



IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 24.04.2019

CORAM:

THE HONOURABLE MS.JUSTICE V.M.VELUMANI

C.M.A.Nos.261 and 262 of 2018

Ganeshan @ Ganesh .. Appellant in C.M.A.No.261/2018

Ragu .. Appellant in C.M.A.No.262/2018

Vs.

1.Vilasini

2.The United India Insurance Co. Ltd.,
O.V.266-Kapila Towers II, Mettupalayam Road,
Coimbatore. .. Respondents in both C.M.As.

Common Prayer: These Civil Miscellaneous Appeals are filed under Section 173 of Motor Vehicles Act, 1988, against the award dated 07.08.2012 made in M.C.O.P.Nos.897 & 900 of 2010 on the file of the Sub Court, (Motor Accident Claims Tribunal), Sathyamangalam.

For Appellant : Mr.Ma.P.Thangavel

For R1 : No appearance

For R2 : Mr.T.Ravichandran

C O M M O N J U D G M E N T

These Civil Miscellaneous Appeals have been filed by the appellant/claimant against the common award dated 07.08.2012 made in M.C.O.P.Nos.897 & 900 of 2010 on the file of the Sub Court, (Motor Accident Claims Tribunal), Sathyamangalam.

2.Both the appeals arise out of the same accident and common award and hence, they are disposed of by this common judgment.

3.The appellants/claimants filed M.C.O.P.Nos.897 & 900 of 2010 on the file of the Sub Court, (Motor Accident Claims Tribunal), Sathyamangalam, claiming a sum of Rs.10,00,000/- each as compensation for the injuries sustained by them in the accident that took place on 26.09.2010.



4.The Tribunal considering the pleadings, oral and documentary evidence, held that the accident occurred due to rash and negligent driving by both the rider of the motorcycle in which the appellants traveled as pillion as well as the driver of the Indica Car belonging to the 1st respondent and fixed 50% negligence on both of them and directed the respondents to pay a sum of Rs.1,17,000/- and Rs.85,750/- jointly and severally being 50% of the compensation amount to the appellants/claimants.

5.Challenging the award fixing 50% contributory negligence on the part of the rider of the motorcycle and for enhancement of the compensation granted by the Tribunal in the award dated 07.08.2012 made in M.C.O.P.Nos.897 & 900 of 2010, the appellants have come out with the present appeals.

6.The learned counsel appearing for the appellants contended that the Tribunal failed to consider that FIR and charge sheet are against the driver of the Indica car belonging to the 1st respondent. The 1st respondent remained exparte before the Tribunal. There is no contra evidence let in by the respondents to disprove the case of the appellants. In the absence of any contra evidence, the Tribunal erred in fixing 50% contributory negligence on the part of the rider of the motorcycle in which the appellants traveled as pillion rider, without any basis, only on the ground that four persons traveled in the motorcycle at the time of accident. The finding of the Tribunal is perverse against the settled proposition of law. The Tribunal failed to see that there is no evidence to show that the accident occurred only due to four persons traveled in the motorcycle. The Tribunal ought to have awarded more compensation by applying multiplier method based on the income earned by the appellants and the appellants are not able to work due to the multiple injuries and shortening of $\frac{1}{2}$ inch in the left leg and removal of femur, the appellants cannot stand for a long time. The Tribunal failed to grant any amount towards loss of amenities, future medical expenses and loss of expectation of life and the amounts granted by the Tribunal towards pain and suffering, extra nourishment and loss of income are very meagre and prayed for enhancement of the compensation. In support of his contentions, the learned counsel appearing for the appellants relied on the following judgments:

(i)2011 (1) TN MAC 136 (DB) [The Branch Manager, United India Insurance Compny Ltd., Vs. Uma and others]:

"10.Learned Counsel for Appellant-Insurance Company mainly contended that as per Section 128 of M.V. Act, no driver of two wheeled motorcycle



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shall carry more than one person in addition to himself and having violated the provisions of Section 128 of M.V. Act, the deceased himself contributed to the accident. It was further contended that Tribunal has failed to appreciate that as per the Police records and the admissions in the Claim Petitions, the deceased Murugappan drove the motorcycle along with his son and his wife and thereby contributed to the accident which the Tribunal failed to take into account.

11. Plea of contributory negligence has to be established by substantive evidence. After necessary Application under Section 170 of M.V. Act, Appellant-Insurance Company must have adduced proper evidence to substantiate the plea of contributory negligence. Even though Appellant-Insurance Company has taken the plea of contributory negligence, no substantive evidence was adduced to establish the same. Apart from the self-serving evidence of RW1, no evidence was adduced to substantiate the same.

12. As seen from Exs.P1-FIR, Criminal case in Crime No. 16/2003 was registered against the lorry driver. After completion of the investigation, charge-sheet [Ex.P4] was also filed against the lorry driver. Filing of charge-sheet [Ex.P4] is a prima facie indication showing that the driver of the Lorry is responsible for the accident. Merely because three persons travelled in the Motorcycle, it is not to be readily presumed that deceased was negligent in riding the TVS Suzuki. It is pertinent to note that the deceased was travelling with his wife and with their son Nagappan @ Siva, aged 14 years. In the absence of substantive evidence, Tribunal rightly held that the accident was due to rash and negligent driving of the Lorry driver and rightly rejected the plea of contributory negligence."

(ii) 2004 1 CTC 677 [Kattabomman Transport Corporation Ltd., vs. Vellai Duraichi and others]:

"8. In the light of the said conclusion, we have carefully verified the factual details and the ultimate decision arrived at in the first Division Bench decision, namely, Tamil Nadu State



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Transport Corporation, Coimbatore Division v. Abdul Salam (cites supra). As observed earlier, except stating that 3 persons travelled in a motor vehicle, which is prohibited, no specific finding was given to the effect that travelling of three persons in a motor cycle was responsible for the accident; hence we are of the view that the conclusion in 2003 I M.L.J. 489 is to be confined to that case. In other words, merely because there is violation of the provisions of the Act or Rules or the policy conditions, it is not automatic that in every case the principle of contributory negligence is to be applied mechanically. As rightly observed in the other Division Bench decision, namely, M. Anandavalli Amma v. Arvind Eye Hospital (2002-3 L.W. 710), unless there is evidence to prove that the accident took place only because of such act that is taking/travelling more persons in a motor cycle which resulted in an accident, the owner of the other vehicle and its insurer will be liable to pay compensation. To put it clear, if the appellant-Transport Corporation is able to prove that it is because of the addition of one more (third person in the motor cycle instead of two), the accident occurred, the position would be different. In other words, unless the owner of the vehicle or the Insurance Company is able to prove that the accident took place only because of such act that is taking more persons than the prescribed number, the owner/Insurance Company will be liable to make good the loss/compensation. In the case on hand the materials placed before the Tribunal show that it was the bus driver who had gone to the other side of the road, hit the motor cycle thereby caused the accident. There is no evidence to show that the accident occurred because of travelling of three persons in the motor cycle. In the light of the above said conclusion, we reject the contra argument made by the learned counsel for the appellant."

(iii)2008 (1) MPLJ 98 [Devi Singh Vs. Vikram Singh and others]:

"3. In its order dated 24-8-2000 passed in the present appeals, the Division Bench found that in Manjo Bee v. Sajjad Khan, 2007 ACJ 737, a Division Bench of this Court has taken a view that



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carrying more passengers than one on motorcycle is in violation of section 128 of the Act but by carrying more persons, one cannot be said to be negligent as a person having more than one pillion rider can also be more careful than a person going alone on a motorcycle and accordingly repelled the plea of contributory negligence on behalf of the driver of the motor-cycle raised in that case. The Division Bench further found that in National Insurance Company Ltd. v. Smt. Uma Tiwari, (2007) 1 MANISA 204 (M.P.), another Division Bench of this Court accepted the contention that the deceased who was driving the scooter along with three other persons by violating the provisions of section 128 of the Act was negligent and had accordingly determined the liability on the owners of the jeep and the scooter in the proportion of 70:30 and another Division Bench of this Court in Kanti Devi Sikarwar v. Om Prakash, (2006) 4 MPLJ 291 : (2007) 1 MPWN 88, has held that section 128 of the Act bars riding of more than one pillion rider on the motorcycle and in that case the deceased who was driving the motorcycle in violation of the provisions of section 128 of the Act was guilty of contributory negligence.

7. Per contra, the learned counsel appearing for the 2nd respondent contended that the appellants have admitted that 4 persons traveled in the motorcycle at the time of accident and they saw the Indica car only when it came near to the motorcycle as they were talking while traveling in the motorcycle. The Tribunal considering the entire materials on record, fixed 50% negligence on the part of the appellants. There is no error in the said finding of the Tribunal. The total amount awarded by the Tribunal is not meagre and prayed for dismissal of the appeals.

8. The learned counsel appearing for the 2nd respondent relied on the judgment reported in 2018 (2) TN MAC 302 (DB) (Reliance General Insurance Company Limited, Chennai vs. B.Chithra and others):

"17. Though there is no rebuttal evidence on the side of the appellant/Insurance company, there is a specific stand taken by the appellant/insurance company, which has been incorporated in the award of the Tribunal as follows:



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"(9)The second respondent contested the claim but the accident is not disputed. According to the second respondent, the deceased did not possess driving license and insurance and the deceased with over load had driven the auto in a rash and negligent manner with two persons sitting on either side of the deceased and further the deceased had suddenly turned the auto from Poonamallee High Road to Noombal Road and capsized at the turning point but to substantiate the same no oral or documentary evidence has been produced on the second respondent side.

18.When such a stand was taken, the claimants should have exhibited the driving licence of the deceased. The non-marking of driving licence of the deceased would show that he was not possessed with valid and effective driving licence. It has become a routine that almost about 50% of the drivers drive the vehicles without any valid and effective driving license and cause many accidents, resulting in loss of precious lives and injuries to many persons. Therefore, in an attempt to deprecate this kind of practice of driving vehicles without any valid and effective driving licence, 10% of the amount awarded towards compensation is deducted. If 10% is deducted, the compensation amount comes to Rs.17,60,400/- (Rs.19,56,000/- (-) 10% of Rs.19,56,000/-)."

9.Heard the learned counsel appearing for the appellant in both the appeals as well as the 2nd respondent and perused the materials available on record.

10.From the materials on record, it is seen that four persons have traveled in the motorcycle at the time of accident. The appellants in both the appeals in the cross examination have admitted that they were talking while traveling in the motorcycle and saw the Indica car when it was nearing the motorcycle. They also admitted that the accident has occurred in the middle of the road. The Tribunal considering the fact that four persons have traveled in the motorcycle, held that the rider of the motorcycle could not have control over the handle bar of the motorcycle and brake. Based on the above materials, the Tribunal fixed 50% contributory negligence on the part of the rider of the motorcycle. The 2nd respondent in the counter statement contended that four persons traveled in the two-wheeler and they are responsible for the accident and accident



has occurred only due to negligence on the part of the appellant. When such a stand was taken, it is for the appellants to prove that the accident did not occur due to their negligence. In the judgment reported in 2018 (2) TN MAC 302 (DB) [Reliance General Insurance Company Limited, Chennai vs. B.Chithra and others] relied on by the learned counsel appearing for the 2nd respondent, it was held that when a stand was taken by the 2nd respondent therein that the deceased did not possess driving license at the time of accident, it has to be proved by the claimants that the deceased had driving license at the time of accident by producing driving license. On such reasoning, 10% was deducted from the total compensation awarded. Applying the same principle, the appellants ought to have proved that the accident did not occur due to their negligence or by negligence of the rider of the motorcycle. The appellants as P.W.1 and P.W.2 admitted the following facts:

"(i) Four persons were traveling in the motorcycle at 9.30 p.m on Mettupalayam-Ooty road in hilly area.

(ii) They were talking to each other while driving.

(iii) They saw the car belonging to the 1st respondent only when the same was near to where the accident has occurred.

(iv) The accident has occurred only in the middle of the road."

10(a). These admitted facts clearly prove that the appellants and the rider of the motorcycle and other persons travelled as pillion are responsible for the accident. In the facts of the present case, the judgments relied on by the learned counsel for the appellants are not applicable to the present case. Similarly, the contention of the learned counsel appearing for the appellants that the respondents ought to have pleaded and proved contributory negligence on the appellants is without merits. It is well settled that admitted facts need not be proved. This issue was considered by a Division Bench of this Court and in paragraph numbers 11 and 12 of the judgment reported in 2003 1 MLJ 489 [The Managing Director, Tamilnadu State Transport Corporation, Coimbatore Vs. Abdul Salam and others], this Court has held as follows:

"11. We are concerned as to whether such action of the individuals is permissible under law. The motor cycle and any other two wheelers are meant only for two persons, the rider and a pillion rider. If more than two persons are travelling in a motor cycle or any other two wheeler, undoubtedly such action of the individual would



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become illegal and unauthorised. It is an awful sight when we come across three persons travelling in a motor cycle. They are sitting in such a cramped manner that the rider of the motor cycle almost sitting on the petrol tank or at the front edge of the seat. When he was sitting in such a position, naturally because of the restricted movement of his legs, he cannot have the complete control over the brake. The movements of his hands also so restricted. When that be so, this court is of the opinion that definitely the rider of the two wheeler cannot have full control over the vehicle.

12. Apart from that, when three persons are travelling in a motor cycle, two as pillion riders, any unusual movement of the pillion riders would make the rider of the motor cycle to loose his control over the vehicle. Even though such travelling of three persons in a motor cycle is contrary to the statute, still the enforcement wing do not care to take note of the same and failed to take action against their illegal action. Virtually because of the failure on the part of the enforcement wing, such travelling of three persons in the two wheelers has become a regular sight. Even though the highway patrolling is available but it is a rare sight to see a highway patrolling vehicle. The travelling of three persons has become rampant in the mofussils and in the City; especially among the youngsters like the college students. When that be the case, the enforcing authority is expected to enforce the statute with some strictness to avoid any untoward incident. There is no purpose in conducting the Road Safety Week without infusing the road sense in compliance of the Rules and Regulations of the statute in the minds of those who are using the vehicles."

10(b). The Division Bench has taken a judicial note of the fact that when three persons travel in a two-wheeler, the rider of the two-wheeler will not have control over the handle bar and the brake. The rider of the motorcycle is almost sitting on the petrol tank when three persons travel in the motorcycle. This Court also held that law enforcing agency must prevent the practise of three persons travelling in the two-wheeler. Even though the said judgment was delivered in 2003, even in 2019 in



most of the two-wheelers three persons travel and law enforcing agency has not taken any steps to prevent such statutory violation. This Court held that upon three persons travel in two-wheeler, the rider will not have control over handle bar and brake, whereas in the present case, four persons traveled in the two-wheeler and definitely the rider of the motorcycle would not have had control over the handle bar and brake. Hence, there is no error in the award of the Tribunal warranting interference by this Court.

11.As far as the quantum of compensation is concerned, the amounts awarded by the Tribunal is not meagre warranting enhancement by this Court.

12.In the result, both the Civil Miscellaneous Appeals are dismissed and the compensation granted by the Tribunal at Rs.1,17,000/- and Rs.85,750/- along with interest and costs is confirmed. The respondents are jointly and severally directed to deposit the award amount along with interest and costs, less the amount already deposited if any, within a period of six weeks from the date of receipt of a copy of this judgment, to the credit of M.C.O.P.Nos.897 & 900 of 2010. On such deposit, the appellant/claimant in both the appeals are permitted to withdraw the award amount along with interest and costs, less the amount already withdrawn if any, by filing necessary application before the Tribunal. No costs.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

To

The Special Subordinate Judge,
(Motor Accident Claims Tribunal), Erode.

Copy to : The Section Officer, V.R. Section, High Court, Madras.

+1 cc to M/s.Ma.P.Thangavel, Advocate Sr.No.39752
+1 cc to Mr.T.Ravichandran, Advocate Sr.No.39010

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C.M.A.Nos.261 and 262 of 2018