

IN THE HIGH COURT OF JUDICATURE OF MADRAS

DATED: 27.9.2016

CORAM:

**THE HON'BLE MR. JUSTICE S. MANIKUMAR
AND
THE HON'BLE MR. JUSTICE N.AUTHINATHAN**

**C.M.A. No.2460 of 2016
and
C.M.P.No.17318 of 2016**

The Branch Manager
The National Insurance Co. Ltd.
Gobichettipalayam

... Appellant

Vs.

1.Malathi
2.Minor Diviyesh
D/o Late Rajasekaran
Rep. by mother & guardian
1st respondent - Malathi
3.S.R.Raghunathan
4.Shanthi
5.R.Palanisamy

... Respondents

Civil Miscellaneous Appeal filed under Section 173 of the Motor Vehicles Act, 1988 against the judgment and decree, dated 23.11.2012 made in MCOP No.238 of 2010, on the file of Motor Accidents Claims Tribunal (III Additional District Judge), Erode at Gopichettipalayam.

For Appellant : Ms.R.Sree Vidhya

For Respondents : Mr.V.P.Karthikeyan for R1&R2
Mr.A.K.Kumarasamy for R3&4

JUDGMENT
(delivered by **S.MANIKUMAR, J.**)

Challenge in this appeal, is to the quantum of compensation of Rs.18,45,000/- and also the appellant's liability to pay Rs.14,76,000/- with interest, at the rate of 7.5% per annum, from the date of claim, till realisation, awarded to the legal representatives of the deceased, on the grounds *inter alia* that the Tribunal, erred in fixing 80% negligence, on the driver of the lorry bearing Registration No.TAM 5133, insured with National Insurance Company Ltd, Gopichettipalayam. Supporting the challenge, Mrs.R.Sree Vidhya, learned counsel for the appellant submitted that when the lorry bearing Registration No.TAM 5133, insured with the appellant/insurance company, was parked on left of the side of the road, it was the deceased motorcyclist, who dashed against the same, from behind and therefore, the Tribunal ought to have fixed the entire negligence, on the motorcyclist.

2. According to the claimants, on 22.12.2009, about 10.15 p.m, when the deceased was riding a Hero Honda motorcycle bearing Registration No.TN-33 AX-7169, from Uthukuli to Gobichettipalayam, on the left side of the road, near Rettaikan Bridge, a lorry bearing Registration No.TAM 5133, was parked on the road without any signal and parking lights and due to the flash

of headlights of the vehicles, coming in the opposite direction, the motorcyclist, could not see the parked vehicle, and thus hit the right side of the parked lorry, and sustained injuries and later on died.

3. PW1-wife has adduced evidence regarding the manner of accident. She has not witnessed the accident. But, PW2 - eye witness has supported her version. Ex.P1 - FIR, Ex.P2 - Observation Mahazar, Ex.P3 - Rough sketch, Ex.P4 - Motor vehicle inspection report of the lorry, Ex.P5 - Postmortem certificate, Ex.P6 - Final Report, Ex.P7 - Death certificate, Ex.P8 - legal heir certificate and Ex.P9-copy of judgment of Criminal court, have been marked.

4. On the side of the appellant, driver of the lorry, has not been examined to prove as to how, the accident occurred. However, three witnesses have been examined and no document has been marked. Ex.P1 - FIR, has been lodged based on the complaint given by RW1 - S.R.Raghunathan. RW2 - Selvam, has deposed that without any signal and parking lights, the lorry was parked on the road. Upon perusing Ex.P1 - FIR, the Tribunal has recorded that the motorcyclist, dashed against the lorry, which was parked, without any signal/parking lights. Upon perusal of Ex.P3-

rough sketch, the Tribunal has also recorded that there was nothing in Ex.P3, to indicate there was any signal. Upon perusal of the Final Report (Ex.P6), the Tribunal has also recorded that lorry bearing Registration Number TAM 5133, was parked on the road, without any signal and parking lights and due to the above, the accident occurred. When the lorry was parked negligently, without any signal and parking lights, the motorcyclist, due to the flash of headlights of the vehicles, coming in the opposite direction, had dashed against the lorry. Thus holding that the lorry driver had contributed to the accident, the Tribunal has apportioned negligence, between the lorry driver and the motorcyclist, in the ratio of 80:20 and thereafter, has computed the loss of contribution to the family.

5. Though M/s.National Insurance Co. Ltd./appellant herein, has sought for reversal of the finding and contended that the entire negligence, should be fixed on the motorcyclist, this court is not inclined to accept the same, for the reason that, as stated supra, the driver of the lorry has not been examined and therefore, adverse inference can be drawn against him. On this aspect, we deem it fit to consider, few decisions.

(i) In **New India Assurance Co. Ltd., v. Debajani Sahu** reported in **I (2002) ACC 103 (Ori.)**, the Orissa High Court held that,

"8. In the present case, the Claims Tribunal found about the negligence of the bus driver on the basis of the evidence of the P.Ws. It is contended that P.W. 2 himself being the driver employed by the deceased was a highly interested witness and his evidence cannot be accepted as reliable. There is no dispute in the fact that the accident was caused involving the scooter and the bus. Even assuming that the evidence of P.W. 2 is not accepted, still then the doctrine of res ipsa loquitur is applicable. In such a situation, the owner of the bus should have examined the driver of the bus to explain the circumstances under which the accident occurred, as the other person involved in the accident having died cannot speak from the grave to explain the circumstances under which the accident had taken place. Of course, the bus owner has remained ex-parte, but no attempt was made by the Insurance Company which was contesting the case even on merit (whether justifiably or not is immaterial), has not chosen to adduce any evidence to rebut the evidence of P.W. 2, not has bothered to summon the bus driver to explain the circumstances under which the accident took place. In such a case, an adverse inference can be drawn against the owner/Insurance Company for not examining the bus driver who would have been the best witness to explain the circumstance under which the accident occurred. In such view of the matter, the

finding of the Tribunal on the question of negligence cannot be assailed and the contention in this regard raised by the Counsel for the appellant cannot be accepted."

(ii) In **Sitabai v. Ishak Hussain** reported in **I (2001) ACC 761 (DB)**, the Madhya Pradesh High Court, at Paragraph 5, held as follows:

"5. In this case, the claimants could not examine any eyewitness of the accident. It was difficult for the claimants to search an eyewitness as the claimants were not present on the spot at the time of accident. This difficulty is avoided by applying the maxim res ipsa loquitur. Their Lordships of the Supreme Court in case of Puspabai Purshottam Udeshi v. Ranjit Ginning and Pressing Co., reported in 1977 ACJ 343 (SC), observed:

"The normal rule is that it is for the plaintiff to prove negligence but as in some cases considerable hardship is caused to the plaintiff as the true cause of the accident is not known to him but is solely within the knowledge of the defendant who caused it, the plaintiff can prove the accident but cannot prove how it happened to establish negligence on the part of the defendant. This hardship is sought to be avoided by applying the principle of res ipsa loquitur. The general purport of the words res ipsa loquitur is that

the accident 'speaks for itself or tells its own story. There are cases in which the accident speaks for itself so that it is sufficient for the plaintiff to prove the accident and nothing more. It will then be for the defendant to establish that the accident happened due to some other cause than his own negligence. Where the maxim is applied the burden is on the defendant to show either that in fact he was not negligent or that the accident might more probably have happened in a manner which did not connote negligence on his part. For the application of the principle it must be shown that the car was under the management of the defendant and that the accident is such as in ordinary course of things does not happen if those who had the management used proper care."

In this case, the respondent No. 1 was driving the vehicle which left the road and dashed against a tree. In view of this maxim, the burden shifts on the respondent No. 1 to prove that he was not negligent. It was in the special knowledge of respondent No. 1 as to how the vehicle left the road and came down and struck against a tree. The respondent No. 1 did not examine himself. Under such circumstances, adverse inference that he drove the vehicle in a rash

and negligent manner as a result of which this accident occurred, shall be drawn against him. The learned Tribunal committed error in not applying this maxim. We hold that the accident occurred due to rash and negligent driving of the vehicle by respondent No. 1."

(iii) In **Beni Bai & others v. A. Salim & another** reported in **II (1999) ACC 408 (DB) (M.P.)**, the Madhya Pradesh High Court, held as follows:

"In the circumstances, for non-examination of the material witnesses particularly the driver and the conductor, who had the first hand knowledge of the manner in which the accident occurred, necessarily an adverse inference has to be drawn against the respondents. For want of evidence on behalf of the respondents, the plea raised in defence cannot be said to be established. On the other hand, the appellants have examined Atmaram, A.W.1. who was at the spot, who stated that at the bus stop when the passengers were getting down from the bus, the driver without seeing that the passengers have got down or not, started the bus and there one boy came under the wheel of the bus. From the circumstances, it cannot be inferred that the deceased might have jumped from the running bus. Hence it was the duty of the driver and conductor to have taken care to see whether passengers have got down from the bus or not, then only the driver could have started the bus. As the driver and conductor have failed in their duties to take

care, we hold that the accident occurred due to negligence of the driver of the city bus. This Court in similar circumstances where the same type of defence was taken, has observed that it is the driver of the passenger bus who has to take care that the passengers who wish to get down from the bus have got down and then to start the bus. But that care was not taken. Therefore, it was held that the accident was caused because of the negligence of the driver and conductor."

6. Accident has occurred at 10.15 p.m. The probability of the motorcyclist, unable to notice a parked vehicle, without signal and parking lights and due to the flash of head lights of vehicles coming from the opposite direction cannot be ruled out. Had the lorry been parked carefully, with signal and parking lights, the accident could have been averted. There was due diligence and care by the driver of the lorry, has not been proved. As stated supra, non-examination of the driver of the lorry, is also relevant.

7. Thus, after assessing the oral and documentary evidence, the Claims Tribunal has fixed 80% negligence, on the driver of the lorry bearing Registration No.TAM 5133, insured with the National Insurance Company Ltd, Gopichettipalayam, in causing the accident. We have gone through the award. Finding of negligence fixed on the driver of the lorry, bearing Registration No.TAM 5133

and insured with the appellant herein, cannot be said to be perverse, warranting interference. Submissions to the contra, are rejected.

8. In the result, the appeal is dismissed. The judgment and decree of the Motor Accident Claims Tribunal (III Additional District Judge) at Erode, Gopichettipalayam, dated 23.11.2012 made in M.C.O.P.No.238 of 2010, is confirmed. The appellant-Insurance Company, is directed to deposit the entire award amount, with proportionate accrued interest and costs, less the statutory deposit, to the credit of the above said MCOP, within a period of four weeks from the date of receipt of a copy of this judgment.

The Tribunal is further directed to affix a copy of this judgment in the Notice Board of the Tribunal, mentioning the names of the parties to above said MCOP, and also the disposal of the appeal, filed by National Insurance Co. Ltd.

The Tribunal is further directed to disburse the compensation amount, only, after due verification and identity of the claimants/respondents herein. We direct that, there should be strict compliance.

The share of the minor shall be deposited in any one of the Nationalised Banks in a fixed deposit, under a reinvestment scheme, initially for a period of three years. Interest accruing on the share of the minor shall be paid to the guardian, once in three months, till she attains majority. Deposit should be made within four weeks from the date of receipt of a copy of this judgment. No costs. Consequently, the connected civil miscellaneous petition is closed.

(S.M.K., J.) (N.A.N., J.)
27.9.2016

Index : Yes
Internet : Yes
asr

To
The Motor Accident Claims Tribunal
(III Additional District Judge) at Erode, Gopichettipalayam

S. MANIKUMAR, J.
AND
N. AUTHINATHAN, J.

asr

C.M.A. No.2460 of 2016

27.09.2016

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