

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 28.04.2017

CORAM

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

C.M.A.Nos.1483 and 1484 of 2017
C.M.P.No.7922 to 7924 of 2017

The Branch Manager,
M/s.New India Assurance Co. Ltd.,
Vellore. ... Appellants in both C.M.As./
Respondent II

v.

1. Vasanthamala
2. Diviya
3. Praveen
4.Nagarathinam ... Respondents 1 to 4 in CMA.1483/17/
Petitionerss

5. Uma
6. Gobi
7. K.Dinesh Babu
8.Gangammal @ Muthammal ... Respondents 1 to 4 in CMA.1484/17/
Petitioners

9.S.Venkatesan ... 5th Respondent in both appeals/
Respondent-I/Respondent-I

Civil Miscellaneous Appeals filed under Section 173 of the
Motor Vehicles Act, against the judgment and decree, made in
M.C.O.P.No.178 and 209 of 2013, dated 22.12.2015, on the file of
the Motor Accident Claims Tribunal (Special District Judge) at
Krishnagiri District.

For Appellant : Mr.J.Chandran

COMMON JUDGMENT

(Judgment of this Court was made by S.MANIKUMAR)

Civil Miscellaneous Appeals are filed, against the judgment
and decree, made in M.C.O.P.No.178 and 209 of 2013, dated

22.12.2015, on the file of the Motor Accident Claims Tribunal (Special District Judge) at Krishnagiri District.

2. Short facts leading to the appeals are as follows:

That on 27.04.2014, Kumar, S/o.Krishnan was standing along with Hero Honda Passion Pro motorcycle, bearing Registration No.TN 24 L 6341 and taking to his friend, Kumar, S/o.Kannan, on the extreme left side mud portion of the road, near Mallapadi Anjaneyar Temple and at that time, a Ashok Leyland lorry, bearing Registration No.TN 23 BY 5599, insured with M/s.New India Assurance Company Ltd., Vanniyambadi, appellant herein, driven by its driver, in a rash and negligent manner, dashed against the motorcyclist and his friend. Both of them sustained fatal injuries and died on the spot. In this regard, a case in Cr.No.185 of 2014, has been registered against the driver of the lorry, for the offences, under Sections 279 and 304(A) IPC., on the file of the Bargur Police Station.

3. Contending inter alia that Kumar, S/o.Krishnan, was working as a Physical Education teacher in Erode and due to his sudden demise, the family has lost his contribution, love and affection, legal representatives of the deceased have filed M.C.O.P.No.178 of 2014, on the file of the Motor Accident Claims Tribunal (Special District Judge), Krishnagiri, claiming compensation of Rs.80,00,000/-, under various heads.

4. Legal representatives of the deceased Kumar, S/o.Kannan, have filed M.C.O.P.No.209 of 2014, on the file of the Motor Accident Claims Tribunal (Special District Judge), Krishnagiri, contending inter alia that on the date of accident, Kumar, S/o.Kannan was standing on the extreme left side of Bargur to Tirupattur road, near Mallapdi Anjanayar Temple, his friend Kumar, S/o.Krishnan, was proceeding in his Hero Honda Passion motorcycle, bearing Registration No.TN 24 L 6341, came from Tirupattur to Bargur and on seeing the deceased Kumar, S/o.Kannan, standing on the road side, took a "U" turn and at that time, a lorry, bearing Registration No.TN 23 BY 5599, belonging to the 5th respondent herein, and insured with M/s.New India Assurance Company Ltd., Vanniyambadi, appellant herein, proceeding from Bargur to Tirupattur, driven by its driver, in a rash and negligent manner, dashed against the Hero Honda motorcyclist and his friend.

5. Claiming that the deceased Kumar, S/o.Kannan, was aged 52 years, at the time of accident, a Proprietor of a rice mill and doing seasonal business, legal representatives have filed M.C.O.P.No.209 of 2014, on the file of the Motor Accident Claims Tribunal (Special District Judge), Krishnagiri, claiming compensation of Rs.50,00,000/-, under various heads.

6. M/s.New India Assurance Company Ltd., Vanniyambadi, appellant herein, has filed separate counter affidavits, in both the claim petitions, denying negligence, on the part of the lorry driver. According to the Company, the accident occurred due to the rash and negligent riding of the motorcyclist, Kumar, S/o.Krishnan. The Company has further contended that the driving licence of the motorcyclist was not produced. Without prejudice to the above, they disputed the age, avocation and income of both the deceased and the compensation claimed under various heads.

7. As facts and evidence adduced are common, both the claim petitions were taken up together. Wife of Kumar, S/o.Krishnan and wife of Kumar, S/o.Kannan, were examined themselves as PWs.1 and 2 respectively. They have not witnessed the accident. PW.3, is stated to be the eye-witness. According to him, on the date of accident, about 7.45 P.M., when he was standing near Anjeneyar Temple, Mallapadi Village, Kumar, S/o.Krishnan, motorcyclist had parked his motorcycle, bearing Registration No.TN 24 L 6341, on the left side of the road and talking to his friend, Kumar, S/o.Kannan and at that time, a lorry, bearing Registration No.TN 23 BY 5599, insured with the appellant-Insurance Company, coming from Bargur to Thirupattur, driven in a rash and negligent manner, dashed against the abovesaid persons. Both of them died on the spot. PW.3, has further deposed that he had given a complaint to Bargur Police Station, which was registered in Cr.No.185 of 2014, for the offences, under Sections 279 and 304(A) IPC. Apart from PW.3, eye-witness, three other witnesses have been examined and 16 documents have been marked. There is no oral or documentary evidence, on behalf of the appellant-Insurance Company.

8. On evaluation of pleadings and evidence, in particular, PW.3, Manoharan, stated to be the eye-witness, the Tribunal has observed that there was yet another eye-witness, PW.5, Karunakaran, who has deposed that Kumar, S/o.Kannan was talking to his friend and at that time, Kumar, S/o.Krishnan, motorcyclist, crossed the road and stopped the motorcycle. A lorry, bearing Registration No.TN 23 BY 5599, insured with the appellant-Insurance Company, coming from Bargur to Thirupattur, dashed against the motorcyclist and in the result, both of them, sustained grievous injuries and died. He has further deposed that PW.3, Manohar, informed the police and relatives of the deceased. According to him, the accident occurred, solely due to the rash and negligent driving of the driver of the abovesaid lorry. The Tribunal has found that the testimony of PW.5, Karunakaran, was in no way prejudiced to the case of the claimants.

9. On the contra, though the appellant-Insurance Company has attributed negligence to the motorcyclist, no oral or documentary evidence has been adduced. Driver of the lorry has not been examined. Though PW.5, has deposed that the motorcyclist crossed the road and that though there was some minor contradiction, after analysing the evidence adduced in both the claim petitions, the Tribunal has categorically held that the accident occurred, after the motorcyclist crossed the road and gone to the other side of the road.

10. The Tribunal has also held that the evidence of PW.5 would not lend any support to the case of the appellant-Insurance Company. Thus, the Tribunal held that the accident occurred solely due to the rash and negligent driving of the driver of the a lorry, bearing Registration No.TN 23 BY 5599, insured with the appellant-Insurance Company. Contention that the motorcyclist suddenly crossed the road, where there was a "U" turn, has not been substantiated. Thus, holding that the driver of the a lorry, bearing Registration No.TN 23 BY 5599, insured with the appellant-Insurance Company, as negligent, in causing the accident, the Tribunal fastened the liability on the appellant-Insurance Company.

11. Insofar as the quantum of compensation in M.C.O.P.No.178 of 2014, filed for death of Mr.Kumar, S/o.Krishnan, is concerned, the legal representatives of the deceased claimed that at the time of accident, the deceased was aged 54 years, a physical education teacher, in Government Deaf and Dumb High School, Aramputhur. PW.4, Headmistress of the School, has adduced evidence, by marking Ex.P7 - BA. Degree Certificate, Ex.P8 - B.Ed. Certificate, Ex.P14 - Service Register and Ex.P15 - Salary Certificate. After perusing the above, particularly, Ex.P14 - Service Register, the Claims Tribunal has recorded that initially, the deceased, Kumar, S/o.Krishnan, was paid a sum of Rs.800/-, on consolidated basis. On 04.02.1993, he was regularised in the pay scale of Rs.1200-30-1560-40-2040 and prior to death, in April' 2014, he was paid Basic Pay - Rs.16,700/-, Grade Pay - Rs.4,300/-, D.A. - Rs.21,000/- (100%), HRA - Rs.140/-, Medical Allowance - Rs.100/-, Special Pay - 500/- and Other Allowance - Rs.30/-. Altogether, a sum of Rs.44,030/- was paid to the deceased Kumar, S/o.Krishnan. He was due to retire on 30.06.2018. PW.4, Headmistress has further deposed that had he been alive, he would have been transferred to High School Secondary School and within a period of four years of service, he would have earned four increments and that his basic pay would have been increased by 3%. Based on the entries in Ex.P6 - Driving Licence of Kumar and Ex.P14 - Service Register, the Tribunal fixed the age as 53 years. Out of net salary of Rs.44,000/-, the Tribunal has deducted 20% as income-tax, determined the income as

Rs.35,200/- . As the number of dependants are four, the Tribunal deducted 1/4th towards personal and living expenses of the deceased and taking the monthly contribution as Rs.26,400/-, applied '12' multiplier and accordingly, computed the loss of contribution as Rs.34,84,800/- (Rs.26,400 x 12 x 11). That apart, the Tribunal has awarded Rs.5,000/- for transportation, Rs.3,000/- towards damages to clothes and articles, Rs.25,000/- for Funeral Expenses, Rs.1,00,000/- for loss of consortium, Rs.50,000/- each for loss of love and affection to the children and Rs.25,000/- towards loss of love and affection to mother. Altogether, the Tribunal has awarded compensation of Rs.37,42,800/-, with interest at the rate of 7.5% per annum, from the date of claim, till deposit.

12. Insofar as M.C.O.P.No.209 of 2014 is concerned, the legal representatives of the deceased have contended that the deceased Kumar, S/o.Kannan, was running a rice mill and also engaged in sale of coconut. PW.6, has deposed that he had taken a lease of coconut grove. Ex.P11 is the lease deed, executed between PW.6 and Kumar, S/o.Kannan. But the Tribunal has not accepted the said document. However, having regard to Ex.P13 - Provisional Tax receipt for the rice mill, the Tribunal fixed the monthly income of the deceased, Kumar, S/o.Kannan, as Rs.12,000/- and deducted 1/4th towards personal and living expenses of the deceased. Based on the entry in Ex.P1 - FIR, wherein, age of Kumar, S/o.Kannan, has been mentioned as 52 years, the Tribunal applied '11' multiplier and accordingly, computed the loss of contribution to the family as Rs.11,88,000/- (Rs.9,000/- x 12 x 11). That apart, the Tribunal has awarded Rs.5,000/- for transportation, Rs.3,000/- towards damages to clothes and articles, Rs.25,000/- for Funeral Expenses, Rs.1,00,000/- for loss of consortium, Rs.50,000/- each for loss of love and affection to the children and Rs.25,000/- towards loss of love and affection to mother. Altogether, the Tribunal has awarded compensation of Rs.14,46,000/-, with interest at the rate of 7.5% per annum, from the date of claim, till deposit.

13. Being aggrieved by the finding, fixing negligence on the driver of the lorry, insured with the appellant-Insurance Company and the quantum of compensation, awarded in both the claim petitions, appeals have been preferred.

14. Though Mr.J.Chandran, learned counsel for the appellant-Insurance Company reiterated that there are discrepancies, as to the manner of accident, in both the claim petitions and it was the motorcyclist, who suddenly crossed the road at the "U" turn, resulting in the accident, this Court is not inclined to accept the said contention for the reason that the Claims Tribunal, after analysing the oral testimony of PWs.1

and 2, wives of the deceased and the testimony of PWs.3 and 5 and the documents, Ex.P1 - FIR and Ex.P16 - Charge Sheet, filed on behalf of the claimants, has arrived at a proper conclusion that the driver of the lorry, bearing Registration No.TN 23 BY 5599, insured with the appellant-Insurance Company, was negligent in causing the accident. The Tribunal has categorically recorded that their evidence do not lend support to the Insurance Company nor prejudicial to the claimants.

15. Though the appellant-Insurance Company has contended that it was the motorcyclist, who had caused the accident, they have not even chosen to examine the driver of the lorry, bearing Registration No.TN 23 BY 5599, insured with the appellant-Insurance Company. Non-examination of the driver of the bus, would lead to adverse inference. 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. 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, 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."

16. Mere pleadings in the counter affidavit, disputing the manner of accident and attributing negligence to the motorcyclist, is not sufficient. Evidence of the claimants, supporting the manner of accident, is not rebutted. Testing the findings of negligence, on the principles of preponderance of probability, there are no grounds for reversal. Hence, the findings with regard to negligence and the consequential liability, are confirmed.

17. Though the appellant-Insurance Company has challenged the quantum of compensation, awarded in both the claim petitions, going through the methodology, in arriving at the quantum of compensation and the supporting documents, stated supra, to substantiate the avocation and income of the deceased and considering the compensation awarded, this Court is not inclined to interfere with the same. Quantum of compensation awarded in both the claim petitions, is also sustained.

18. Hence, the Civil Miscellaneous Appeals are dismissed. The appellant-Insurance Company is directed to deposit the award amount, with proportionate accrued interest and costs, less the amount already deposited, to the credit of M.C.O.P.No.178 and 209 of 2013, on the file of the Motor Accident Claims Tribunal (Special District Judge) at Krishnagiri District. On such deposit, respondents/claimants are permitted to withdraw the same, by making necessary applications before the Tribunal. No costs. Consequently, connected Miscellaneous Petition is also closed.

Sd/-
Asst.Registrar (CS II)

/true copy/

Sub Asst. Registrar

skm
To

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

+2cc to Mr.J.Chandran, Advocate Sr. 36364, 36365

C.M.A.Nos.1483 and 1484 of 2017
C.M.P.No.7922 to 7924 of 2017

SR(CO)
VR(11/09/2017)