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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
DATED : 17.03.2016

CORAM :

THE HONOURABLE MR.JUSTICE S.MANIKUMAR
and
THE HONOURABLE MR.JUSTICE C.T.SELVAM

Civil Miscellaneous Appeal(MD)No.201 of 2016
and
C.M.P (MD)No.2769 of 2016

The Managing Director,
Kerala State Transport Corporation,
Thiruvananthapuram,
Kerala State.

.. Appellant/Respondent No.2

vs.

- 1) Shamimma
- 2) Minor Shamiya
- 3) Minor Azil

(Minor respondents 2 and 3 are represented by
through their mother and next friend
1st respondent herein)

.. Respondents 1 to 3/Petitioners

- 4) Venu
- 5) Ponnulingam
- 6) The General Manager,
Tamilnadu State Transport Corporation Ltd.,
(Madurai Division 3)
Nagercoil Ranithottam,
Kanyakumari Taluk, Tamilnadu.
- 7) Jisthu Mohamed
- 8) The Divisional Officer,
National Insurance Company Ltd.,
Post Office No.112,
North Car Street.
Anguvilas Building,
Nagercoil, Kanyakumari,
Tamilnadu.

.. Respondents/Respondents 1,3to6

Appeal filed under Section 173 of the Motor Vehicles Act, 1988,
against the judgment and decree dated 20.10.2011 in MCOP.No.59 of 2004 on
the file of the Motor Accident Claims Tribunal, Sub Court, Padmanabapuram.

For Appellant	: Mr.N.Elangovan
For Respondents	: Mr.Ananth C.Rajesh for R1 to R3
	Mr.P.Prabhakaran for R6
	Mr.N.Murugesaan for R8
	R4,5&7 - No Appearance



JUDGMENT

(Judgment of the Court was made by Mr. Justice S.MANIKUMAR)

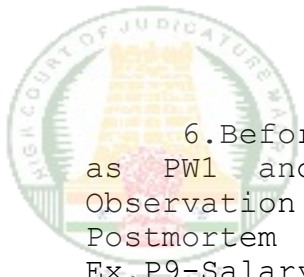
Civil Miscellaneous Appeal filed by the Kerala State Transport Corporation, Thiruvananthapuram, Kerala State, is directed against the judgment and decree in MCOP.No.59 of 2004, dated 20.10.2011, on the file of the Motor Accident Claims Tribunal, Sub Court, Padmanabapuram, fixing entire negligence on the 4th respondent, driver of the bus bearing registration No.KL 15-4737, belonging to the Kerala State Transport Corporation, Thiruvananthapuram, Kerala State, and also the quantum of compensation of Rs.13,03,557/- with interest, @ 7.5% per annum, awarded to the legal representatives of the deceased.

2.Facts leading to the appeal are that on 28.08.2003 about 05.50 P.M., when the husband of the 1st respondent was riding a Susuki motor cycle bearing registration No.TN 74 B 2350 on Nagercoil-Trivandrum main road, at Chunkankadai Junction, a bus bearing registration No.KL 15-4737, belonging to Kerala State Transport Corporation, driven in a rash and negligent manner by its driver, dashed against the motor cycle bearing registration No.TN 74 B 2350. Due to the impact, the motor cyclist was thrown away and later on hit by another bus bearing registration No.TN 49 N 1093 belonging to Tamil Nadu State Transport Corporation, (Madurai Division 3), Kanyakumari, Tamilnadu. The motor cyclist sustained grievous injuries. Despite treatment, he died on 30.08.2003 in Krishhna Kumar Hospital, Parvathipuram.

3.Legal representatives, wife, minor children of the deceased/respondents 1 to 3 filed a claim petition in MCOP.No.59 of 2004 on the file of the Motor Accident Claims Tribunal, Sub Court, Padmanabapuram, claiming compensation of Rs.20,00,000/-. According to them, prior to the accident, the deceased had worked as a Heavy Equipment Operator (Driver) in Damman, Saudi Arabia, and earned Rs.15,000/-. Before the Tribunal, 4th respondent/driver of the bus bearing registration No.KL 15-4737 belonging to Kerala State Transport Corporation, Thiruvananthapuram, Kerala State remained, ex parte. The appellant/Managing Director, Kerala State Road Transport Corporation, Kerala State, in his counter affidavit has submitted that the two wheeler was hit by some unknown vehicle and thereafter, due to the impact, the injured motor cyclist was thrown away and it was the Tamil Nadu State Transport Corporation bus bearing registration No.TN 49 N 1093, ran over the injured, who subsequently died.

4.The appellant/Kerala State Transport Corporation has further submitted that since the bus belonged to other State, the police had implicated respondent No.4 in this appeal, as accused in the criminal case. It was also the submission of the Kerala State Transport Corporation that there was no damage to the bus driven by the 4th respondent. Without prejudice to the claim, Kerala State Transport Corporation disputed the compensation claimed under various heads.

5.Respondent No.5 in this appeal is the driver of the Tamil Nadu State Transport Corporation bus bearing registration No.TN 49 N 1093. Respondent No.6 is the General Manager, Tamil Nadu State Transport Corporation Ltd., (Madurai Divison 3), Kanyakumari Taluk, Tamil Nadu.



6. Before the Claims Tribunal, wife of the deceased examined herself as PW1 and reiterated the manner of accident. Ex.P1-FIR, Ex.P2-Observation Mahazar, Ex.P3-Sketch, Ex.P4-Discharge Summary, Ex.P5-Postmortem report, Ex.P6-Death certificate, Exs.P7 and P8-Passports, Ex.P9-Salary Certificate, Ex.P10-Passbook, Ex.P11-Medical Receipt, Ex.P12-Receipt dated 29.08.2003 given by Vivek Blood Bank, Ex.P13-Receipt dated 29.08.2009 given by Vivek Blood Bank, Ex.P14-Medical Receipt dated 29.08.2003, Ex.P15-Driving Licence dated 04.07.2000, Exs.P16 to P24-intimations from the bank, for sending money from abroad and Ex.P25-Legal heirship certificate, have been marked on the side of the claimants. Before the Tribunal, RW1-Ponnulingam is the driver of the bus belonging to Tamil Nadu State Transport Corporation. No documents have been marked on the side of the respondents in the claim petition.

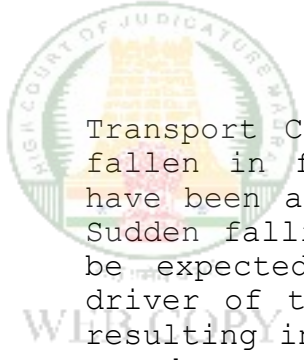
7. On evaluation of pleadings and evidence, the Claims Tribunal held that the accident occurred due to the rash and negligent driving of K.K.Venu, driver of the bus bearing registration No.KL 15-4737 belonging to Kerala State Transport Corporation, Thiruvananthapuram, Kerala State, and quantified the compensation as Rs.13,03,557/-, with interest @ 7.5% per annum.

8. Assailing the correctness of the impugned award, Mr.N.Elangovan, learned counsel for the appellant has contended that the Tribunal has erred in not fixing 50% negligence on the driver of the bus belonging to Tamil Nadu State Transport Corporation. On the quantum of compensation, he submitted that the award amount under various heads is excessive and requires reduction.

Heard the learned counsel for the appellant and perused the materials available on record.

9. Perusal of the award shows that PW1 alone has adduced oral evidence and marked Ex.P1-FIR. On behalf of the driver of the vehicle bearing registration No.TN 49 N 1093 belonging to Tamil Nadu State Transport Corporation, (Madurai Division 3), Kanyakumari and the Managing Director, Tamil Nadu State Transport Corporation, arguments have been advanced that the accident occurred, solely due to the rash and negligent driving of the driver of the Kerala State Transport Corporation bus. RW1-Ponnulingam, driver of the bus belonging to Tamil Nadu State Transport Corporation, has deposed that it was K.K.Venu, driver of the Kerala State Transport Corporation bus who had caused the accident. During cross-examination, he has made it clear that had K.K.Venu, driver of the Kerala State Transport Corporation bus driven the bus in a careful manner, there would not have been any chance for the accident. He has also stated that after hitting the motor cycle, the Kerala bus proceeded further, without stopping. According to him, had the Kerala bus not dashed against the motor cycle, the motor cyclist would not have fallen in front of the Tamil Nadu bus and consequently, there would not have been a situation of the Tamil Nadu bus running over the motor cyclist, who ultimately died. To controvert his testimony, Kerala State Transport Corporation has not adduced any oral evidence, though they have filed a counter affidavit denying negligence.

10. Mere averment in the counter affidavit does not amount to a fact being proved. The appellant who has disputed negligence, ought to have examined their driver K.K.Venu. As rightly contended, had the Kerala



Transport Corporation bus not hit the motor cyclist, he would not have fallen in front of the Tamilnadu bus, and eventually, there would not have been any possibility of the Tamilnadu bus running over the injured. Sudden falling of the injured in front of the Tamilnadu bus, cannot also be expected, to avoid hitting the motor cyclist, and therefore, the driver of the Tamilnadu bus cannot be said to have caused the accident, resulting in death. Non-examination of the driver of the bus, would lead to adverse inference. Useful reference can be made to 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.



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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, it is held 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.''

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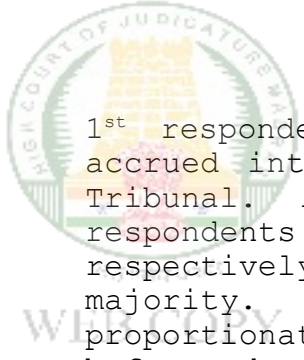
11.Thus after assessing the oral and documentary evidence, the Claims Tribunal held that the driver of the Kerala State Transport Corporation alone was negligent in causing the accident. Finding of negligence cannot be said to be perverse warranting interference. Submissions to the contra are rejected.

12.On the contention that the Claims Tribunal has awarded excess compensation, perusal of the award shows that taking note of the date of birth 14.05.1966, entered in Ex.P7-Passport of the deceased, the Tribunal has determined the age of the deceased as 37 years. Ex.P9 is the Salary Certificate. Upon perusal of the same, the Claims Tribunal has found that the deceased had worked in Saudi Arabia as Heavy Equipment Operator (Driver) and earned Rs.15,000/- per month. At that time, one Saudi Riyal was equivalent to Indian Rupees 11/-. Based on the equivalency, by observing that though at the time of accident, the deceased would have earned Rs.12,100/- as per the entry in Ex.P9-Salary Certificate, yet the Tribunal fixed the monthly income as Rs.10,000/-. 1/3rd has been deducted towards the personal and living expenses and thereafter, the Tribunal applying 15 multiplier, has computed the loss of contribution to the family as Rs.11,99,880/-.

13.Having regard to the age of the 1st respondent/wife, at the time of accident, 29 years, the Tribunal has awarded Rs.50,000/- under the head loss of consortium. For the loss of love and affection to the minor children/respondents 2 and 3, the Tribunal has awarded Rs.10,000/- each. A sum of Rs.7,500/- has been awarded under the head transportation and Rs.5,000/- for funeral expenses. Based on the medical bills Exs.P11 to P14, the Tribunal awarded Rs.18,677/- towards medical expenses. Added further, the Tribunal has awarded Rs.5,000/- towards damage to clothes and articles. Altogether, the Claims Tribunal has awarded Rs.13,03,557/- with interest, @ 7.5% per annum from the date of claim till realisation. Determination of income as Rs.10,000/- has been done, on the basis of oral testimony of PW1/wife, Ex.P9-Salary Certificate, Ex.P10-Passport, Exs.P16 to P24- intimations from the bank, for sending money from abroad. There is no manifest illegality in such determination. Quantum of compensation of Rs.20,000/- awarded to the minor children under the head loss of love and affection is less. Even Rs.5,000/- awarded for funeral expenses is less.

14.Considering the overall quantum of compensation awarded to the legal representatives of the deceased, we are of the view that the same cannot be said to be grossly excessive warranting interference. On the contra, the award under the abovesaid heads is less. There are no merits in this appeal.

15.The appellant is directed to deposit the entire award amount with proportionate accrued interest and costs, to the credit of MCOP.No.59 of 2004 of the Motor Accident Claims Tribunal, Sub Court, Padmanabapuram, within a period of six weeks from the date of receipt of a copy of this order, if not already done earlier. On such deposit, the



1st respondent is permitted to withdraw her share with proportionate accrued interest and costs, by making necessary application before the Tribunal. At the time of filing of the claim petition in the year 2004, respondents 2 and 3/claimants were minors aged 7 and 1¼ years, respectively. Now by passage of time, 2nd respondent would have attained majority. Hence, she is permitted to withdraw her share with proportionate accrued interest and costs, by making necessary application before the Tribunal. Since 3rd respondent is minor, the Tribunal is directed to deposit his share with proportionate accrued interest and costs, in any one of the Nationalised Banks in Fixed Deposit, proximate to the residence of the claimants, till he attains majority. The interest accruing on such deposit is permitted to be withdrawn by the 1st respondent/mother of minor once in three months directly from the bank.

In the result, the Civil Miscellaneous Appeal is dismissed. No costs. Consequently, C.M.P(MD)No.2769 of 2016 is closed.

Sd/-
Assistant Registrar

/True copy/

Sub Assistant Registrar

To

The Subordinate Judge,
Motor Accident Claims Tribunal,
Padmanabapuram.

+1 CC to Mr.Ananth C.Rajesh, Advocate, SR No.15564
+1 CC to Mr.P.Prabhakaran, Advocate, SR No.15276
+1 CC to Mr.N.Murugesan, Advocate, SR No.15642

C.M.A (MD) No.201 of 2016
17.03.2016

SH/AN-MP/AR-I:18.04.2016:7P/5C