

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 27.04.2017

CORAM:

THE HONOURABLE MR.JUSTICE S.MANIKUMAR
and
THE HONOURABLE MR.JUSTICE M.GOVINDARAJ

C.M.A.No.1980 of 2016
C.M.P.No.14261 of 2016
C.M.P.No.16912 of 2016

M/s.United India Insurance Co. Ltd.,
Chennai.

.. Appellant

versus

1. D.Hemavathy
2. Dhakshinamoorthy
3. D.Vasu

.. Respondents

Prayer: Civil Miscellaneous Appeal is filed, against the judgment and decree in M.C.O.P.No.4590 of 2012, dated 17.09.2014, on the file of the learned Motor Accident Claims Tribunal (II Court of Small Causes), Chennai.

For Appellant : Mr.D.Bhaskaran

For Respondents 1 & 2 : Mr.N.M.Muthurajan

JUDGMENT

(Judgement of the Court was made by **S.MANIKUMAR, J.**)

Challenge in this appeal is to the judgment and decree in M.C.O.P.No.4590 of 2012, dated 17.09.2014, by which, the learned 2nd Judge, Small Causes Court, Motor Accident Claims Tribunal, Chennai has ordered compensation of Rs.24,41,000/- with interest, at the rate of 7.5% per annum and costs, to the respondent/claimant.

2. Facts of the case, as adduced from the material on record are that on 24.06.2012, at 6.45 p.m., when the deceased was travelling as a pillion rider in the third respondent's Motor Cycle, bearing Registration No.TN 07 BM 6368, from Sozhinganallur to Kottivakkam, along Rajiv Gandhi Salai from South to North direction, near Okkiyam Bus Stop, opposite to Thalappakattu Briyani Centre, the third respondent rode the abovesaid motorcycle in a rash and negligent manner and collided with an un-known Share Auto Rickshaw. The pillion rider was thrown out and sustained fatal injuries. Despite intensive

treatment, he died in the hospital on 25.06.2012. According to the legal representatives of the deceased, at the time of accident, the deceased was aged 23 years and as a Layout Artist in M/s.Nanaym Vikatan, Anada Vikatan Group, Chennai, earned Rs.20,000/- per month. Legal representative of the deceased have filed claim petition in M.C.O.P.No.4590 of of 2012 for Rs.30,00,000/-.

3. United India Insurance Company Limited, the appellant herein, has denied the manner of accident. The Company submitted that the deceased travelled only as a pillion rider in the Motorcycle bearing Registration No.TN 07 BM 6368 and in the absence of any policy coverage for pillion rider, insurance company is not liable to pay any compensation. According to the Company, the respondents/claimants have to prove that the third respondent's vehicle was insured with the appellant-Insurance Company and that the driver of the vehicle had valid driving licence, at the time of accident. Without prejudice to the above, the Company has disputed the age, avocation, income of the deceased and the quantum of compensation claimed under various heads.

4. Before the claims tribunal, mother of the deceased examined herself as PW1 and reiterated the manner of accident. PW2, is the eye witness. PW3, is a witness examined to prove employment. Ex.P1 - Medical Bills, Ex.P2 - Postmortem Certificate, Ex.P3 - Death Report, Ex.P4 - Legal-heirs Certificate, Ex.P-5 - Copy of School Transfer Certificate, Ex.P6 - Copy of B.C.A. Degree Course Certificate, Ex.P7 - Copy of Voter I.D. of 1st respondent, Ex.P8 - Copy of Identity Card of PW-3, Ex.P9 - Pay bill, and Ex.P10 - Offer and Confirmation Letter, have been marked. On behalf of the appellant-Insurance Company, one Mr.Elango, Sub-Inspector of Police, Traffic Investigation (Admn) has been examined as RW.1 and RW.2 is Mr.D.Vasu, the 3rd respondent herein, motorcyclist. Documents, Ex.R1 - Copy of F.I.R. in Cr.No.280/S2/2012 registered at J-3 Guindy Traffic Investigation, Ex.R2 - Copy of Charge sheet and Ex.R3 - Inquest Report, have been marked on the side of the appellant-Insurance Company.

5. On evaluation of pleadings and evidence, the Claims Tribunal, came to the conclusion that the rider of the Motorcycle, bearing Registration

No.TN 07 BM 6368, insured with the appellant-Insurance Company, was negligent in causing the accident. After considering the age, avocation and determining the monthly income of the deceased, as Rs.13,000/-, computed the total compensation as Rs.24,41,000/-, with interest at the rate of 7.5% per annum, from the date of claim, till the date of realisation and costs, as hereunder:

Loss of Dependency	: Rs.21,06,000/- (Rs.19,500/- x 12 x 18 x 1/2)
Loss of love and affection	: Rs. 2,00,000/-
Loss of Estate	: Rs. 1,00,000/-
Medical Expenses	: Rs. 10,000/-
Funeral Expenses	: Rs. 25,000/-

Total	: Rs.24,41,000/-

6. Being aggrieved by the finding, fixing negligence and the quantum of compensation, on behalf of the appellant-Insurance Company, Mr.D.Bhaskaran, submitted that the Claims Tribunal has erred in fixing negligence, on the rider of the Motorcycle, bearing Registration No.TN 07 BM 6368, without considering the averments made in the counter affidavit filed by

the Company and the evidence adduced. He further submitted that the Tribunal ought to have held that the accident occurred solely due to the negligent act of the driver of an unknown Share Auto Rickshaw. He also submitted that Ex.R1 - FIR was lodged only against the driver of the unknown Share Auto Rickshaw. The Tribunal has failed to note that vicarious liability arises only when the driver of the insured's vehicle is at fault.

7. By inviting the attention of this Court to the cross-examination of PW.2 that the accident occurred when the vehicles were driven, while attempting to overtake each other, Mr.N.M.Muthurajan, learned counsel appearing for the respondents/claimants made submissions to sustain the finding of negligence.

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

8. Before the Claims Tribunal, PW.2, Mr.R.Vinothkumar, eye-witness, has adduced evidence to the effect that on the date of accident, when he was

riding his Motor cycle from Chozhinganallur to Kandansavadi, along Rajiv Gandhi Salai from South to North direction, the offending Motorcycle, bearing Registration No.TN 07 BM 6368 and a Share Auto Rickshaw were going ahead of him. Near Okkiyam bus stop, they were trying overtake each other. The motorcyclist rode the same, in a rash and negligent manner, hit the said Share Auto Rickshaw. Rider and pillion of the motorcycle were thrown out. Pillion rider sustained head injuries and according to him, the accident took place, only due to rash and negligent riding of the motorcyclist. Even during cross-examination, PW.2, has admitted that it is correct to say that both the vehicles were overtaking each other and thus, the accident occurred.

9. RW.1, Mr.S.Elango, Sub-Inspector of Police, Traffic Investigation (Admn), has deposed that Ex.R1 - F.I.R., has been registered against the driver of an Unknown Share Auto Rickshaw and in this regard, Ex.R2 - Charge sheet was filed only against him. However, he deposed that the said auto rickshaw could not be traced. RW.2, Mr.D.Vasu, the third respondent herein, owner-cum-rider of the Motorcycle, bearing Registration No.TN-07-BM-6368, in which, the deceased travelled as a pillion rider, has deposed that the accident

occurred, due to reckless driving of the unknown Share Auto Rickshaw.

10. Upon perusal of Ex.P1 - FIR, the Tribunal has held that RW.2, Mr.D.Vasu, 3rd respondent herein, himself had lodged complaint against the driver of the unknown Share Auto Rickshaw and therefore, he is an interested witness. However, considering the entire evidence and submission of the learned counsel for the respondents/claimants that where a person is injured, as a result of negligence of two or more wrongdoers, each wrongdoer is jointly and severally liable for entire damages and that the injured person had choice of proceeding against all or any of them and following the decision of the Hon'ble Supreme Court in **Pawan Kumar v. Harkishan Dass Mohan Lal** reported in **2014 ACJ 704**, the Tribunal held that the claim petition is maintainable, even in the absence of the unknown auto rickshaw driver/owner, the Tribunal held that the accident occurred due to the rash and negligent riding of the 3rd respondent herein.

11. The Hon'ble Supreme Court in **Municipal Corporation of Greater Bombay v. Laxman Iyer** reported in **2003 (8) SCC 731**, has explained the

terms, "Negligence" "Composite Negligence" and "Contributory Negligence". At Paragraph 6, the Hon'ble Supreme Court explained, as to what act amounts to negligence and that the same is extracted hereunder:

"Negligence is omission of duty caused either by an omission to do something which a reasonable man guided upon those considerations who ordinarily by reason of conduct of human affairs would do or obligated to, or by doing something which a prudent or reasonable man would not do. Negligence does not always mean absolute carelessness, but want of such a degree of care as is required in particular circumstances. Negligence is failure to observe, for the protection of the interests of another person, the degree of care, precaution and vigilance which the circumstances justly demand, whereby such other person suffers injury. The idea of negligence and the duty are strictly correlative. Negligence means either subjectively a careless state of mind or objectively careless conduct. Negligence is not an absolute term, but is a relative one; it is rather a comparative term. No absolute standard can be fixed and no mathematically exact formula can be said just and down by which negligence or lack of it can be infallibly measured in a given case. What constitutes negligence varies under different conditions and in determining whether negligence exists in a particular case, or whether a mere act or course of conduct amounts to negligence,

all the attending and surrounding facts and circumstances have to be taken into account. It is absence of care according to circumstances. To determine whether an action would be or would not be negligent, it is relevant to determine if any reasonable man would foresee that the act would cause damage or not. The omission to do what the law obligates or even the failure to do anything in a manner, mode or method envisaged by law would equally and per se constitute negligence on the part of such person."

12. In **Pawan Kumar and another v. Harkishan Dass Mohan Lal and others** reported in **(2014) 3 SCC 590**, the appellants therein were the claimants and being aggrieved by liability apportioned between the drivers/owners of the two vehicles, involved in the motor accident, they filed an appeal before the Hon'ble Apex Court. It was the contention of the appellants therein that as they were third parties to the claim, the High Court ought to have made the drivers/owners of the vehicles jointly and severally liable to pay compensation, in view of their composite negligence, instead of apportioning their liability by invoking the principle of contributory negligence. The Hon'ble Apex Court considered the distinction between the principles of composite and contributory negligence, as dealt with in *Winfield*

and Jolowicz on Tort (Chapter 21) (15th Edition, 1998) and the same is extracted hereunder:

"WHERE two or more people by their independent breaches of duty to the Plaintiff 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 Plaintiff to suffer a single injury the position is more complicated. The law in such a case is that the Plaintiff 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. 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 is greatly to the Plaintiff's advantage to show that 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. 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.

.....

The question of whether there is one injury can be a difficult one. The simplest case is that of two virtually simultaneous acts of negligence, as where two drivers behave negligently and collide, injuring a passenger in one of the cars or a pedestrian, but there is no requirement that the acts be simultaneous....

While considering the fact that when the claimant himself was found to be a party to the negligence, the question of joint and several liability cannot arise and that he is entitled to such part of damages/compensation, that is not attributable to his own negligence, the Hon'ble Supreme Court has considered the decision made in **T.O.Anthony v. Karvarnan** reported in **2008 ACJ 1165 (SC)**, held as follows:

"8. In the present case, neither the driver/owner nor the insurer has filed any appeal or cross objection against the findings of the High Court that both the vehicles were responsible for the accident. In the absence of any challenge to the aforesaid part of the order of the High Court, we ought to proceed in the matter by accepting the said finding of the High Court. From the discussions that have preceded, it is clear that the High Court was not correct in apportioning the liability for the accident between drivers/owners of the two vehicles.

9. We, accordingly, hold that the drivers/owners of both

the vehicles are jointly and severally liable to pay compensation and it is open to the claimants to enforce the award against both or any of them."

It is worthwhile to extract Paragraphs 6 and 7 of the decision in **T.O.**

Anthony's case (cited *supra*), considered in **Pawan Kumar's** case,

"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 wrongdoers, it is said that the person was injured on account of the composite negligence of those wrongdoers. In such a case, each wrongdoer 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 wrongdoer separately, nor is it necessary for the court to determine the extent of liability of each wrongdoer 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 on 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 stand 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."

13. In **Khenyei v. New India Assurance Co. Ltd. and Ors.**, reported in **(2015) 9 SCC 273**, the question, which came up for consideration, was whether it is open to a claimant to recover the entire compensation, from one of the joint tort feasons, particularly when, in the accident occurred due to the composite negligence of drivers of trailer-truck and bus, found to be 2/3rd

and 1/3rd, respectively. Injuries were sustained by the claimants, when two vehicles, a bus and trailer-truck collided with each other. New India Assurance Company Ltd., is the insurer of the bus. However, on the basis of additional evidence adduced, the High Court came to the conclusion that New India Assurance Company Ltd., was not the insurer of the trailer-truck and hence, not liable to satisfy 2/3rd of the award. The Hon'ble Supreme Court held that it was a case of composite negligence, where injuries have been caused to the claimants, by combined wrongful act of joint tort feorsors. The Hon'ble Supreme Court in **Khenyei's** case (cited supra), observed that,

"In a case of accident caused by negligence of joint tort feorsors, 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 feorsors in such a case is immaterial for satisfaction of the claim of the claimant and need not be determined by the court.

However, in case all the joint tort feorsors 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 feorsor 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 feasons 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."

After considering various decisions, including **Pawan Kumar's** case (cited supra), the Hon'ble Supreme Court has laid down following principles of law,

(i) In the case of composite negligence, Plaintiff/claimant is entitled to sue both or any one of the joint tort feasons and to recover the entire compensation as liability of joint tort feasons is joint and several.

(ii) In the case of composite negligence, apportionment of compensation between two tort feasons vis-a-vis the Plaintiff/claimant is not permissible. He can recover at his option whole damages from any of them.

(iii) In case all the joint tort feasons 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 feasons 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

tortfeasor can recover the amount from the other in the execution proceedings.

(iv) 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 tortfeasors. In such a case, impleaded joint tortfeasor should be left, in case he so desires, to sue the other joint tortfeasor in independent proceedings after passing of the decree or award."

14. Reverting, in the case on hand, PW.1, has not witnessed the accident. PW.2, stated to have witnessed the accident, is not the complainant in Ex.P1 - FIR in Cr.No.280/S2/2012 registered, by J-3 Guindy Traffic Investigation. Ex.P1 - FIR has been registered on the complaint of RW.2, D.Vasu, owner of the motorcycle, bearing Registration No.TN 07 BM 6368, who has categorically deposed that the accident occurred, due to the rash and negligent driving of the driver of the Share Auto-Rickshaw. RW.1, Mr.Elango, Sub-Inspector of Police, Traffic Investigation (Admn.), has deposed that Ex.R2 - Charge Sheet has been filed against the driver of the Share Auto-Rickshaw.

15. When the motorcyclist, RW.2, himself has given a complaint,

against the unknown driver of the Share Auto-Rickshaw, against whom, Ex.R2 - Charge Sheet has been filed, the sole statement of PW.2, Mr.R.Vinothkumar, alone to the effect that the accident occurred, due to negligent act of both the motorcyclist and driver of the unknown Share Auto-Rickshaw, trying to proceed ahead of each other, cannot be the basis of arriving at a conclusion that the accident occurred, due to the negligence of the motorcyclist.

16. Testimony of RW.2, Motorcyclist is corroborated by Ex.R1 - FIR and Ex.R2 - Charge Sheet and duly supported by the testimony of RW.1, Sub-Inspector of Police, Traffic Investigation (Admn.). FIR would be the first document produced by any claimant to prove that there was an accident. Inasmuch as FIR has been given by RW.2, motorcyclist, against the unknown Share Auto-rickshaw, it could be deduced that conveniently, the claimants have failed to mark FIR.

17. Testimony of PW.2, is not supported or corroborated by any evidence. There is no logic in the conclusion of the Tribunal that just because, the motorcycle was new, there was every possibility to ride the same, in a

rash and negligent manner and therefore, the accident could have occurred, due to the rash and negligence act, on the part of the motorcyclist. Analyzing the evidence, in the light of the preponderance of probability, this Court is unable to subscribe to the contention of the legal representatives of the deceased that the pillion rider had not contributed to the accident and therefore, liability should be fastened on the motorcyclist and its insurer.

18. On the facts and circumstances of the case, we are of the view that the finding of the Tribunal, holding that the motorcyclist had contributed to the accident, is perverse and warrants reversal and accordingly, the said finding is set aside. Consequently, the insurer of the motorcycle, the appellant-Insurance Company, is not liable to pay compensation. The respondents are at liberty to pursue remedy, against the Share Auto Rickshaw and its insurer.

19. Record of proceedings shows that this Court, while admitting this appeal, granted interim stay, subject to the condition that the appellant-Insurance Company deposits 50% of the award amount. Consequent to allowing

this appeal, the appellant-Insurance Company is permitted to withdraw the amount lying in the Court deposit.

In the result, the Civil Miscellaneous Appeal is allowed. No costs. Consequently, connected Miscellaneous Petition is also closed.

(S.M.K., J.) (M.G.R., J.)
27.04.2017

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To

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

S. MANIKUMAR, J.
AND
M.GOVINDARAJ, J.

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