan, it is evident that it happens to be the truck, offending vehicle which was being rashly and negligently driven whereupon, it dashed against the Bus. Had there been proper care and caution at the end of driver of truck, the accident could have averted.

7. It has also been pleaded that mere driving the vehicle in high speed would not cost liability unless the driving happens to be rash and negligent. There happens to be no such allegation against the driver of the Bus. Hence, no obligation could be saddled against the owner of Bus. To substantiate the same, it has also been pleaded that from location of damage caused to bus (right side), the impact could be perceived.

8. It has also been pleaded that driver possessed valid driving license at the relevant time. Bus was running under valid permit. Apart from this, it has also been submitted that in worst case, it could be appropriate 75% as well as 25% and the owner of the bus is only liable for 25% of determined claimed amount.

9. Owner of the truck bearing Registration No. BRO6G-1748 had pleaded that as the offending vehicle happens to be bus, which was being driven in rash and negligent manner, hence he is not liable to pay the claim. It has also been pleaded that the truck in question happens to be insured during the tenure of the so alleged accident.

10. Insurance Company against Truck No. BR-O6G-1748 had also filed WS reserving its protection as per Section 149(2) of the M.V. Act and for that reiterated version of Fard-e-beyan and pleaded that as the driver of the bus was rash and negligent, on account of which, bus was the offending vehicle, hence liability should be borne by the owner of the bus. Furthermore, it has also been pleaded that the deceased met with death on account of own fault. Also question over discloser relating to income of the deceased. Then it has been pleaded that in any case, the liability should be in proportion to 50-50.

11. New India Assurance Company for bus filed WS and submitted that at the relevant time, bus was not insured under it.

12. On the basis respective pleadings following issues were found:-

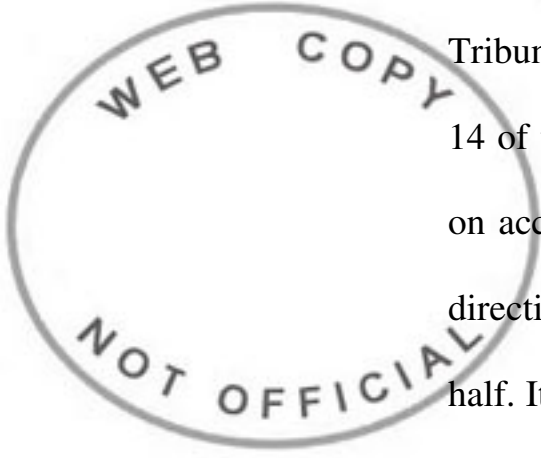
- (i) Whether the suit is maintainable?
- (ii) Whether the accident took place on account of rash and negligent driven by the respective drivers of Truck No. BR06G 1748 as well as BR30P-2289?
- (iii) Whether the owners of the respective vehicles have violated the terms of

- agreement?
- (iv) Whether the applicants are entitled for compensation?
 - (v) What other relief or reliefs, applicants are found entitled for?

13. While deciding issue no.(ii) the learned Tribunal had discussed the same in detail as is evident under para-14 of the judgment and held it to be a composite negligence and on account thereof, while deciding the other issues concluded by directing owners of both the vehicles to share the burden half and half. It happens to be the owner of the bus who has challenged the judgment and decree impugned on the limited point that he could not have been directed to share the burden to the extent of half.

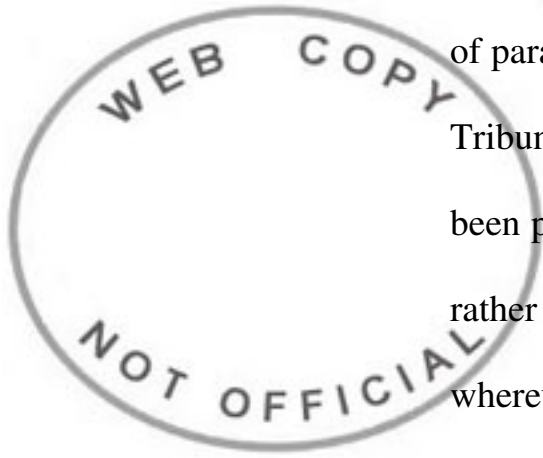
14. Before coming to main issue, from the lower court record, it is evident that appellant no.2, driver of the bus bearing registration no. BR30P-2289 had not appeared and on account thereof, the case proceeded against him ex parte. However, his presence has been perceived as a witness coming at the end of appellant no.1, owner of the bus bearing Registration No. BR30P-2289 who himself withheld to depose. It has also been perceived that in spite of having the bus uninsured, New India Assurance Company Ltd impleaded on account of being insurer of the bus but, the insurance policy commenced after accident and on account thereof, its presence has been found inefficacious.

15. Learned counsel for the appellants while challenging the finding recorded by the learned Tribunal under issue no.(ii) fully discussed under para-14 of the judgment, has



submitted that the finding so arrived at by the learned Tribunal happens to be bad in law as well as on facts and that being so, would not have saddled the liability to the extent of half against the appellant. Furthermore, it has been submitted that from perusal of para-14 of the judgment impugned, it is evident that the learned Tribunal had not taken into consideration the evidences having been produced on record not only by the appellants/opposite party rather on behalf of respondents no. 1 and 2/claimants also whereunder there happen to be specific disclosure that it happens to be the driver of truck bearing Registration No. BR06G-1748 which was being driven in rash and negligent manner and on account of such rashness and negligence, the accident took place costing life of Sanjay Kumar, the deceased as well as injuries to other different passengers.

16. To substantiate such plea, it has also been stated that learned Tribunal had based its finding over the Fard-e-beyan of one of the passengers, which ought not to be, in the background of the fact that the maker of document was not at all before the court as a witness, contrary to it, the witnesses on behalf of respondent 1 and 2/claimants apart from pleading have categorically stated that driver of truck bearing Registration No. BR06G-1748 was negligent and not diligent in discharging his duty carefully and cautiously. Had there been proper exercise of precaution and would have been diligent one, the accident would not have taken place. Therefore, the learned Tribunal was wrong

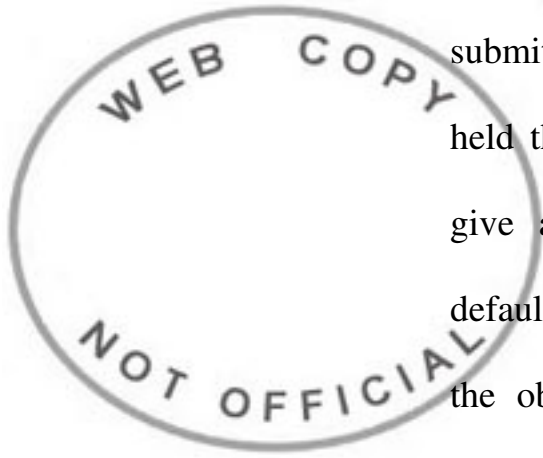


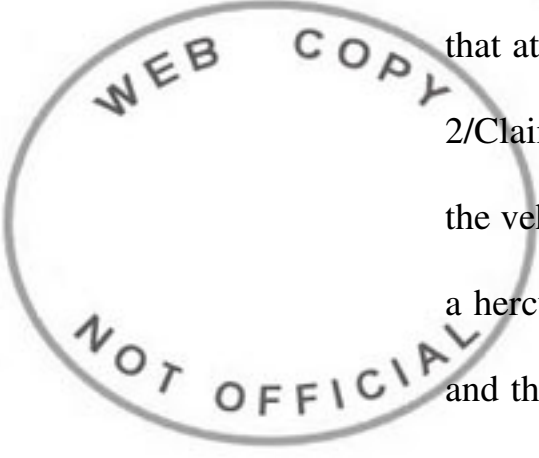
in deciding the issue no.(ii) identifying as well as directing the appellant to share half and half, the claimed amount. So submitted that the judgment impugned is fit to be set aside.

17. The learned counsel for the appellant further submitted that in so many judicial pronouncements it has been held that mere indulging of two vehicles in accident would not give an opportunity to saddle the liability against both the defaulters half and half rather, the Tribunal is expected to identify the obligation and awarded amount should be directed to be shared in proportionate thereof. To substantiate the same, the learned counsel for the appellant also relied upon ***2008 ACJ 1964, 2006 ACJ 1285, 2009(3) PLJR 25, (2008)3 SCC 748, (2011)3 SCC 646, 2004(2) PLJR 755, 2008(3) PLJR 748, 2006 ACJ 803, 2009(1) PLJR 443, (2009)5 SCC 112.***

18. Learned counsel for the respondents no.1 and 2 has submitted that the judgment and award impugned is duly substantiated with the facts emerging out from the record. The burden of half share inflicted against the Insurance Company of Truck bearing Registration No. BR06G-1748 had already been discharged while the appellants, instead of making payment, have invented a new methodology to ward off the mandate of judgment and award impugned. So submitted that the appeal is fit to be dismissed.

19. It has been submitted on behalf of respondent no.4, Insurance Company substituting the owner of the



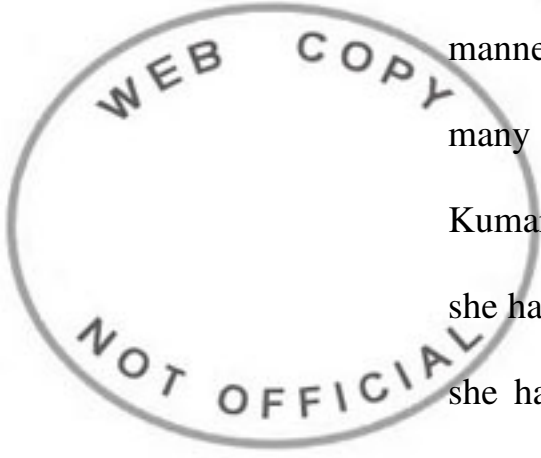


truck bearing Registration No. BR06G-1748 that appellants have got no legal, genuine ground to challenge the verdict, more particularly, having a conclusive finding by the learned Tribunal based upon sound reasoning. Furthermore, it has been submitted that at the stage of filing claim petition, the Respondent No.1 and 2/Claimants were aware with the facts that at the time of accident the vehicle (bus) was not insured and on account thereof, it will be a herculean task in getting the amount from the owner of the bus and that happens to be the reason behind that they have deflected from the narration of the Fard-e-beyan which was recorded by one of the passengers. Furthermore, it has also been submitted that the aforesaid document that means to say, FIR of Bathnaha PS Case No. 79/2006 is fully relied upon and the same is evident not only from pleading rather from the exhibits which, the claimant had brought up on record during course of trial. Therefore, it has also been submitted that the learned Tribunal have rightly identified the quantum to be shared by both the tortfeasors half and half. Also relied upon **2009 (1) PLJR 443, (2009)5 SCC 112.**

20. During course of trial altogether five witnesses have been examined on behalf of respondents no. 1 and 2/claimants, out of whom AW-1, Ruby Devi, the claimant herself, AW-2, Arun Rai, AW-3, Kamlesh Thakur, AW-4, Ram Pratap Ram and AW-5, Anu Jha. Right from AW-2 to AW-5, none had deposed over factum of manner of accident. They happen to be on different footing, that means to say, over the source of income,

age of the deceased. AW-1 is the wife/one of the claimants. She had narrated that on 20.06.2006 her husband proceeded over the bus no. BR30P-2289. A truck coming from opposite side bearing no. BR06G-1748 which was being driven in rash and in negligent manner, came and dashed against the bus on account thereof, so many passengers got injuries including her husband, Sanjay Kumar who died out of the injuries. During cross-examination, she had stated that she had not seen the occurrence. But in para-10 she had stated that on account of collision in between bus and truck, her husband sustained injury who later on succumbed. Therefore, there happens to be absence of substantial evidence whereupon an inference could be drawn conclusively.

21. At the other end, only Appellant no.2 came as a witness on behalf of his owner who had stated that he possesses driving license. He had further admitted that he happens to be accused in Bathnaha P.S. Case No. 79/2006 along with driver of truck. Then he deposed that at the time of accident, he was driver of bus bearing Registration no. BR30P-2289. He was driving the bus in moderate speed, cautiously and diligently. When he reached near Rampur Inerva, he stopped the bus at left side of road for boarding/de-boarding of the passengers. At that very moment a truck bearing Registration No. BR06G-1748 came rashly and negligently and dashed against his bus on account of which passengers sustained injuries. He had further asserted that there was no negligence on his part rather it was truck the



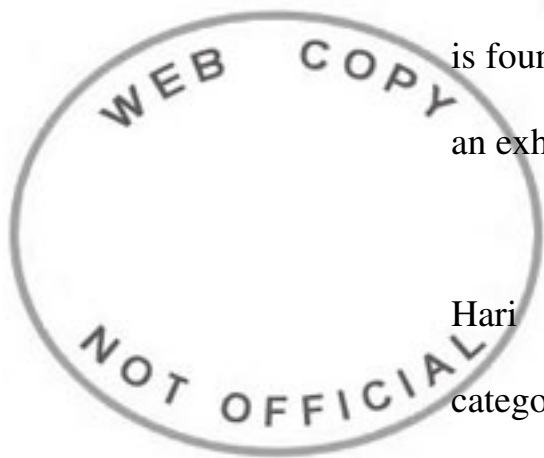
offending vehicle which was responsible and so, the proprietor of the offending vehicle is responsible to carry burden exclusively. During cross-examination, had denied the suggestion that bus was being driven by him in negligent manner. However, his evidence is found contrary to the pleading. No other papers have been made an exhibit to infer that the truck in question was offending vehicle.

22. From Ext-No.1, it is evident that informant, Hari Krishna Ranjan, one of the injured passengers, had categorically detailed the event wherein he identified the driver of the bus to be rash and negligent and in likewise manner, the driver of truck ultimately, the bus and truck collided. Ext-2 is the charge-sheet wherefrom it is apparent that driver of both the vehicles happen to be accused. The other documents are not at all relevant on the present issue as death is out of controversy.

23. From nature of respective pleadings as well as evidences, it is evident that it happens to be a case of collision of two vehicle and as the claimants happen to be third party, as such, it could be treated as composite negligence. Being it a case of composite negligence, the only point now for determination is whether owner of one of the vehicles has got choice to ask for apportionment according to his desire?

24. In the case of *T.O. Anthony v. Karvarnan as reported in (2008) 2 SCC 748*, it has been held as following:-

4. The appellant contended that at the time of the accident, he was driving his bus at a moderate speed in a careful manner and his bus was traveling



from East to West on the correct side of the road. According to him the private bus, being driven by the first respondent in a rash and negligent manner, came from the opposite side, went to the wrong side of the road and dashed against his bus. He contended that The Tribunal and High Court ought to have held that the first respondent was solely responsible for the accident, and consequently, awarded the compensation without any deduction.



5. The Tribunal assumed that the extent of negligence of the appellant and the first respondent is fifty:fifty because it was a case of composite negligence. The Tribunal, we find, fell into a common error committed by several Tribunals, in proceeding on the assumption that composite negligence and contributory negligence are the same. In an accident involving two or more vehicles, where a third party (other than the drivers and/or owners of the vehicles involved) claims damages for loss or injuries, it is said that compensation is payable in respect of the composite negligence of the drivers of those vehicles. But in respect of such an accident, if the claim is by one of the drivers himself for personal injuries, or by the legal heirs of one of the drivers for loss on account of his death, or by the owner of one of the vehicles in respect of damages to his vehicle, then the issue that arises is not about the composite negligence of all the drivers, but about the contributory negligence of the driver concerned.

6. 'Composite negligence' refers to the negligence on the part of two or more persons. Where a person is injured as a result of negligence on the part of two or more wrong doers, it is said that the person was injured on account of the composite negligence of those wrong-doers. In such a case, each wrong doer, is jointly and severally liable to the injured for payment of the entire damages and the injured person has the choice of proceeding against all or any of them. In such a case, the injured need not establish the extent of responsibility of each wrong-doer separately, nor is it necessary for the court to determine the extent of liability of each wrong-doer separately. On the other hand where a person suffers injury, partly due to the negligence on the part of another person or persons, and partly as a result of his own negligence, then the negligence of the part of the injured which contributed to the accident is referred to as his contributory negligence. Where the injured is guilty of some negligence, his claim for damages is not defeated

merely by reason of the negligence on his part but the damages recoverable by him in respect of the injuries stands reduced in proportion to his contributory negligence.

25. In *Khenyei v. New India Assurance*

Company Limited as reported in (2015) 9 SCC 273, it has been

held:-



3. It is a case of composite negligence where injuries have been caused to the claimants by combined wrongful act of joint tort feors. In a case of accident caused by negligence of joint tort feors, all the persons who aid or counsel or direct or join in committal of a wrongful act, are liable. In such case, the liability is always joint and several. The extent of negligence of joint tort feors in such a case is immaterial for satisfaction of the claim of the plaintiff/claimant and need not be determined by the court. However, in case all the joint tort feors are before the court, it may determine the extent of their liability for the purpose of adjusting inter-se equities between them at appropriate stage. The liability of each and every joint tort feor vis a vis to plaintiff/claimant cannot be bifurcated as it is joint and several liability. In the case of composite negligence, apportionment of compensation between tort feors for making payment to the plaintiff is not permissible as the plaintiff/claimant has the right to recover the entire amount from the easiest targets/solvent defendant.

4. In Law of Torts, 2nd Edn., 1992 by Justice G.P. Singh, it has been observed that in composite negligence, apportionment of compensation between two tort feors is not permissible.

5. In Law of Torts by Winfield and Jolowicz, 17th Edn., 2006, the author has referred to Performance Cars Ltd. v. Abraham [1962 (1) QB 33], Baker v. Willoughby 1970 A.C. 467, Rogers on Unification of Tort Law: Multiple Tortfeors; G.N.E.R. v. Hart [2003] EWHC 2450 (QB), Mortgage Express Ltd. v.

Bowerman & Partners 1996 (2) All E.R. 836 etc. and observed thus :

“WHERE two or more people by their independent breaches of duty to the claimant cause him to suffer distinct injuries, no special rules are required, for each tortfeasor is liable for the damage which he caused and only for that damage. Where, however, two or more breaches of duty by different persons cause the claimant to suffer a single, indivisible injury the position is more complicated. The law in such a case is that the claimant is entitled to sue all or any of them for the full amount of his loss, and each is said to be jointly and severally liable for it. If the claimant sues defendant A but not B and C, it is open to A to seek “contribution” from B and C in respect of their relative responsibility but this is a matter among A, B and C and does not affect the claimant. This means that special rules are necessary to deal with the possibilities of successive actions in respect of that loss and of claims for contribution or indemnity by one tortfeasor against the others. It may be greatly to the claimant’s advantage to show that he has suffered the same, indivisible harm at the hands of a number of defendants for he thereby avoids the risk, inherent in cases where there are different injuries, of finding that one defendant is insolvent (or uninsured) and being unable to execute judgment against him. Even where all participants are solvent, a system which enabled the claimant to sue each one only for a proportionate part of the damage would require him to launch multiple proceedings, some of which might involve complex issues of liability, causation and proof. As the law now stands, the claimant may simply launch proceedings against the “easiest target”. The same picture is not, of course, so attractive from the point of view of the solvent defendant, who may end up carrying full responsibility for a loss in the causing of which he played only a partial, even secondary role. Thus a solicitor may be liable in full for failing to point out to his client that there is reason to believe that a valuation on which the client proposes to lend is suspect, the valuer being insolvent; and an auditor will be likely to carry sole responsibility for negligent failure to





discover fraud during a company audit. A sustained campaign against the rule of joint and several liability has been mounted in this country by certain professional bodies, who have argued instead for a regime of "proportionate liability" whereby, as against the claimant, and not merely among defendants as a group, each defendant would bear only his share of the liability. While it has not been suggested here that such a change should be extended to personal injury claims, this has occurred in some American jurisdictions, whether by statute or by judicial decision. However, an investigation of the issue by the Law Commission on behalf of the Dept of trade and Industry in 1996 led to the conclusion that the present law was preferable to the various forms of proportionate liability."

6. Pollock in Law of Torts, 15th Edn. has discussed the concept of composite negligence. The relevant portion at page 361 is extracted below :

"Another kind of question arises where a person is injured without any fault of his own, but by the combined effects of the negligence of two persons of whom the one is not responsible for the other. It has been supposed that A could avail himself, as against Z who has been injured without any want of due care on his own part, of the so-called contributory negligence of a third person B. It is true you were injured by my negligence, but it would not have happened if B had not been negligent also, therefore, you can not sue me, or at all events not apart from B. Recent authority is decidedly against allowing such a defence, and in one particular class of cases it has been emphatically disallowed. It must, however, be open to A to answer to Z: You were not injured by my negligence at all, but only and wholly by B's. It seems to be a question of fact rather than of law (as, within the usual limits of a jury's discretion, the question of proximate cause is in all ordinary cases) what respective degrees of connection, in kind and degree, between the damage suffered by Z and the independent negligent conduct of A and B will make it proper to say that Z was injured by the negligence of A alone, or of B alone, or of both A and B,. But if

this last conclusion be arrived at, it is now quite clear that Z can sue both A and B.

At page 362 Author has observed as :-



"The strict analysis of the proximate or immediate cause of the event: the inquiry who could last have prevented the mischief by the exercise of due care, is relevant only where the defendant says that the plaintiff suffered by his own negligence. Where negligent acts of two or more independent persons have between them caused damage to a third, the sufferer is not driven to apply any such analysis to find out whom he can sue. He is entitled- of course, within the limits set by the general rules as to remoteness of damage- to sue all or any of the negligent persons. It is no concern of his whether there is any duty of contribution or indemnity as between those persons, though in any case he can not recover in the whole more than his whole damage."

7. In *Palghat Coimbatore Transport Co. Ltd. v. Narayanan*, [ILR (1939) Mad. 306], it has been held that where injury is caused by the wrongful act of two parties, the plaintiff is not bound to a strict analysis of the proximate or immediate cause of the event to find out whom he can sue. Subject to the rules as to remoteness of damage, the plaintiff is entitled to sue all or any of the negligent persons and it is no concern of his whether there is any duty of contribution or indemnity as between those persons, though in any case he cannot recover on the whole more than his whole damage. He has a right to recover the full amount of damages from any of the defendants.

8. In *National Insurance Co. Ltd. v. P.A. Vergis & Ors.* [1991 (1) ACC 226], it has been observed that the case of composite negligence is one when accident occurs and resulting injuries and damages flow without any negligence on the part of the claimant but as a result of the negligence on the part of two or more persons. In such a case, the Tribunal should pass a composite decree against owners of both vehicles. In *United India Fire & Genl. Ins. Co. Ltd. v. Varghese & Ors.* [1989 2 ACC 483 = 1989 ACJ 472], it has been observed that in a case of composite negligence, the injured has option to proceed



against all or any of the joint tortfeasors. Therefore, the insurer cannot take a defence that action is not sustainable as the other joint tortfeasors have not been made parties. Similar is the view taken in *United India Fire & General Insurance Co. Ltd. v. U.E. Prasad & Ors.* [AIR 1985 Kar. 160]. In *Andhra Marine Exports (P) Ltd. & Anr. v. P. Radhakrishnan & Ors.* [AIR 1984 Mad. 358], it has been held that every wrong doer is liable for whole damages in the case of composite negligence if it is otherwise made out.

9. Similar is the view taken in *Smt. Kundan Bala Vora & Anr. v. State of U.P.* [AIR 1983 All. 409], where a collision between bus and car took place. Negligence of both the drivers was found. It was held that they would be jointly and severally liable to pay the whole damages. In *Narain Devi & Ors. v. Swaran Singh & Ors.* [1989 2 ACC 116 (Del.) = 1989 ACJ 1118] there was a case of composite negligence by drivers of two trucks involved in an accident which hit the tempo from two sides. The proportion in which the two vehicles misconducted or offended was not decided. It was held by the High Court that the Tribunal was right in holding the liability of tortfeasors as joint and several.

10. A Full Bench of the High Court of Karnataka at Bangalore in *Karnataka State Road Transport Corporation, Bangalore and etc. v. Arun alias Aravind and etc. etc.* [AIR 2004 Kar. 149] has affirmed the decision of another Full Bench of the same High Court in *Ganesh v. Syed Munned Ahamed & Ors.* [ILR (1999) Kar. 403]. A Division Bench referred the decision in *Ganesh's* case (supra) on following two questions to the larger Bench :

“1. If the proceedings are finally determined with an award made by the Tribunal and disposed of in some cases by the appeal against the same by the High Court, does the Tribunal not become *functus officio* for making any further proceedings like impleading the tortfeasor or initiating action against him legally impermissible ?

2. What is the remedy of a tortfeasor who has satisfied the award, but who does not know the particulars of the vehicle which was responsible

for the accident?”

11. A Full Bench in *KSRTC v. Arun @ Aravind* (supra) while answering aforesaid questions has observed that it was a case of composite negligence and the liability of tort feasons was joint and several. Hence, even if there is non-impleadment of one of tort feasons, the claimant was entitled to full compensation quantified by the Tribunal. The Full Bench referred to the decision of a Division Bench of the Gujarat High Court in *Hiraben Bhaga & Ors. v. Gujarat State Road Transport Corporation* [1982 ACJ (Supp.) 414 (Guj.)] in which it has been laid down that it is entirely the choice of the claimant whether to implead both the joint tort feasons or either of them. On failure of the claimant to implead one of the joint tort feasons, contributory liability cannot be fastened upon the claimant to the extent of the negligence of non-impleaded joint tort feasons. It is for the joint tort feasons made liable to pay compensation to take proceedings to settle the equities as against other joint tort feasons who had not been impleaded. It is open to the impleaded joint tort feason to sue the other wrong doer after the decree or award is given to realize to the extent of others' liability. It has been laid down that the law in *Ganesh's* case (supra) has been rightly laid down and it is not necessary to implead all joint tort feasons and due to failure of impleadment of all joint tort feasons, compensation cannot be reduced to the extent of negligence of non-impleaded tort feasons. Non-impleadment of one of the joint tort feasons is not a defence to reduce the compensation payable to the claimant. In our opinion, the law appears to have been correctly stated in *KSRTC v. Arun @ Aravind* (supra).

12. A Full Bench of Madhya Pradesh High Court in *Smt. Sushila Bhadoriya & Ors. v. M.P. State Road Transport Corpn. & Anr.* [2005 (1) MPLJ 372] has also laid down that in case of composite negligence, the liability is joint and several and it is open to implead the driver, owner and the insurer one of the vehicles to recover the whole amount from one of the joint tort feasons. As to apportionment also, it has been observed that both the vehicles will be jointly and severally liable to pay the compensation. Once the negligence and



compensation is determined, it is not permissible to apportion the compensation between the two as it is difficult to determine the apportionment in the absence of the drivers of both the vehicles appearing in the witness box. Therefore, there cannot be apportionment of the claim between the joint tort feors.

13. The relevant portion of decision of Full Bench is extracted hereunder : (SCC OnLine MP paras 25-28)

“25. When injury is caused as a result of negligence of two joint tort-feors, claimant is not required to lay his finger on the exact person regarding his proportion of liability. In the absence of any evidence enabling the Court to distinguish the act of each joint tort-feor, liability can be fastened on both the tort-feors jointly and in case only one of the joint tort-feors is impleaded as party, then entire liability can be fastened upon one of the joint tort-feors. If both the joint tort-feors are before the Court and there is sufficient evidence regarding the act of each tort-feors and it is possible for the Court to apportion the claim considering the exact nature of negligence by both the joint tort-feors, it may apportion the claim. However, it is not necessary to apportion the claim when it is not possible to determine the ratio of negligence of joint tort-feors. In such cases, joint tort-feors will be jointly and severally liable to pay the compensation.

26. On the same principle, in the case of joint tort- feors where the liability is joint and several, it is the choice of the claimant to claim damages from the owner and driver and insurer of both the vehicles or any one of them. If claim is made against one of them, entire amount of compensation on account of injury or death can be imposed against the owner, driver and insurer of that vehicle as their liability is joint and several and the claimant can recover the amount from any one of them. There can not be apportionment of claim of each tort- feors in the absence of proper and cogent evidence on record and it is not necessary to apportion the claim.

27. To sum up, we hold as under:-

(i) Owner, driver and insurer of one of the vehicles can be sued and it is not necessary to



sue owner, driver and insurer of both the vehicles. Claimant may implead the owner, driver and insurer of both the vehicles or anyone of them.

(ii) There can not be apportionment of the liability of joint tort-feasors. In case both the joint tort-feasors are impleaded as party and if there is sufficient material on record, then the question of apportionment can be considered by the Claims Tribunal. However, on general principles of Jaw, there is no necessity to apportion the inter se liability of joint tort-feasors.

28. Reference is answered accordingly. Appeal be placed before appropriate Bench for hearing.”

14. In our opinion, the law laid down by the Madhya Pradesh High Court in Smt. Sushila Bhadoriya (supra) is also in tune with the decisions of the High Court of Karnataka in Ganesh (supra) and Arun @ Aravind (supra). However, at the same time, suffice it to clarify that even if all the joint tortfeasors are impleaded and both the drivers have entered the witness box and the tribunal or the court is able to determine the extent of negligence of each of the driver that is for the purpose of inter se liability between the joint tortfeasors but their liability would remain joint and several so as to satisfy the plaintiff/claimant.

15. There is a difference between contributory and composite negligence. In the case of contributory negligence, a person who has himself contributed to the extent cannot claim compensation for the injuries sustained by him in the accident to the extent of his own negligence; whereas in the case of composite negligence, a person who has suffered has not contributed to the accident but the outcome of combination of negligence of two or more other persons. This Court in T.O. Anthony v. Karvarnan & Ors. [2008 (3) SCC 748] has held that in case of contributory negligence, injured need not establish the extent of responsibility of each wrong doer separately, nor is it necessary for the court to determine the extent of liability of each wrong doer separately. It is only in the case of contributory negligence that the injured himself has contributed by his negligence in the accident. Extent of his negligence is required





to be determined as damages recoverable by him in respect of the injuries have to be reduced in proportion to his contributory negligence. The relevant portion is extracted hereunder :

“6. 'Composite negligence' refers to the negligence on the part of two or more persons. Where a person is injured as a result of negligence on the part of two or more wrong doers, it is said that the person was injured on account of the composite negligence of those wrong-doers. In such a case, each wrong doer, is jointly and severally liable to the injured for payment of the entire damages and the injured person has the choice of proceeding against all or any of them. In such a case, the injured need not establish the extent of responsibility of each wrong-doer separately, nor is it necessary for the court to determine the extent of liability of each wrong-doer separately. On the other hand where a person suffers injury, partly due to the negligence on the part of another person or persons, and partly as a result of his own negligence, then the negligence of the part of the injured which contributed to the accident is referred to as his contributory negligence. Where the injured is guilty of some negligence, his claim for damages is not defeated merely by reason of the negligence on his part but the damages recoverable by him in respect of the injuries stands reduced in proportion to his contributory negligence.

7. Therefore, when two vehicles are involved in an accident, and one of the drivers claims compensation from the other driver alleging negligence, and the other driver denies negligence or claims that the injured claimant himself was negligent, then it becomes necessary to consider whether the injured claimant was negligent and if so, whether he was solely or partly responsible for the accident and the extent of his responsibility, that is his contributory negligence. Therefore where the injured is himself partly liable, the principle of 'composite negligence' will not apply nor can there be an automatic inference that the negligence was 50:50 as has been assumed in this case. The Tribunal ought to have examined the extent of contributory negligence of the appellant and thereby avoided confusion between composite

negligence and contributory negligence. The High Court has failed to correct the said error.”

The decision in *T.O. Anthony v. Karvarnan & Ors.* (supra) has been relied upon in *Andhra Pradesh State Road Transport Corpn. & Anr. v. K Hemlatha & Ors.* [2008 (6) SCC 767].

16. In *Pawan Kumar & Anr. v. Harkishan Dass Mohan Lal & Ors.* [2014 (3) SCC 590], the decisions in *T.O. Anthony* (supra) and *Hemlatha* (supra) have been affirmed, and this Court has laid down that where plaintiff/claimant himself is found to be negligent jointly and severally, liability cannot arise and the plaintiff's claim to the extent of his own negligence, as may be quantified, will have to be severed. He is entitled to damages not attributable to his own negligence. The law/distinction with respect to contributory as well as composite negligence has been considered by this Court in *Machindranath Kernath Kasar v. D.S. Mylarappa & Ors.* [2008 (13) SCC 198] and also as to joint tortfeasors. This Court has referred to *Charlesworth & Percy* on negligence as to cause of action in regard to joint tortfeasors thus:

“42. Joint tortfeasors, as per 10th Edn. of *Charlesworth & Percy on Negligence*, have been described as under :

Wrongdoers are deemed to be joint tortfeasors, within the meaning of the rule, where the cause of action against each of them is the same, namely, that the same evidence would support an action against them, individually..... Accordingly, they will be jointly liable for a tort which they both commit or for which they are responsible because the law imputes the commission of the same wrongful act to two or more persons at the same time. This occurs in cases of (a) agency; (b) vicarious liability; and (c) where a tort is committed in the course of a joint act, whilst pursuing a common purpose agreed between them.”

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22. What emerges from the aforesaid discussion is as follows :

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



feasors is joint and several.

22.2 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.

22.3 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 feisor can recover the amount from the other in the execution proceedings.

22.4. 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 feasors. In such a case, impleaded joint tort feisor should be left, in case he so desires, to sue the other joint tort feisor in independent proceedings after passing of the decree or award.

26. Therefore, apart from having left at the option of the claimant regarding choosing the party to be impleaded in case of composite negligence, it is also apparent that it depends upon the tribunal either to demarcate *inter se* negligence but the same should be based upon the evidence. From the evidence as discussed herein before no authentic evidence has been found in order to spare the appellant/O.P. from the liability as held by the learned tribunal.



27. Accordingly, I do not find any merit in this appeal. The same is rejected.

Patna High Court
July 27th 2016
Perwez/AFR

(Aditya Kumar Trivedi, J)

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