

THE HON'BLE SRI JUSTICE G. SHYAM PRASAD

M.A.C.M.A Nos. 218 and 881 of 2010

COMMON JUDGMENT:

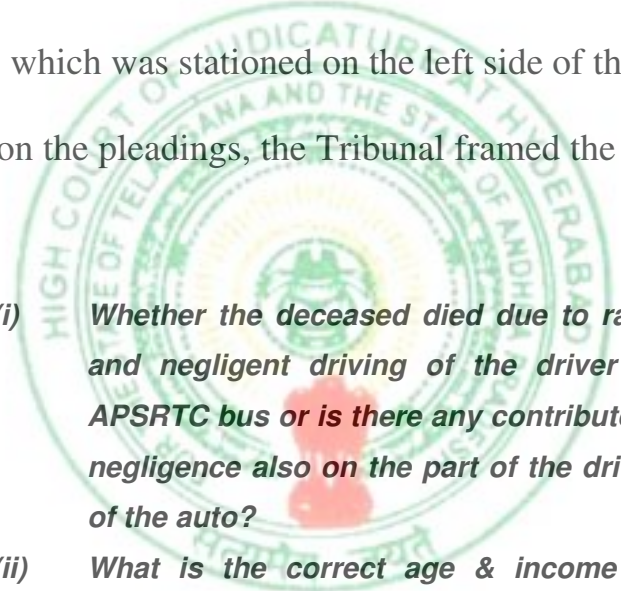
These appeals are arising out of the order dated 16.09.2009 in M.V.O.P.No.474 of 2007 on the file of the Chairman, Motor Accidents Claims Tribunal-cum District Judge, Ongole, (for short, 'the Tribunal'). Since these appeals are connected as they arise out of a common accident, they are taken up together for disposal by this common judgment.

2. Brief facts of the case are that on 14.12.2006, at about 8:30 AM, the deceased along with other villagers, was proceeding towards Podili in an Auto bearing No.AP-27W-3891 and when the Auto reached near Kunchepalli on Podili-Darsi road, an APSRTC bus AP-11Z-4826 of Podili Depot which was proceeding towards Hyderabad, dashed against the Auto and dragged the auto to some distance resulting in instantaneous death of the deceased. A case was registered in Crime No.173 of 2006 of Podili Police Station for the offences punishable under Sections 337, 338 and 304A IPC. Alleging that the accident occurred only due to the rash and negligent driving by the driver of the APSRTC bus, the claimant, who was the son of the deceased and a minor boy of 10 years at the time of accident, filed the claim petition against respondents 1 and 2, who are the Vice Chairman & Managing Director, APSRTC, Musheerabad, Hyderabad; and the Regional Manager, APSRTC, RTC Bus Stand Complex,

Ongole, respectively, seeking a compensation of Rs.4,50,000/- on account of the death of his mother in the accident.

Respondent No.1 remained *ex parte*. Respondent No.2- Regional Manager, Ongole, filed a written statement denying all the material averments in the claim petition and contending that the accident was not due to the rash and negligent driving by the driver of the APSRTC bus, instead it was due to rash and negligent driving by the driver of the Auto as the Auto was overloaded with 18 passengers and the Auto driver drove it in a zig zag manner and dashed the APSRTC bus which was stationed on the left side of the road margin.

Based on the pleadings, the Tribunal framed the following three issues:

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- (i) ***Whether the deceased died due to rash and negligent driving of the driver of APSRTC bus or is there any contributory negligence also on the part of the driver of the auto?***
 - (ii) ***What is the correct age & income of deceased as on the date of accident?***
 - (iii) ***Whether the petitioner is entitled for compensation, if so, to what extent and from whom?***
 - (iv) ***To what relief?***

On behalf of the appellant-claimant, PW.1 was examined and Exs.A1 to A5 were marked. On behalf of the respondents, RW1 was examined.

The Tribunal, on consideration of the evidence available on record, partly allowed the petition, by fixing the liability of the

respondents at 75%, and by awarding compensation of Rs.3,48,000/- against the respondents with interest at 9% per annum and proportionate costs. Seeking enhancement of compensation, the claimant filed MACMA No.218 of 2010; whereas contending that the compensation is exorbitant, the respondent-APSRTC filed MACMA No.881 of 2010.

3. Heard Sri Nutalapati Krishna Murthy, learned counsel for the appellant; and Sri P.Durga Prasad, learned counsel representing the learned Standing Counsel for the respondent-APSRTC.

4. Learned counsel representing the respondent-APSRTC, Sri P. Durga Prasad, submits that this is a case of collision between the APSRTC bus and Auto, but the claimant has not made the driver, owner and insurer of the Auto as parties to the claim petition; and, therefore, non-joinder of necessary parties is fatal to the case of claimant and hence the claim petition itself is liable to be dismissed.

5. Learned counsel for the claimant submits that the claim petition is not liable to be dismissed for non-joinder of parties. Learned counsel placed reliance on the decision of the Hon'ble Supreme Court in **Khenyei v. New India Assurance Company Limited and Others**¹, wherein the apex Court held in paras 15 and 22.1 as under:

15. There is a difference between contributory and composite negligence. In the case of contributory negligence, a person who

¹ (2015) 9 Supreme Court Cases 273

has himself contributed to the extent cannot claim compensation for the injuries sustained by him in the accident to the extent of his own negligence; whereas in the case of composite negligence, a person who has suffered has not contributed to the accident but the outcome of combination of negligence of two or more other persons. This Court in T.O. Anthony v. Karvarnan & Ors. [2008 (3) SCC 748] has held that in case of contributory negligence, injured need not establish the extent of responsibility of each wrong doer separately, nor is it necessary for the court to determine the extent of liability of each wrong doer separately. It is only in the case of contributory negligence that the injured himself has contributed by his negligence in the accident. Extent of his negligence is required to be determined as damages recoverable by him in respect of the injuries have to be reduced in proportion to his contributory negligence. The relevant portion is extracted hereunder :

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 wrong doers, it is said that the person was injured on account of the composite negligence of those wrong-doers. In such a case, each wrong doer, 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 wrong-doer separately, nor is it necessary for the court to determine the extent of liability of each wrong- doer 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 of 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 stands 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.

22.1. In the case of composite negligence, the plaintiff/claimant is entitled to sue both or any one of the joint tortfeasors and to recover the entire compensation as liability of joint tortfeasors is joint and several."

6. Learned counsel for the claimant submits that the claimant is entitled to sue one or both the joint tortfeasors and the claimant is entitled to claim compensation from any one of the joint tortfeasors.

7. In view of the submissions made by the learned counsel for the claimant, and in view of the decision in **Khenyei** (1 supra), it can be concluded that non-joinder of necessary parties in a claim petition need not necessarily end in the dismissal of the claim petition, but the liability of the other joint tortfeasors can be separated and that amount need not be considered in awarding compensation.

8. Learned counsel for respondent-APSRTC contends that there is a contributory negligence on the part of the Auto driver, and therefore the Tribunal ought to have fixed the liability at 50% each on APSRTC and the Auto, but the Tribunal erroneously fixed the liability of respondent-APSRTC at 75% and that of the Auto at 25%. It is further contended that at the time of accident, there were 18 passengers in the Auto and the Auto driver could not control the auto and it contributed to the accident, and therefore, the Tribunal ought to have apportioned the liability of the Auto at 50%.

9. On consideration of the evidence and the award passed by the Tribunal, it is obvious that the Tribunal has taken into consideration the manner in which the accident has occurred and arrived at a proper conclusion that there is negligence on the part of the Auto driver. It is a case where a third party liability is involved. The deceased is a third party to the accident and the Tribunal has rightly fixed the liability of the APSRTC at 75% and the driver of the Auto at 25% and the same does not require any interference.

10. Learned counsel for the claimant contended that the award passed by the Tribunal is not adequate and it requires to be enhanced. Learned counsel referred to the quantum of compensation awarded by the Tribunal under the Heads of loss of estate, loss of consortium and funeral expenses as Rs.32,000/- which requires to be enhanced.

11. Per contra, learned counsel for the respondent submits that the award of the Tribunal is exorbitant, as such no enhancement is required to be made under any Head. Learned counsel further contends that the Tribunal awarded interest at 9% per annum which is highly excessive.

12. In view of the foregoing submissions and also the facts and circumstances of the case, the compensation under the Head of loss of estate is enhanced to Rs.20,000/-, and the compensation for loss of consortium is enhanced to Rs.25,000/-, and an amount of Rs.25,000/- is awarded towards funeral expenses. After apportioning the liability of APSRTC at 75% and of the Auto driver at 25%, the compensation entitled to by the claimant is shown in the tabular format below:

S.No.	Head	Compensation awarded by the Tribunal	Compensation enhanced
1.	Loss of dependency	Rs.3,24,000/-	Rs.3,24,000/-
2.	Loss of estate, loss of consortium and funeral expenses	Rs.24,000/-	Rs.52,500/-
	Total	Rs.3,48,000/-	Rs.3,76,500/-

13. In the result, the appeals are partly allowed by enhancing the compensation awarded by the Tribunal from Rs.3,48,000/- to

Rs.3,76,500/-, with interest at 7.5% per annum with proportionate costs, from the date of petition till the date of realization. No costs.

Miscellaneous petitions, if any pending, shall stand closed.

JUSTICE G.SHYAM PRASAD

07th February, 2017

KSM



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07th February, 2017

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