

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 27.06.2017

CORAM:

THE HON'BLE MR. JUSTICE S.MANIKUMAR
AND
THE HON'BLE MR. JUSTICE M.GOVINDARAJ

C.M.A.No.1734 of 2017
C.M.P.No.9368 of 2017

Cholamandalam MS General
Insurance Co. Ltd.,
Erode.

.. Appellant/2nd Respondent

vs.

1. Chanthirika
2. Minor B.Darshan
3. Minor B.Rohit
(Minors are represented by
their mother, 1st respondent)
4. Amsarani
5. P.Myilsamy
6. M.Sengodan

... Respondents 1 to 5/Claimant
6th Respondent/1st Respondent

Appeal against the fair and decretal order dated
26.08.2016, passed in M.C.O.P.No.303 of 2015, on the file of
the Motor Accidents Claims Tribunal (Special District Court),
Erode.

For Appellant .. Mr.N.Vijayaraghavan

For Respondents 1 to 5 .. Mr.R.Nalliyappan

JUDGMENT

(Judgment of the Court was delivered by S.MANIKUMAR, J.)

Aggrieved by the award dated 26.08.2016, made in
M.C.O.P.No.303 of 2015, on the file of the Motor Accidents
Claims Tribunal, (Special District Court), Erode, the
appellant-Insurance Company has preferred this appeal.

2. Brief facts of the case are as follows:

On 07.12.2014, about 1.00 P.M., when the husband of
the 1st respondent/claimant was riding his Motorcycle, bearing
Registration No.TN 33 C 9463, on Erode to Chennimalai Road,
near Rangampalayam, a Minidor Goods Van, bearing Registration
No.TN 33 AF 4360, insured with the appellant-Insurance
Company, going in front of the motorcycle, driven by its
driver, in a rash and negligent manner, on seeing the speed

breaker, without giving any signal, suddenly applied the brake. Due to which, the motorcyclist was forced to hit the Minidor Goods Van behind, fell down and sustained grievous injuries. In this regard, a case in Cr.No.346 of 2014, has been registered for the offences, under Sections 279 and 337 (a) IPC, on the file of Erode Taluk Police Station. According to the legal representatives, at the time of accident, the deceased was running power looms, engaged in real estate business and earned a sum of Rs.40,000/- per month. They preferred a claim for Rs.30,00,000/-, under various heads.

3. The appellant-Insurance Company resisted the claim application, contending inter alia that the driver of the Minidor Goods Van was not negligent and it was the motorcyclist, who hit the Minidor Goods Van from behind and caused the accident. Without prejudice to the above, the Insurance Company has disputed the age, avocation and income of the deceased and the compensation claimed under various heads.

4. Before the Tribunal, wife of the deceased, examined herself as PW.1. PW.2, Suresh, is the brother of the deceased. PWs.3 and 5, Poosappan and Saravanan are the eye-witness to the accident. PW.4, Chinnadurai is the Senior Manager from Kilpauk Medical College Hospital, Erode. On the side of the respondents/claimants, Exs.P1 to P40, have been marked. RW.1 is the 6th respondent herein. RW.2 is the Inspector of Karungalpalayam Police Station. An Astrologer, friend of the 6th respondent, has been examined as RW.3. RW.4 is the Proprietor of Amman Fast Food, in front of which, the accident has taken place. On the side of the 6th respondent, five documents have been marked as Ex.R1 to Ex.R5. On behalf of the appellant-Insurance Company, Law Officer has been examined as RW.5 and through him, Insurance Policy has been marked as Ex.R6.

5. On evaluation of pleadings and evidence, the Tribunal held that both the rider of the motorcycle and driver of the Minidor Van, insured with the appellant-Insurance Company, were negligent in causing the accident, in the ratio of 75:25 and quantified the compensation to the legal representatives as Rs.21,95,065/-, with interest, at the rate of 12% per annum, from the date of claim, till the date of realisation.

6. Assailing the correctness of the award, Mr.N.Vijayaraghavan, learned counsel for the appellant-Insurance Company submitted that the Tribunal has erred in holding that the accident was due to rash and negligent driving of the driver of the Minidor Van, insured with the appellant-Insurance Company. He further submitted that the Tribunal has failed to consider that Ex.P1 - FIR was registered against the deceased motorcyclist, on the basis of the complaint lodged by the brother of the deceased. He also

submitted that the Tribunal ought to have given credence to the evidence of RW.1, driver of the Minidor Van and fixed the entire negligence on the deceased motorcyclist, who rode the motorcycle on the speed breaker, lost control and went upto 20 Feet on the mud road, on the Eastern Side and then, hit the rear side of the Minidor Van and thus, invited the accident. Without prejudice to the above, he submitted that the compensation awarded to the respondents/claimants is excessive and prayed for reduction.

7. Mr.R.Nalliyappan, learned counsel for the respondents/claimants submitted that the award, both on negligence and quantum, is just and reasonable, and does not warrant interference.

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

8. As regards the manner of accident, PW.1, wife of the deceased, has adduced evidence, reiterating the averments made in the claim petition. As there was contradiction in the evidence of PW.3 and PW.3, eye-witnesses, the Tribunal, by observing that the entire negligence cannot be fixed on the driver of the Minidor Van and considering the probability of the case, fixed 25% negligence, on the deceased motorcyclist and 75% on the driver of the Minidor Van.

9. Though Ex.P1 - FIR, has been registered against the deceased motorcyclist in Cr.No.346 of 2014, by Erode Taluk Police Station, on the basis of the complaint made by the elder brother of the deceased, we are of the view that the same cannot be put entirely against the claim, made by the legal representatives of the deceased. Merely because, a criminal case has been registered by the police, against the deceased motorcyclist, that alone cannot be taken as a substantive evidence, before the Tribunal to hold him, negligent. After re-investigation, RW.2, Inspector of Police, Karungalpalayam Police Station, Erode, has closed the criminal case, as abated, since the motorcyclist died. Abatement of a criminal case registered against a dead person by the police, alone is not sufficient, to hold him negligent, for causing the accident. We are of the view, it should not be. At this juncture, we deem it fit to consider a judgment of the Hon'ble Supreme Court in Jacob Mathew v. State of Punjab reported in 2005 (4) CTC 540, wherein, the Hon'ble Apex Court has explained the distinction between a tort and crime, where negligence is the fact, required to be proved and at Paragraphs 13 to 17, held 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-

"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 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."

10. It is well settled that statements made on solemn affirmation, are subject to cross examination, whereas, FIR is not lodged on solemn affirmation. Further, it is also well settled that purpose of lodging an FIR is only to set the criminal law in motion. Thus, the contents of the FIR are always open to scrutiny by the competent Court and it can be used for corroborating or contradicting the testimony of the witnesses, regarding the manner of accident and in such circumstances, the contents of FIR, has to be considered with care. It is also well settled that evidence in the criminal case is not ipso facto proof of negligence, in claim cases under the Motor Vehicles Act, 1988.

11. Though RW.1, driver of the Minidor Goods Van, has given contra evidence, stating that at the time of accident, Minidor Van was not moving, but parked, by facing south on the eastern edge of the North-South main road, he has not witnessed the accident and at that time, he was inside of the Office of RW.3, Astrologer. To support his version, RW.4, an independent eye-witness has been examined.

12. Upon perusal of Ex.P2 - Rough Sketch, the Tribunal has noticed that the place of occurrence on eastern edge of north-south main road, in front of RW.4's shop. Analysing the evidence adduced by both the parties and by observing that had the accident occurred, as stated by PWs.3 and 4, eye-witnesses, supporting the version of PW.1, then the place of

occurrence should have been on the Northern side of the speed breaker, which lies east to west, but the place of occurrence in the sketch, has been shown, as 20 feet away, south of speed breaker, the Claims Tribunal came to the conclusion that at the time of accident, the minidor goods van, was not moving on the northern side of the speed breaker, but was actually parked, on the eastern side of the road, 20 feet away on the southern side of speed breaker.

13. Taking note of the Rules of Road Regulations, 1989, particularly, Rule 15(1) and 15(2) Clause (iv), which states that a driver of a motor vehicle shall not park his vehicle, on the main road or one carrying fast traffic, the Claims Tribunal has observed that the parking of the minidor van, in such a manner, as recorded in Ex.P2 - Rough Sketch, itself amounts to negligence, on the part of its driver. It has also observed that if the minidor van was not so parked, then the accident could have been averted.

14. On analysis of oral and documentary evidence, the Claims Tribunal also observed that, at the time of accident, the motorcyclist was proceeding from north to south, and when the accident occurred at 01.00 P.M., Noon, the vehicle parked on the eastern edge of the road, was visible, and had the motorcyclist was cautious and diligent, he could have also averted the accident. The Tribunal held that the motorcyclist had failed to avoid the accident, and thus, contributed to the accident.

15. In India, vehicles are operated on the left side of the road. Parking has to be done only on the extreme left side of the road. Though it has been claimed that the Minidor van was parked on the left side of the road, on appreciation of oral and documentary evidence, the Tribunal held that the van was parked near the speed breaker, endangering a person, driving a vehicle from North to South, on the speed breaker.

16. Though Mr.N.Vijayaraghavan, learned counsel for the appellant-Transport Corporation submitted that the motorcyclist/deceased ought to have exercised due care and caution and the entire negligence should be fixed on the motorcyclist, considering the evidence, analysed by the Tribunal and appreciation of the entire evidence, on appeal, we are of the considered view that the Minidor Van was parked facing south, on the eastern edge of the north-south main road and therefore, the possibility of an accident, cannot be ruled out. By parking the van, in the above manner, we are of the view that the van driver was also negligent. Considering the overall facts and circumstances of the case, negligence on the part of the motorcyclist and the driver of the Minidor Van, requires to be modified, and this Court deems it fit to apportion the same, in the ratio of 40:60.

17. On the quantum of compensation, it is the case of the respondents/claimants that, at the time of accident, the deceased was running power looms and doing real estate business. He earned Rs.40,000/- per month. To support avocation, respondents/claimants have produced documents, such as, Ex.P15 - Acknowledgement provided by the Regional Office of the Textile Commissioner, Coimbatore, Ministry of Textile, Government of India, for the installation of four looms by the deceased, Ex.P34 - Property Tax paid by the deceased for the year 2009-10, 2012-13 and 2013-14, for the properties, which stood in his name, Ex.P35 - Water tax receipt, in the name of the deceased, Ex.P36 - Identity Card, with photograph and Ex.P37 (series) - Four receipts issued by Tamil Nadu Generation and Distribution Corporation, in the name of the deceased, relating to the tariff, for the power loom from 08.02.2014 to 08.10.2014, have been marked. Considering the same, the Tribunal has fixed his monthly income as Rs.9,000/- and added 50% of the income, towards future prospects. Income for the purpose of computation of loss of contribution, arrived at, by the Tribunal, is Rs.13,500/- [Rs.9,000/- x 1/2 = Rs.4,500/- + Rs.9,000/- = Rs.13,500/-]. Date of Birth mentioned in Ex.P6 - Postmortem Certificate, is 04.05.1975. Accident has occurred on 11.12.2014 and therefore, the Tribunal has fixed the age of the deceased as 40 years. Following the decision in Sarla Verma v. Delhi Transport Corporation Ltd., reported in 2009 ACJ 1298 SC, the Claims Tribunal has applied '15' multiplier, applicable for the age group of persons, between 36 and 40 years. Considering the number of legal representatives, the Tribunal has deducted 1/4th towards the personal and living expenses of the deceased and after applying '15' multiplier, computed the loss of contribution to the family as Rs.18,22,500/- [Rs.13,500/- x 12 x 15 x 1/4th]. That apart, the Claims Tribunal has awarded Rs.1,00,000/- for loss of consortium, Rs.50,000/- for loss of love and affection, Rs.25,000/- towards funeral expenses and Rs.10,000/- towards transportation. Exs.P20 (series), Ex.P21 (series), Exs.P23 to P25, Ex.P39 and Ex.P40, medical bills to the tune of Rs.1,87,562/- and other documents, have been marked. A sum of Rs.1,87,565/- has been awarded under the medical expenses. Altogether, the Claims Tribunal has awarded Rs.21,95,065/- with interest at the rate of 7.5% per annum, from the date of claim, till deposit.

18. Legal representatives are the wife, minor children and aged parents. Minor children have lost the love and affection of their father. In Jiju Kuruvila v. Kunjujamma Mohan reported in 2013 (4) CTC 252 and Surti Gupta v. United India Insurance Co. Ltd., reported in 2015 (1) TNMAC 472 (SC), the Hon'ble Apex Court has awarded Rs.1,00,000/- to the legal representatives of the deceased, for the loss of love and affection. However, in the case on hand, the Claims Tribunal has awarded only Rs.50,000/- for loss of love and affection to the minor children and aged parents, which is less. Therefore,

Rs.1,00,000/- each, is awarded to the minor children, under the head, loss of love and affection. That apart, Rs.50,000/- each, under the head, loss of love and affection, is awarded to the aged parents. Hence, a total sum of Rs.3,00,000/- is awarded under the abovesaid head. There is no award towards damages to clothes, for which, a sum of Rs.2,500/- is awarded.

19. In view of the above, the total compensation now determined by this Court is Rs.24,47,565/-. In the light of our discussion, Civil Miscellaneous Appeal No.1734 of 2017, is partly allowed and the appellant-Insurance Company, is directed to deposit 60% of the amount, now determined by this Court, with proportionate accrued interest and costs, less the statutory deposit, to the credit of M.C.O.P.No.303 of 2015, on the file of the Motor Accidents Claims Tribunal (Special District Court), Erode, within a period of four weeks from the date of receipt of a copy of this order.

20. On such deposit, the respondents 1, 4 and 5/claimants are permitted to withdraw the same, by making necessary applications, before the Tribunal. Share of the minors shall be deposited in any one of the Nationalised Banks in fixed deposit under the reinvestment scheme initially for a period of three years. The interest accruing on the share of the minor shall be paid to the guardian once in three months, till he attain majority. No costs. Consequently, connected Miscellaneous Petition is also closed.

s/d-
Assistant Registrar (CS VI)

True Copy

Sub-Assistant Registrar

skm
To

The Motor Accidents Claims Tribunal,
(Special District Judge), Erode.

Copy to

The Section Officer
VR Section
High Court, Madras.

+1 CC to Mr.R. Nalliyappan, Advocate sr 44585
+1 Cc to Mnr.N. Vijayaraghavan, Advocate sr 45193.

C.M.A.No.1734 of 2017

SSI (CO)
sp(31/08/2017)