

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 27/3/2017

C O R A M

The Honourable Mr.JUSTICE S. MANIKUMAR
and
The Honourable Mr.JUSTICE M. GOVINDARAJ

Civil Miscellaneous Appeal No.1089 of 2017
and
CMP.5379 of 2017

Royal Sundaram Alliance Insurance
Company Limited
Chennai. ..Appellant/3rd Respondent

Vs

1. Muthulakshmi
2. Bharathi (Minor)
3. Subash (Minor)
4. Gandhi (Minor)
(Minors rep. by Mother next
friend 1st Respondent)
5. Palanisamy
6. Valli ..Respondents 1to6/Petitioners
7. Paulraj
8. Mageshwari ..7&8 Respondents/Respondents 1,2

Prayer: Appeal filed under Section 173 of the Motor Vehicles Act, 1988 against the Judgment and Decree passed by the Motor Accident Claims Tribunal (Subordinate Court), Dharapuram, in M.C.O.P.No.215 of 2013 dated 16/6/2016.

For appellant : Mr.N.Vijayaraghavan

J U D G M E N T

(Judgment of the Court was made by S.Manikumar,J)

In the accident, which occurred on 10/2/2013, Thangavel, bread winner of the respondents/claimants, aged about 31 years, an agriculturalist and pillion rider of TVS vehicle, bearing Registration No.TN42Z-4911, insured with M/s. Royal Sundaram Alliance Insurance Company Limited, died. A case in Crime No.96 of 2013, under Sections 279, 337 and 304 A of the Indian Penal Code, has been registered, against the driver of Maruthi Car, which dashed against the motorcycle. According to the legal representatives of the deceased, at the time of accident, he was 31 years.

2. Claiming compensation of Rs.25 lakhs, they filed M.C.O.P.No.215 of 2013, on the file of the Motor Accident Claims Tribunal, Subordinate Judge, Dharapuram.

3. Opposing the claim, Insurance Company contended that when Thangavel was travelling as a pillion rider in TVS Motor Cycle, bearing Registration No.TN42Z-4911, along with Senthil Kumar, who was riding the motorcycle towards South, a Maruthi car, bearing Registration No.TN69AX-6973, coming from South to North, driven by its driver in a rash and negligent manner and hit the motorcycle. Insurance Company further contended that though First Information Report was registered against the driver of Maruthi car, Police on investigation, filed a charge sheet against the motorcyclist Senthil Kumar. Therefore, they submitted that negligence cannot be fixed on the driver of the Maruthi Car. Without prejudice to the above, they disputed the age, avocation, income and the quantum of compensation, claimed under various heads.

4. Before the Tribunal, P.W.1 wife of the deceased reiterated the averments made in the petition. She has not witnessed the accident. P.W.2 stated to be the eye witness has deposed that the accident occurred, due to the rash and negligent driving of Maruthi car.

5. Ex.P.1 First Information Report, Ex.P.2, Post Mortem certificate, Ex.P.3 Report of the Motor Vehicles Inspector, Ex.P.4 rough sketch, Ex.P.5 Observation Mahazar, Ex.P.6 Charge sheet, Ex.P.7 Document obtained under the Right to Information Act, Ex.P.8 Death certificate and Ex.P.9 Legal heir certificate, have been marked on the side of the respondents/claimants.

6. R.W.1 official of Royal Sundaram Alliance Insurance Company Limited/appellant herein, has adduced evidence based on Ex.P.6 charge sheet. R.W.2 Sub-Inspector of Police has deposed that after arresting the accused, on completion of investigation, charge sheet was laid against Senthil Kumar, motor cyclist.

7. Ex.R.1 Arrest Report, Ex.R.2 Remand Report, Ex.R.3 charge sheet, Ex.R.4 final report against Senthil Kumar and Ex.R.5 and another final report have been filed on behalf of the Insurance Company/appellant herein.

8. On evaluation of pleadings and evidence, Tribunal held that the driver of the Maruthi Car, bearing Registration No.TN69AX-6973 and insured with the Insurance Company/appellant herein was negligent in causing the accident.

9. Though respondents/claimants contended that the deceased earned Rs.10,000/- p.m., having regard to the avocation pleaded and by presuming that even an agricultural labourer would earn a reasonable income as Rs.4,500/-, and taking note of the entry in Ex.P.2, post-mortem report, the Tribunal determined the age of the deceased as 31 years. Following the decision of the Hon'ble Supreme Court in the case of Sarla Verma, the Tribunal added 50% of the income under the head future prospects. Thus, fixed Rs.6,750/-, as monthly income.

10. As the number of claimants were 6, Tribunal deducted 1/6 towards personal and living expenses of the deceased. Having regard to the age of the deceased, applied 16 multiplier. Thus, quantified the loss of contribution to the family as Rs.10,80,000/- (Rs.5,625/- x 12 x 16). Added further, the Tribunal awarded Rs.1 lakh under the head loss of love and affection. Rs.25,000/- for funeral expenses. Rs.2,000/- for damages to clothes. A sum of Rs.50,000/- has been awarded under the head consortium. Altogether, the Tribunal awarded Rs.12,57,000/- as compensation, with interest at the rate of 7.5%, from the date of claim till deposit and costs.

11. Though Mr.N.Vijayaraghavan, learned counsel for the Insurance Company/appellant herein contended that the Tribunal erred in recording a finding that the driver of the car was negligent in causing accident and failed to consider that the Police, after investigation has filed charge sheet only against the motorcyclist and further contended that the Tribunal erred in relying on the eye witness of P.W.2 and failed to properly appreciate the evidence of R.W.1 Insurance Officer and R.W.2 Police Official along with the documents Ex.R.1 to R.4, stated supra, this Court is not inclined to reverse the finding fixing negligence on the driver of the Maruthi Car bearing Registration No.TN69AX-6973 and insured with the Royal Sundaram Alliance Insurance Company Limited. Perusal of the award does not indicate that the Insurance Company/appellant herein has taken any steps to examine Mr.Palraj, driver of Maruthi car. Ex.P.1 First Information Report has been registered against him. P.W.2 eye witness has deposed that the driver of Maruthi car was negligent in causing accident.

12. In Jacob Mathew Vs. State of Punjab reported in {2005 (4) CTC - 540}, the Hon'ble Supreme Court has explained the difference between tort and crime, as follows:-

"13. The moral culpability of recklessness is not located in a desire to cause harm. It resides in the proximity of the reckless state of mind to the state of mind present when there is an intention to cause harm. There is, in other words, a

disregard for the possible consequences. The consequences entailed in the risk may not be wanted, and indeed the actor may hope that they do not occur, but this hope nevertheless fails to inhibit the taking of the risk. Certain types of violation, called optimizing violations, may be motivated by thrill-seeking. These are clearly reckless.

14. In order to hold the existence of criminal rashness or criminal negligence it shall have to be found out that the rashness was of such a degree as to amount to taking a hazard knowing that the hazard was of such a degree that injury was most likely imminent. The element of criminality is introduced by the accused having run the risk of doing such an act with recklessness and indifference to the consequences. Lord Atkin in his speech in *Andrews V. Director of Public Prosecutions*, [1937] A.C.576, stated,

"Simple lack of care such as will constitute civil liability is not enough; for purposes of the criminal law there are degrees of negligence; and a very high degree of negligence is required to be proved before the felony is established."

Thus, a clear distinction exists between "simple lack of care" incurring civil liability and "very high degree of negligence" which is required in criminal cases. Lord Porter said in his speech in the same case - सत्यमेव जयते

"A higher degree of negligence has always been demanded in order to establish a criminal offence than is sufficient to create civil liability. (Charlesworth & Percy, *ibid*, para 1.13)

15. The fore-quoted statement of law in *Andrews* has been noted with approval by this Court in *Syad Akbar V. State of Karnataka* (1980) 1 SCC 30. The Supreme Court has dealt with and pointed out with reasons the distinction between negligence in civil law and in criminal law. Their Lordships have opined that there is a marked difference as to the effect of evidence, viz., the proof, in civil and

criminal proceedings. In civil proceedings, a mere preponderance of probability is sufficient, and the defendant is not necessarily entitled to the benefit of every reasonable doubt; but in criminal proceedings, the persuasion of guilt must amount to such a moral certainty as convinces the mind of the Court, as a reasonable man, beyond all reasonable doubt. Where negligence is an essential ingredient of the offence, the negligence to be established by the prosecution must be culpable or gross and not the negligence merely based upon an error of judgment.

16. Law laid down by Straight, J in the case Reg V. Idu Beg (1881) 3 All. 776, has been held good in cases and noticed in Bhalchandra Waman Pathe V. State of Maharashtra 1968 Mh.L.J 423, a three Judge Bench decision of this Court. It has been held that while negligence is an omission to do something which is a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do; criminal negligence is the gross and culpable neglect or failure to exercise that reasonable and proper care and precaution to guard against injury either to the public generally or to an individual in particular, which having regard to all the circumstances out of which the charge has arisen, it was the imperative duty of the accused person to have adopted.

17. In our opinion, the factor of grossness or degree does assume significance while drawing distinction in negligence actionable in tort and negligence punishable as a crime. To be latter, the negligence has to be gross or of a very high degree."

13. Though, in the case on hand, Police on completion of investigation has laid a charge sheet, against the motorcyclist, which in the normal course, the Tribunal/Courts would be obligated to consider, testing the finding in the light of Jacob Mathew's decision and on the facts and circumstances of the case, we are of the view that when the insured has not even taken any steps to examine the driver of Maruthi car, adverse inference can be drawn. Examination of R.W.1 from Insurance Company would not alter the position. On this aspect, we deem fit to consider the 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.

(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.

14. For the foregoing reasons, this Court is not inclined to reverse the finding fixing negligence on the driver of Maruthi car and consequently, liability fastened on the insurer to pay compensation.

15. Considering the number of dependents, quantum of compensation of Rs.12,57,000/-, with interest at the rate of 7.5% p.a., from the date of claim till deposit and costs, awarded in M.C.O.P.No.215 of 2013, on the file of the Motor Accidents Claims Tribunal (Subordinate Judge), Dharapuram, cannot be said to be excessive, warranting reduction.

16. In the light of the above discussion and decisions, finding of negligence and quantum of compensation, are sustained. Civil Miscellaneous Appeal is dismissed. No costs. Consequently, the connected Miscellaneous Petition is closed.

17. Royal Sundaram Alliance Insurance Company Limited, Chennai, is directed to deposit the entire award amount with interest at the rate of 7.5% p.a., from the date of claim till deposit and costs awarded in M.C.O.P.No.215 of 2013, on the file of the Motor Accidents Claims Tribunal (Subordinate Judge), Dharapuram, within a period of four weeks from the date of receipt of a copy of this order. Share of the minors shall be invested in a Nationalised Bank under a fixed deposit scheme, initially for a period of three years. Share of the majors can be withdrawn, by making necessary applications. Tribunal is directed to disburse the share of the majors, only on proper identification and proof.

Sd/-
Assistant Registrar(CS VIII)

//True Copy//

Sub Assistant Registrar

mvs.

To

The Motor Accident Claims Tribunal
(Subordinate Judge), Dharapuram.

+ 1 cc to Mr.N. Vijayaraghavan, Advocate SR.19427

C.M.A. No.1089 of 2017

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