

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Date : 09.08.2019

CORAM

THE HONOURABLE MR.JUSTICE R.MAHADEVAN

C.M.A.No.2824 of 2006

and

M.P.No.1 of 2006

National Insurance Co. Ltd.,
Branch Office
Metur Main Road
Bhavani.

Appellant/3rd Respondent

vs.

1. K.S.Nallasamy
2. Thilagavathi ... Respondents 1 & 2/ Claimants 1&2
3. K.Murugan
4. K.Thangamuthu
5. D.Chandrasekaran ... Respondents 3 to 5/ Respondents 1,2&4

Civil Miscellaneous Appeal is filed under Section 173 of Motor Vehicles Act, 1988, against the judgment and decree dated 20.02.2006 made in M.A.C.T.O.P.No.218 of 2005 on the file of the Motor Accidents Claims Tribunal, (Additional District Judge) (Fast Track Court No.1), Erode.

For Appellant : M/s.N.B.Surekha

For R1 & R2 : Mr.N.Manoharan

R3 : NA

JUDGMENT

This appeal arises out of the judgment and decree dated 20.02.2006 passed by the Motor Accidents Claims Tribunal, (Additional District Judge) (Fast Track Court No.1), Erode, (for brevity, "the Tribunal") in M.A.C.T.O.P.No.218 of 2005.

2.The case in brief is as follows:

On the fateful day, i.e., on 30.12.2004, at about 7.00pm, one K.N.Satheesh Kumar was driving the mini lorry bearing

Regn.No.TN32 4055 from South to North direction at a normal speed by observing the traffic rules on the Perundurai - Bhavani Road. When the mini lorry was nearing Kandampalayam Pirivu, the lorry bearing Regn.No.TN36 B7277 belonging to the fourth respondent and insured with the appellant herein, came in a rash and negligent manner and suddenly turned to the right side without giving any signal and hit the mini lorry thereby, causing the accident. As a result of the same, the said Satheeth Kumar died on the spot. The respondents 1 and 2, who are the parents of the deceased, filed a claim petition claiming a compensation of Rs.6,00,000/-. The Tribunal, after evaluating the oral and documentary evidence adduced by the parties, came to the conclusion that the accident had occurred due to the rash and negligent driving of the drivers of both the vehicles i.e., mini lorry and lorry and accordingly, fixed the contributory negligence at 20% and 80% respectively and quantified the compensation at Rs.3,33,400/- with interest at 7.5%p.a. from the date of petition. Challenging the same, the insurance company has preferred this Civil Miscellaneous Appeal.

3.The learned counsel for the appellant insurance company submitted that the Tribunal has erred in fixing 80% contributory negligence on the part of the driver of the lorry insured with the appellant insurance company, when the accident had occurred due to the rash and negligent driving of the deceased, while he was trying to overtake a lorry, which was going in the front. In support of the same, he relied on Exs.P2-Observation Mahazar, P3-rough sketch and P5-Motor Vehicle Inspector's Report pertaining to the insured lorry. The learned counsel further submitted that the Tribunal has erred in adopting the multiplier of 17, considering the age of the deceased as 23 years; and the total compensation of Rs.3,33,400/- awarded by the Tribunal is on the higher side and the same has to be reduced substantially.

4.The learned counsel for the respondents/claimants has sought to justify the impugned judgment contending that the Tribunal, on proper appreciation of both oral and documentary evidence, rightly recorded its findings regarding contributory negligence as well as quantum of compensation and the same do not call for any interference at the hands of this Court.

5.Heard the learned counsel on either side and perused the materials available on record carefully and meticulously.

6.Now, the points that arise for consideration in this appeal are:

"1. Whether the 80% contributory negligence fixed on the part of the driver of the lorry insured with the appellant insurance company is sustainable in law?

2. Whether the quantum of compensation awarded by the Tribunal is just and reasonable?"

7.It is an undisputed fact that the accident took place on 30.12.2004 at about 7.00p.m involving two vehicles viz., mini lorry bearing Regn.No.TN32 4055 driven by the deceased and lorry bearing Regn.No.TN36 B 7277 insured with the appellant insurance company and the same resulted in instantaneous death of the deceased.

8.Before examining the aforesaid points raised herein, it is relevant to refer to the observation of the Supreme Court as well as the High Court regarding contributory negligence. (i)The Supreme Court in Municipal Corporation of Greater Bombay v. Laxman Iyer [2003 (8) SCC 731] held as under:

"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."

(ii) In North East Karnataka Road Transport Corporation v. Vijayalaxmi reported in (2011) 2 TN MAC 840, the Full Bench of Karnataka High Court has set out a difference between the negligence and contributory negligence, as follows:

"11. Negligence is conduct, not a state of mind - conduct which involves an unreasonably great risk of causing damage. Negligence is the 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. In strict legal analysis, negligence means more than heedless or careless conduct, whether in omission or commission. It properly connotes the complex concept of duty, breach and damage thereby suffered by the person to whom the duty was owing. It is a question of law whether in any particular circumstances a duty of care exists. The question is was the Defendant under any duty of care at all, and, if so, did he observe the standard required in the circumstances of the case? Foresight is the test for duty and remoteness. It is a characteristic of the definition of the tort of negligence that it does not refer to the scope of the protection it affords to the Plaintiff but rather to the qualities of blameworthiness or fault to be attributed to the conduct of the Defendant. There is no liability for negligence unless there is in the particular case a legal duty to take care, and this duty must be one which is owed to the Plaintiff himself and not merely to others. This duty of carefulness is not universal; it does not extend to all occasions and all persons and all modes of activity. The harm to the Plaintiff's interest which has in fact occurred must be of a kind against which it was the duty of the Defendant to take precautions. In the absence of some existing duty the general principle is that there is no liability for a mere omission to act. The fundamental notion appears to be that the imposition of an obligation to take positive steps

for the benefit of another requires that other should furnish something by way of consideration. The standard of conduct required by the common law is that of the reasonable man. The reasonable man is presumed to be free both from over-apprehension and from over-confidence. A reasonable man does not mean a paragon of circumspection. But he is also cool and collected and remembers to take precautions for his own safety even in emergency. So, while on the one hand an error of judgment may not amount to negligence, on the other hand the fact that it might happen to him is not necessarily a defence - even the most careful are sometimes careless.

12. The doctrine that, if the Plaintiff's act was the proximate cause of the damage the Plaintiff could not recover damage was a well-established Principle of Medieval law. In the sixteenth and seventeenth centuries the conception of negligence as a ground of liability worked its way into the common law. With the recognition of negligence as a ground of liability a practice grew up of alleging that a Plaintiff could not recover because he was debarred by his own negligence. The Rule of law is that if there is blame causing the accident on both sides, however small that blame may be on one side, the loss lies where it falls. When any person suffers damage as the result partly of his own fault and partly on the fault of any other person or persons, the claim in respect of that damage shall not be defeated by reason of the fault of the person suffered damage, but the damages recoverable in respect thereof shall be reduced to such extent as the Court thinks just and equitable having regard to the Claimant's share in the responsibility for the damage.

13. The question of contributory negligence does not depend upon any breach of duty as between the Plaintiff and the Defendant. All that the Defendant is obliged to prove is that the Plaintiff failed to take reasonable precautions for his own safety in respect of the particular danger which in fact occurred, so that he thereby contributed to his own injury. This however is not to say that in all cases the Plaintiff who is guilty of contributory negligence owes to the Defendant no duty to act carefully. The governing principle is that the Defendant must show that the Plaintiff has

failed to take reasonable care for his own safety in respect to the particular danger which has in fact occurred. The question whether the principle applies in any particular case is, as always, one of fact. Firstly, the law does not, in general, require any man to be careful of his own safety. What it does say is that a man who has negligently created a danger whereby another person is injured may plead as a way of avoiding liability that the injured person by his negligence contributed to create the danger. Secondly, no question of operative contributory negligence arises in a case where the Defendant proves that the Plaintiff has failed to take precautions against a foreseeable danger which has not occurred and that those precautions, if taken, would have been effective to protect him against the unforeseeable danger which in fact occurred. The statement that the Plaintiff must be shown to have failed to take proper precautions for his own safety against the particular danger which in fact occurred does not mean that the particular form in which the danger manifested itself should actually have occurred to his mind. It is sufficient if it is a danger of a particular class whose occurrence he should anticipate and take reasonable precautions to guard against him. It is necessary to consider not only the causative potency of a particular act, but also its blameworthiness, though culpability here, as elsewhere in the law of torts, means not so much moral blameworthiness as a departure from the standard of care of the reasonable man.

13-A. The Court must also consider a third factor - namely, what is just and equitable. Hence, the precise percentage by which the award is reduced, is a question of fact in each case. The Court should find and record the total damages which would have been awarded if the Claimant had not been at fault. It is inappropriate to apply this principle when the responsibility of one of the parties is properly to be assessed at 100 per cent. The Court cannot deal with minute percentage. It is a question of fact in each case whether the conduct of the Plaintiff amounts to contributory negligence. The burden of proving the negligence of the Plaintiff that contributed to the damage in such a way as to exonerate the Defendant wholly or partially lies upon the Defendant. The Defendant

must always establish such contributory negligence as well amount to a defence. When the Court has to decide, that the case is one in which it is proper to apportion the loss between the parties, the result is that the Plaintiff's damages are reduced to such extent as the Court thinks just and equitable having regard to the Plaintiff's share in the responsibility for the damage.

14. The contributory negligence has two facets. One in which two or more vehicles and drivers are involved in the accident. In such a case the question is who drove the vehicle in a rash and negligent manner. If all of them drove the vehicle in a negligent manner, who contributed to what extent in causing the accident. It is on the basis of such factual finding apportioning the blameworthiness on the drivers, the contributory negligence has to be assessed. To the extent of the percentage of negligence attributed to each driver, the owner of the vehicle and consequently if the vehicle is insured, the Insurer would be liable to pay the compensation. If the driver himself is claiming compensation as third party, if his negligent act is also the cause of the accident, then the compensation payable to him would get reduced to the extent of the percentage of negligence attributed to him.

15. The second fact where the Claimant is not involved in the accident in any manner, i.e., in driving the vehicle but arises out of breach of duty, resulting in injury on account of the accident. Failure to take reasonable care or precaution for his own safety while traveling in a motor vehicle, in respect of the particular danger, which in fact occurred, so that he thereby contributed to his own injury. It is this second aspect, which is dealt with under Section 123 of the Act.

16. Section 123 of the Acts casts a duty on the driver and conductor of a motor vehicle to prevent any person from traveling on the running board or on the top of the vehicle. There is an obligation cast on them under the statute to see that all persons are within the body of the vehicle. In spite of this statutory provision, if they permit any person to travel on the running board or on the top of the vehicle, it is breach of

duty. It is an omission to do some thing which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs would do. The driver and conductor of a motor vehicle owe a duty to the passengers of a motor vehicle to see that they do not travel on the running board or on top of the vehicle. Similarly no person shall travel on the running board or on the top or on the bonnet of the motor vehicle. If he travels, it is a careless conduct, the commission of which amounts to negligence. A duty of care exists as it is embodied in a statute with foresight for the benefit of such persons traveling in a motor vehicle. Mere breach of law or duty would not create a liability to pay damages. Such a breach should result in injury which is the foundation of a claim for damages. Therefore, the question of contributory negligence does not depend upon any breach of duty as between the Plaintiff and Defendant. Such a breach of duty should result in injury and consequent loses. In other words there should be a nexus between the breach of duty and the injury. If there is a blame causing the accident on both sides, the loses lies where it falls. This omission constitute a careless conduct. Foresight is the rest for duty and remoteness."

9. In this context, this Court also deems it fit to consider certain portions from Halsbury's Law, wherein, the duties and responsibilities of the drivers and driving the vehicles on highways, have been explained.
Passing in General

(i) As a general rule, a vehicle proceeding along the highway has the right to pass another vehicle traveling in the same direction. If this can be accomplished in safety, and the driver of each vehicle owes the duty not to injure the other by reason of negligence or wantonness.

(ii) Although there is no rule of law giving one vehicle the unqualified right to overtake and pass another traveling in the same direction, as a general rule, a vehicle proceeding along the highway has the right to pass another vehicle traveling in the same direction, and this is not forbidden. The driver of the overtaken vehicle is entitled to assume that the overtaking vehicle will observe the law of the road in passing by

giving a timely signal by passing to the left of him, and by exercising due care; and he is not bound to anticipate that such vehicle will suddenly cut in or stop in his immediate path, that it may attempt to pass him on the wrong side, or that the operator thereof, after passing him, will fall asleep and lose control of the car.

(iii) Furthermore, he is not bound to anticipate that such vehicle will attempt to pass him at an intersection, where passing at such a place is prohibited by regulation, but he has no right to assume that no one will pass him at an intersection where passing is not unlawful; and, if he should see that the following vehicle is engaged in a passing maneuver in close proximity to his own vehicle and at an intersection, he can no longer rely on the presumption that the following vehicle is going to obey the law.

(iv) Duty to reduce speed. A driver who is proceeding at a reasonable rate of speed on the proper side of the road is not under a duty to reduce his speed so that a car approaching from the rear may pass him even though a third car is approaching from the opposite direction; but it has been held that an increase of speed by the vehicle being overtaken, after the following vehicle has signaled his intention to pass and is in the act of passing, may in some circumstances constitute negligence, and under some regulations the overtaken vehicle is required to refrain from increasing its speed while being passed.

(v) Duty to stop. Under ordinary circumstances driver is not obliged to stop in order to permit the passage of an overtaking vehicle, but the circumstances may be such as to impose on the slower moving vehicle a duty to stop for a sufficient time to permit a faster moving vehicle to pass.

Duties of Overtaking Vehicle

(i) The operator of a motor vehicle who wishes to over take and pass a vehicle preceding him must exercise vigilance commensurate with the surrounding conditions and he must so manage his automobile as not to cause injury to others; he must see to it that the condition are such that an

attempt to pass is reasonably safe and prudent, and in passing must exercise reasonable care.

(ii) As a general rule, the operator of a motor vehicle who wishes to overtake and pass a vehicle proceeding in front of him must exercise vigilance commensurate with the surrounding conditions, and he must so manage his own automobile as not to cause injury to others under the penalty of being chargeable with negligence. The driver of the overtaking car must see to it that the conditions are such that an attempt to pass is reasonably safe and prudent, and a signal from the preceding vehicle that it is safe to pass does not relieve the driver of the following vehicle from the duty of making his own independent observation as to when it is safe for him to pass.

(iii) In passing he must exercise reasonable care and comply with all traffic regulations, including those generally applicable to vehicles traveling in the same direction and the duty of care does not shift to the overtaken vehicle until the passing has been safely made.

(iv) Under some regulations an overtaking vehicle is required to have a clear view ahead for a specified distance before passing an overtaken vehicle, and the violation of such a regulation constitutes negligence where there is no emergency or loss of control, justifying such violation. The driver of the following automobile may not lawfully turn to the left and increase speed in order to overtake and pass another vehicle unless the road is clear of obstacles which might obstruct such passage and violation of a statute so providing may constitute negligence per se.

(v) Furthermore, it may constitute negligence to attempt to pass when the vehicle ahead is approaching an intersecting road or passageway where a possibility of its making a left-hand turn should be anticipated, when the operator of the preceding vehicle has evidenced his intention to make a left turn, or where the vehicle ahead is in the act of going around another vehicle also proceeding in the same direction; but it has been stated that an overtaking driver is free of negligence when the forward driver makes a sudden unsignaled left turn across his path.

(vi) If there is not sufficient room for a safe passage the driver of the overtaking vehicle should not attempt to pass but should wait until a place is reached where a safe passage may be had, and failure of the overtaken car to turn to the right as soon as a signal of desire to pass is given does not warrant the operator of the overtaking car in attempting to pass before this can safely be done or in running into the vehicle ahead.

(vii) If, after turning out to pass, the driver of the overtaking car finds conditions such that he cannot make the passage in safety, he should either stop or drop back to his former position in the rear of the other car, and he must so regulate his speed as to be able to stop in time to avoid a collision with the vehicle ahead in his effort to return to the lane of travel.

(viii) Where the traveled track is too narrow to permit the passage of two vehicles, but a turnout is reasonably practicable, the overtaking car is entitled only to one half of the traveled track, but if the overtaken vehicle gives way so as to allow the overtaking vehicle the entire traveled track the latter vehicle may occupy it and its driver is under no obligation to turn out to the left.

(ix) The driver of the overtaking vehicle may assume that the driver of the overtaken vehicle will comply with regulations or ordinances, or with the law of the road, as by giving way to the right on audible signal, and that such vehicle will remain on the right side of the road after warnings, and that its driver will signal before making any intended turn.

(x) So the driver of the overtaking vehicle sounding his horn is justified in assuming that the forward driver turned to the right edge of the road in response to the signal to permit a passing until such time as the motorist, exercising ordinary prudence, can see that such assumption is unwarranted, and he does not assume the risk of a sudden unexpected left turn by the leading vehicle. The driver of the passing vehicle may also assume that no greater caution or skill will be required of him than would be necessary if such driver were on his own right side of the road.

(xi) As shown infra subdivision (b) of this section, a driver on a heavily traveled highway turning into the left lane to pass some vehicles is bound to anticipate that other vehicles would likely be approaching in the opposite direction in that lane; but where the highway is clear of traffic, as far as the overtaking motorist can discern, he is justified in negotiating the passing movement, and is not required to anticipate the presence of an obstruction.

10.Re-point No.1:- P.W.1/father of the deceased deposed that on 30.12.2004 at about 7.00pm, when the deceased was driving the mini lorry bearing Regn.No.TN32 4055 from South to North in a normal speed, observing all the rules of traffic, on the Perundurai to Bhavani Main Road, near Kandampalayam Pirivu, the driver of the lorry bearing Regn.No.TN36 B 7277, without giving any signal, suddenly turned it to the right side and hit the mini lorry, which resulted in death of the deceased. P.W.2 who is said to be the eyewitness to the accident, asserted that after the accident, he saw the deceased in the mini lorry in dying position. The testimony of P.W.3 corroborated the evidence of P.W.1 and P.W.2. However, no motor vehicle inspector's report pertaining the mini lorry driven by the deceased was produced with regard to the damage caused to the vehicle. The appellant Insurance Company, placing reliance on Exs.P1-FIR, P2-observation mahazar, P3-rough sketch and P5-Motor Vehicle Inspector's report, contended that the deceased, while trying to overtake the lorry, which was going in the front, drove the mini lorry in a rash and negligent manner and hit the lorry on the rear side, due to which, he sustained fatal injuries and hence, he was responsible for the accident. After evaluating those oral and documentary evidence and also considering the fact that Ex.P1 FIR was also lodged against the driver of the lorry, coupled with the evidence of P.W.2, the Tribunal has rightly come to the conclusion that the accident was due to the contributory negligence of the deceased as well as the driver of the insured lorry, which this Court is not inclined to interfere. However, the percentage of contributory negligence fixed on the part of the deceased and the driver of the lorry at 20% and 80% respectively is hereby modified as 30% and 70%, having regard to the facts and circumstances of the case. This point is accordingly, answered in favour of the appellant.

11.Re-point No.2: P.W.1 stated that the deceased was aged 23 years and was working as driver and was earning Rs.5,000/- per month at the time of accident. He further deposed

that due to the death of the deceased, the claimants have lost their breadwinner of the family, besides his love and affection and hence, sought Rs.6,00,000/- as compensation. But no document was produced to prove the monthly income of the deceased. The Tribunal, after evaluation of the oral and documentary evidence available on record, has taken the monthly income of the deceased at Rs.2,400/- and adopted the multiplier of 17 and after making necessary deduction towards his personal expenses, calculated the loss of dependency at Rs.3,26,400/-. Further, the Tribunal has awarded Rs.5,000/- towards loss of love and affection and Rs.2,000/- towards funeral expenses. Though it is argued on the side of the appellant that the multiplier adopted by the Tribunal, considering the age of the deceased is incorrect, this Court is not inclined to accept the same, in view of the decision in National Insurance Co. Ltd. v. Pranay Sethi [(2017) 16 SCC 680], wherein, the Supreme Court held that the age of the deceased should be the basis for applying the multiplier. Thus, the quantum so awarded by the Tribunal is perfect just and reasonable and the same warrants no interference at the hands of this Court. This point is accordingly, answered against the appellant.

12. In view of the aforesaid discussions, this appeal is allowed in part. No costs. Consequently, connected Miscellaneous Petition is closed. The appellant/Insurance Company is directed to deposit Rs.2,33,380/- (70% of the award amount) with interest and costs, less the amount already deposited, if any, within a period of four weeks from the date of receipt of a copy of this judgment. On such deposit being made, the Tribunal shall transfer the same to the respective savings bank account of the respondents/claimants through RTGS, as per the ratio of apportionment made by the Tribunal, within a period of one week thereafter.

Sd/-

Assistant Registrar(CS-IV)

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Sub Assistant Registrar

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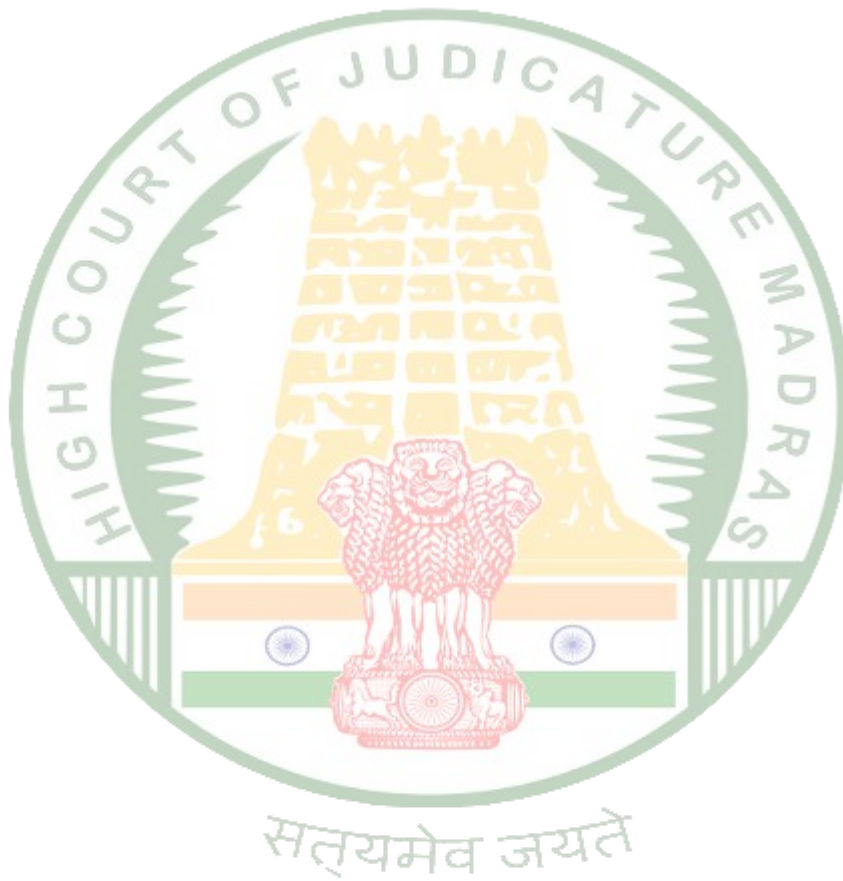
1.The Additional District Judge
Motor Accidents Claims Tribunal,
Fast Track Court No.1, Erode.

2.The Section Officer,
V.R.Section,
Madras High Court,
Chennai 104.(+2 copies)

+1cc to Mrs.N.B.Surekha, Advocate SR.68868
+1cc to Mr.N.Manokaran, Advocate SR.68729

C.M.A.No.2824 of 2006

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