

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 17.08.2017

CORAM:

THE HONOURABLE MR.JUSTICE S.MANIKUMAR

AND

THE HONOURABLE MR.JUSTICE M.GOVINDARAJ

C.M.A.NO.2864 OF 2015

The Oriental Insurance Company Limited
First Floor, Gopal Rao Library Building,
Town Hall,
Kumbakonam.

... Appellant/3rd respondent in trial court

Versus

- 1.Panchavarnam
- 2.Prakash
- 3.Sowdhamani
- 4.Chithra
- 5.Minor Muthu
- 6.Minor Karthi

(Minors Rep. by their mother and guardian
Chithra, the 4th respondent herein)

- 7.Palaniraja

- 8.Classic Knit Processors
52/1, Chinnakarai,
Karaipudur,
Tiruppur.

- 9.Balachandar

- 10.Karunanidhi

... Respondents/Petitioners 1 to 6 and RR1,
2, 4 and 5 in trial Court

PRAYER: Appeal filed under Section 173 of the Motor Vehicles Act, 1988, against the judgment and decree dated 17.06.2015 passed in M.C.O.P.No.310 of 2012, by the Motor Accident Claims Tribunal (Additional Sub Court) Tiruppur.

For Appellant : Mr.S.Manohar
For Respondents: Mr.Ma.P.Thangavel
1 to 6

J U D G M E N T

(JUDGMENT OF THE COURT WAS MADE BY M.GOVINDARAJ, J.)

Challenging the award passed in MCOP No.310 of 2012 on

the file of Motor Accidents Claims Tribunal (Additional Sub Court) Tiruppur, dated 17.06.2015, the insurance company has preferred this appeal.

2. The case of the claimants is that the deceased while walking on the left side of the road, a motorcycle, bearing Registration No.TN39-AB-4135 and a bus bearing Registration No.TN28-M-4098 dashed against him and he died on the spot. Wives and children of the deceased laid the claim before the Tribunal for a sum of Rs.25,00,000/- as compensation, for the death. The owner and the driver of the motorcycle, as well as the owner, driver and the insurer of the bus were impleaded as parties. Based on Ex.P1 - First Information Report and the evidence of P.W.1 - first wife and P.W.2 - eyewitness, the Tribunal has fixed negligence on the bus driver. Since the bus was covered by insurance, the insurer was made liable for payment of compensation, fixed as Rs.15,73,320/-.

3. The Tribunal dismissed the claim petition against the fourth respondent, who is the second wife of the deceased. The Tribunal also dismissed the claim petition against respondents nos.9 and 10, being the owner and driver of the motorcycle, as there was no allegation against them, in the claim petition.

4. Challenging the award of the Tribunal, in fixing negligence solely on the driver of the bus, the insurance company has preferred the appeal, among other grounds and on quantum also.

5. According to the appellant / insurance company, Ex.P1 - First Information Report, as well as the evidence of P.W.1 - first wife of the deceased, would clearly show the proximity of the cause of action in causing the accident, is fully on the motorcyclist. Therefore, the liability should have been fixed as per the principles of composite negligence.

6. Learned counsel for the appellant submitted that a reading of Ex.P1 - First Information Report would show that the motorcyclist dashed against the deceased, and he fell on the northern side, near the rear wheels of the bus and in that event, the left rear wheel of the bus ran over the head of the deceased. Therefore, when two different tort-feasors were involved in the incident, the damages claimed by a third party, shall be treated as composite negligence and only one party cannot be fastened with liability. In such circumstances, the carelessness / negligence, proximate to the cause of accident, has to be gone into.

7. In support of the above contention, learned counsel appearing for the appellant / insurance company relied on a

judgment of the Hon'ble Supreme Court in MUNICIPAL CORPORATION OF GREATER BOMBAY VS. LAXMAN IYER AND ANOTHER [2004 ACJ 53] wherein, the Hon'ble Supreme Court, at para 6, observed that where a person is injured without any negligence on his part, but as a result of the combined effect of negligence of two other persons, it is not a case of contributory negligence in that sense. It is a case of what has been styled by Pollock as injury by composite negligence (See Pollock on Torts, 15th Edition, P.361). Further, the Hon'ble Supreme Court discussed about the doctrine of last opportunity. Even though the theory of last opportunity is no longer applied, the Hon'ble Supreme Court held that negligence cannot be completely wiped out, as in the instant case, the rear wheel of the bus rolled over the head of the deceased. Therefore, he contends that on the basis of the judgment of the Hon'ble Supreme Court, even though the bus driver had driven the bus following the traffic rules and regulations and at a slow speed, negligence on his part also should be fixed.

8. The learned counsel appearing for the appellant would rely on a judgment of the Hon'ble Supreme Court in T.O. ANTHONY VS. KARVARNAN AND OTHERS [2008 ACJ 1165] wherein, the Hon'ble Supreme Court held that 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 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 that the injured person has the choice of proceeding against all, or any of them.

9. Therefore, it is the contention of the learned counsel for the appellant that the Tribunal is wrong in fixing negligence on the bus driver alone. He further contended that the evidence of P.W.1 - first wife, during cross examination, would clearly show that the motorcycle had hit the bus and thereafter, due to the impact, her husband fell near the wheels of the bus. According to him, the evidence of P.W.2 is not credible and from his evidence, negligence aspect cannot be clearly established. In such circumstances, in view of Ex.P1 - First Information Report and evidence of P.W.1, composite negligence, should have been fixed on both the vehicles. He therefore submitted that, the finding of the Tribunal fixing negligence solely on the bus driver, is erroneous.

10. In PAWAN KUMAR AND ANOTHER VS. HARKISHAN DASS MOHAN LAL AND OTHERS [2014 ACJ 704] the Hon'ble Supreme Court while reiterating the concept of composite negligence has upheld the decision of the High Court that both the vehicles were responsible for the accident and the liability of the joint tortfeasors has to be apportioned which has been so done by the

High Court. In the said 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. But, in the instant case, the insurer has raised a specific ground in the appeal that there shall be apportionment of liability.

11. In KHENYEI VS. NEW INDIA ASSURANCE CO. LTD., AND OTHERS [2015 ACJ 1441] the Hon'ble Supreme Court held that in case, all the joint tort-feasors 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-feasors 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 the main case, one joint tort-feasor can recover the amount from the other, in the execution proceedings.

12. From the reading of the judgment of the Hon'ble Supreme Court, it is clear that when two or more tortfeasors were involved in an accident and the damages claimed against them, it shall be construed as composite negligence and the claimant is entitled of his choice to recover the compensation from any of the tortfeasors. Insofar as the apportionment is concerned, it is only to fix the extent of liability of inter se tort-feasors in order to pay and recover the same from the other tort-feasor.

13. In the instant case also, all the tortfeasors have been impleaded and there is sufficient evidence to show that the accident occurred due to both tortfeasors. In that event, considering the proximity of causing the accident, extent of negligence on the tortfeasors can be fixed, as contended by the learned counsel for the appellant. The motorcyclist and the owner of the vehicle were set exparte before the Tribunal and they have not entered appearance before this Court also. The claimants have entered appearance and they are interested only in respect of quantum and recovery.

14. In view of the stand taken by the parties and following the judgments of the Hon'ble Supreme Court, we find that the extent of negligence and liability shall be fixed between the tortfeasors. It is reasonable to fix the ratio as 50:50, between the tortfeasors. Owner of the motorcycle is liable to pay compensation. The appellant - insurance company is

liable to pay the entire compensation and entitled to recover the same from the joint tortfeasors, namely, motorcyclist and the owner. It is pertinent to point out that at the time of accident, the motorcycle was not covered by insurance. Compensation payable by the owner of the motorcycle can be recovered by the insurance company, in the manner known to law.

15. Insofar as the other grounds raised by the appellant - insurance company on the quantum and entitlement are concerned, they are not seriously disputed and there is no material to interfere with the same. Therefore, this Court is of the view that the quantum of compensation need not be interfered with.

16. In the result, the Civil Miscellaneous Appeal is partly allowed and the extent of liability is apportioned between the tortfeasors in the ratio of 50:50 namely, motorcyclist and the owner. No costs.

17. The appellant - insurance company is directed to deposit the entire award amount, with proportionate interest at the rate of 7.5% per annum and costs, from the date of petition, till the date of deposit, within a period of eight weeks from the date of receipt of a copy of this order, to the credit of MCOP No.310 of 2012, on the file of Motor Accidents Claims Tribunal [Additional Sub Court] Tiruppur.

18. On such deposit being made, the respondents 1, 2 and 3 / claimants are permitted to withdraw their respective shares, on filing proper applications before the Tribunal.

19. Insofar as the share apportioned to the minors is concerned, the same should be deposited in favour of the minors viz., respondents 5 and 6, in a Nationalised Bank, proximate to the residence of the first respondent, in a reinvestment scheme, till they attain majority. The first respondent / mother is entitled to withdraw interest accrued thereon, once in three months, for the welfare of the minors. The apportionment made by the Tribunal is confirmed.

Sd/-
Assistant Registrar (CS II)

//True copy//

Sub Assistant Registrar

TK

To

The Motor Accident Claims Tribunal
(Additional Sub Court)
Tiruppur.

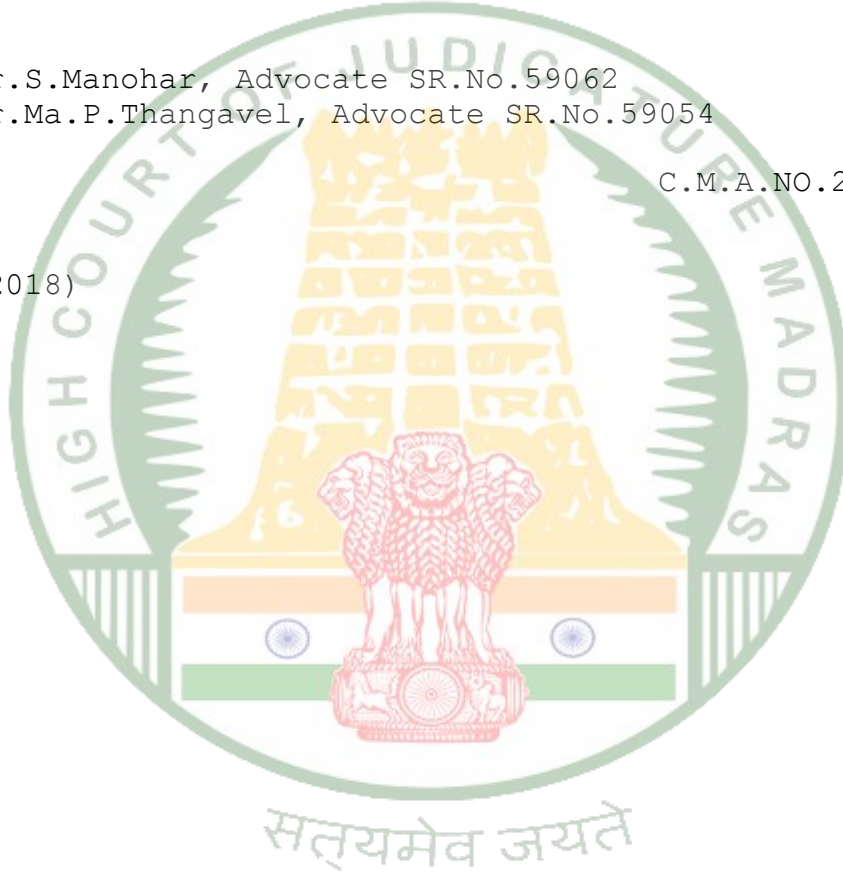
Copy To

The Section Officer,
VR Section, High Court,
Madras.

+1cc to Mr.S.Manohar, Advocate SR.No.59062
+1cc to Mr.Ma.P.Thangavel, Advocate SR.No.59054

C.M.A.NO.2864 OF 2015

SS(CO)
GN(16/02/2018)



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