IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved On	24.03.2021
Pronounced On	02.06.2021

CORAM

THE HON'BLE **MR.JUSTICE R.SUBBIAH**
and
THE HON'BLE **MR.JUSTICE C.SARAVANAN**

C.M.A.Nos.1245, 1264, 1321 & 1327 of 2020
and
C.M.P.Nos.8266, 8429 & 8430 of 2020

C.M.A.Nos.1245 & 1264 of 2020

United India Insurance Company Ltd.,
D.No.266, Kabila Towers, 2nd Floor,
Mettupalayam Road, Coimbatore – 641 043. ... Appellant

Vs.

1.Kaveri
2.Alagarasi
3.Chitra @ Aruna
4.Sun Transports,
34B, Thiruvidaimarudhur Road,
Kumbakonam, Thanjore District.
5.K.Rajkumar
6.The New India Assurance Co. Ltd.,
83, TSR Big Street, Kumbakonam. ... Respondents

C.M.A.Nos.1321 & 1327 of 2020

Kaveri (Deceased)

1.Alagarasi
2.Chitra @ Aruna ... Appellants

Vs.

1.Sun Transports,
34B, Thiruvidaimaruthur Road,
Kumbakonam, Tanjavur District.
2.K.Rajkumar
3.The New India Assurance Company Limited,
83, TSR Big Street, Kumbakonam.
4.United India Insurance Company Limited,
D.No.266, Kapila Towers, 2nd Floor,
Mettupalayam Road, Coimbatore – 641 043. ... Respondents

Prayer in C.M.A.No.1245 of 2020: Civil Miscellaneous Appeal filed under Section 173 of Motor Vehicles Act, 1988 against the Judgment and Decree dated 24.11.2017 made in M.C.O.P.No.179 of 2010, on the file of the Motor Accidents Claims Tribunal (Sub Court), Sankari.

Prayer in C.M.A.No.1264 of 2020: Civil Miscellaneous Appeal filed under Section 173 of Motor Vehicles Act, 1988 against the award and Decree dated 24.11.2017 made in M.C.O.P.No.180 of 2010, on the file of the Motor Accidents Claims Tribunal (Sub Court), Sankari.

Prayer in C.M.A.No.1321 of 2020: Civil Miscellaneous Appeal filed under Section 173 of Motor Vehicles Act, 1988 as amended by Act 54 of 1994 to set aside the order made in M.C.O.P.No.179 of 2010, on the file of the Motor Accidents Claims Tribunal Cum Subordinate Court, Sankari dated 24.11.2017.

Prayer in C.M.A.No.1327 of 2020: Civil Miscellaneous Appeal filed under Section 173 of Motor Vehicles Act, 1988 as amended by Act 54 of 1994 to set aside the order made in M.C.O.P.No.180 of 2010, on the file of the Motor Accidents Claims Tribunal Cum Subordinate Court, Sankari dated 24.11.2017.

C.M.A.Nos.1245 & 1264 of 2020

For Appellant : Mr.D.Bhaskaran

For R1 to R3 : Mr.C.Kulanthaivel
For R4 & R5 : set exparte
For R6 : Mr.K.Vinod

C.M.A.Nos.1321 & 1327 of 2020

For Appellants : Mr.C.Kulanthaivel
For R1 & R2 : set exparte
For R3 : Mr.K.Vinod
For R4 : Mr.D.Bhaskaran

COMMON JUDGMENT

C.SARAVANAN,J.

By this common order we are disposing all the four appeals. These appeals are directed against the impugned common judgment and separate decrees dated 28.11.2017 passed in M.C.O.P Nos. 179 and 180 of 2010 by the Motor Accident Claims Tribunal, Sub Court, Sankari.

2. By the impugned common judgment and separate decrees in MCOP Nos. 179 and 180 of 2010, the Tribunal has awarded the following compensation to the claimant [the Appellant in C.M.A.No.1321 of 2020 and C.M.A.No.1327 of 2020] payable by the insurer of the Car namely the United India Insurance Company Ltd [the appellant in CMA Nos. 1245 and 1264 of 2020] and by the insurer of lorry bearing registration No. TN.

49 R. 8509, namely the New India Assurance Company Limited, [one of the respondent in these appeals] as detailed below:-

MCOP Nos.	Amount Awarded by the Tribunal	Compensation Apportioned by the Tribunal.	
		The United India Insurance Company Ltd.- The Appellant in **CMA Nos. 1245 and 1264 of 2020** (80% of the award Amount)	New India Assurance Company Limited. (20% of the award amount)
MCOP No. 179 of 2010 [For the death of the co-passenger Mr.Kandasamy]	Rs. 4,60,000/-	Rs. 3,68,000/-	Rs. 92,000/-
MCOP No. 180 of 2010 [For the death of the Driver of the car Mr.Arul]	Rs.61,65,000/-	Rs.49,32,000/-	Rs.12,33,000/-

3. CMA Nos.1321 and 1327 of 2020 have been filed by the legal heirs of the deceased Mr.Kandasamy and the deceased Mr.Arul S/o Mr.Kandasamy who died in an accident, while CMA Nos. 1245 and 1264 of 2020 have been filed by United India Insurance Company Ltd., the insurer of the Car.

4. Since the parties are both appellant and respondent in the

respective appeals, they shall be referred to as claimant and the insurer of car and insurer of the lorry for the sake of convenience.

5. The 1st Claimant before the Tribunal has since deceased, was the wife of deceased late Mr.Kandasamy, the co-passenger and the mother of deceased Mr.Arul, driver of the insured car involved in the accident. The other claimants are the two daughters/the sisters of these deceased persons.

6. They have questioned the conclusion and the reasoning of the Tribunal fixing contributory negligence on the driver of the car deceased Mr.Arul. The Tribunal has fixed 80% liability on the driver of the car for the accident.

7. On the other hand, CMA Nos. 1245 and 1264 of 2020 have been filed by insurer of the car namely United India Insurance Company Ltd., which had insured the car in which the deceased travelled along with other injured passengers on 07.03.2010.

8. Brief facts of the case are that on 07.03.2010, Tata Indigo car, bearing registration No. TN.34 J3510 insured with the United India Insurance Company Ltd [the appellant in CMA Nos. 1245 and 1264 of

2020] was driven by Mr. Arul aged about 34 years. In the said car, his father Mr.Kandasamy aged about 68 years had travelled as a co-passenger along with three other relatives at the back of the car as other co-passengers.

9. The accident is said to have taken place at about 10 PM in the night on 07.03.2010 when the insured car hit the lorry from behind as a result of which all the occupants of the car suffered grievous injuries. Mr.Kandasamy succumbed to the injuries on the spot while his son Mr.Arul, driver of the car, later died in the hospital on the following day.

10. The other occupants in the car namely Mrs.Shanthi, Mr.Ravichandran and their minor son Master Jai Chandru suffered grievous injuries due to the accident and were admitted in a hospital for treatment.

11. Thus, five different claim petitions were filed. Three claims in M.C.O.P.Nos.201-203 of 2010 were filed by injured person before the same Tribunal which culminated in a common judgment and three separate decrees dated 10.11.2017. These cases were decided by the Tribunal

separately.

12. Two claims in M.C.O.P Nos. 179 and 180 of 2010 filed by the dependents/legal heirs of the two deceased person culminated in the impugned judgment and decree dated 24.11.2017. Separate appeals against the judgment and decree in M.C.O.P.Nos.201-203 of 2010 were disposed by separate orders by this Court. Details of all the respective MCOP Numbers and the respective appeals before this Court are as under:-

Sl. No	Claimants	MCOP No.	Date of Judgment and Decree.	Award Amount	C.M.A No.	Appellant
1. 2. 3.	Kaveri, Alagarasi Chitra	179 of 2010 (Death of Mr.Kandasamy)	**24.11.2017**	4,60,000 ________	**1321 of 2020**	Kaveri Alagarasi Chitra
					1245 of 2020	United Insurance Company Ltd.
					4455 of 2019	The New India Assurance Company Ltd.
4. 5.	Kaveri , Alagarasi Chitra.	180 of 2010 **(Death of Mr.Arul**)	**Do.**	61,65,000	**1327 of 2020**	Kaveri Alagarasi Chitra
					1264 of 2020	United Insurance Company

						Ltd.
6.					4458 of 2019	The New India Assurance Company Ltd.
7.	Shanthi	201 of 2010 (Injury Case)	**10.11.2017**		1830 of 2019	The New India Assurance Company Ltd.
8.	Ravichandran	202 of 2010 (Injury Case)	**10.11.2017**		1832 of 2019	-Do-
9.	Minor Jai Chandru	203 of 2010 (Injury Case)	**10.11.2017**		1833 of 2019	-Do-

Note:-

i) These Appeals against the impugned judgment and decrees at Sl. No.1,2 and 4,5.

ii) The appellant in **Sl.No.3** to the above table in CMA No. 4455 of 2019 was also filed by the insurer of lorry **The New India Assurance Company Ltd.** A Memo was filed by the appellant therein. The appeal was permitted to withdrawn in view of the order dated18.3.2019 in C.M.A Nos. 1830, 1832 and 1833 of 2019 at **Sl.Nos.7,8 & 9**. Same was recorded by an order dated 26.08.2020.

iii) The appellant **Sl.No. 6** to the above table in CMA No. 4458 of 2019 was also filed by the insurer of lorry **The New India Assurance Company Ltd.** The said appeal was disposed in terms of a memo. As per the above memo, appellant **The New India Assurance Company was advised to get the appeal disposed in line with the orders passed on** dated 18.3.2019 in C.M.A No. 1830, 1832 and 1833 of 2019.

iv) The appeals at **Sl.Nos.7, 8 & 9** to the above table in C.M.A Nos. 1830, 1832 and 1833 of 2019 were also filed by the insurer of lorry **The New India Assurance Company Ltd.** These appeals were dismissed at the time of admission after notice to the 1st respondent/claimant therein vide order dated 18.3.2019 by a single judge of this Court.

13. We have heard the learned counsel for the claimants and the perspective insurance companies.

14. At the outset we would like to point out that there is a glaring error in the impugned judgment and decree passed in M.C.O.P.No. 180 of 2010by the Tribunal. The Tribunal has erred in ordering payment of compensation by the insurer of the car appellant United India insurance Co Ltd in CMA Nos.1245 and 1264 of 2020 after giving finding that the driver of the insured car was negligent.

15. If the driver of the insured car late Mr.Arul was negligent, liability if any, at best, that could have been fastened on the appellant in CMA No.1264 of 2020 namely United India Insurance Co Ltd, insurer of the car can only be confined only on the amount specified in the comprehensive package policy covering the risk of the driver cum owner of the insured car and no more.

16. The Tribunal cannot fix 80% contributory negligence on the driver of the car and still hold the Appellant in C.M.A.No.1264 of 2020

[United India Insurance Co. Ltd] to pay compensation.

17. Thus, there is flaw in the impugned judgment and decree to that extent. Thus, the amount of Rs.49,32,000/- awarded to the claimants MCOP No. 180 of 2010 to be paid by the appellant in CMA No. 1264 of 2020 namely United India insurance Co Ltd. cannot be sustained.

18. For the same reason also an amount of Rs.3,68,000/- that has been ordered to be paid by the appellant in CMA No. 1245 of 2020 [United India Insurance Co. Ltd.] as per the impugned judgment and decree in MCOP No. 179 of 2010 cannot be sustained.

19. The claimants on the other hand in C.M.A.Nos.1321 & 1327 of 2020 have questioned the finding of the Tribunal that the driver of the insured car namely the deceased Arul was negligent and responsible for the accident.

20. Since the issue relating to fixation of contributory negligence has been questioned in these appeals by the claimant, the learned counsel for the insurer of the insured lorry involved in the accident namely New India

Assurance Company Limited submitted that by operation of res-judicata, the Appellants/Claimants in C.M.A.Nos.1321 & 1327 of 2020 were precluded from questioning the fixation of contributory negligence in these appeals.

21. He submits that the contributory negligence and liability arrived by the Tribunal has already attained finality vide order dated 18.03.2019 in C.M.A Nos. 1830, 1832 and 1833 of 2019 in the appeal filed by New India Assurance Company Limited and in view of subsequent order dated 26.08.2020 of the Division Bench in C.M.A.Nos. 4455 and 4458 of 2020 in the appeals filed by the same party namely the New India Assurance Company Limited against the impugned judgment and decree herein.

22. In this connection reference was made to the following decisions by learned counsel for the said Insurance Company:-

(i) **S.Palanisamy and another** Vs **Chinnakali and others**, 2007 (2) TNMAC 147.

(ii) **AmiraliJafarali Khoja** Vs **MohmadbhaiUsmanbhai Shaikh**, 2008 ACJ 2012.

(iii) **Oriental Insurance Co. Ltd.,** Vs **R.Gopalakrishnan and others**, 2010 (1) TNMAC 255 (DB)

(iv) **Oriental Insurance Co. Ltd.,** Vs **Umakanta Sethi**, 2014 ACJ 2517.

(v) **Shyam Babu** Vs **District Judge, Moradabad**, AIR 1984 SC 1399.

(vi) **State of West Bengal** Vs **Hemant Kumar Bhattacharjee**, AIR 1966 SC 1061.

23. Therefore, before proceeding further as to whether the Tribunal was justified in coming to conclusion as to whether the deceased driver of the Car Mr.Arul was negligent or not we first proceed to answer the preliminary objection raised by the learned counsel for New India Assurance Company Limited, the insurer of the lorry.

24. The orders of this Court in C.M.A.Nos.1830 of 2019 to 1833 of 2019 at Sl.Nos. 7 to 9 in the above Table pertains to the appeals filed by the Appellant New India Insurance Company Limited. They were against order dated 10.11.2017 passed by the Tribunal in M.C.O.P.Nos.201 to 203 of 2010 filed by the three injured claimants. Though the respective appellants herein were parties therein in C.M.A.Nos.1830 of 2019 to 1833

of 2019, it was disposed *exparte* without awaiting service of notice on the respective appellant herein.

25. In our view, the objections of the learned counsel for the New India Assurance Company Limited is to be negatived. At best, such a plea of res-judicata would operate against itself New India Assurance Company Limited itself in these appeals if it was arguing contrary to the order dated 18.03.2019 in CMA Nos. 1830, 1832 and 1833 of 2019.

26. Even if several suits are decided by a common judgment and separate appeals are filed, an appeal would not become incompetent merely because one of the other appeal had been disposed earlier without notice to the other parties therein. By applying the above doctrine dogmatically without applying it to the factual background of the case would result in scuttling of rights of an aggrieved party. Such scuttling of rights can be neither be allowed nor recognized in law.

27. C.M.A.Nos.4455 and 4458 of 2019 at Sl.Nos.3 and 5were also filedby New India Assurance Co Ltd, the insurer of the lorry against order passed in the impugned Judgment and Decree in M.C.O.P.Nos. 179 and

180 of 2010 as in these appeals. However, these appeals were more or less withdrawn or the decree passed by the Tribunal were concede by New India Assurance Co Ltd, the insurer of the lorry without contest.

28. Therefore, such disposal of the appeals cannot be act as an estoppel or res-judicata against the appellants herein. "Res judicata as we understand is an ancient doctrine of universal application and permeates every civilized system of jurisprudence as held by the Privy Council in **Sheoparsan Singh v. Ramnandan Prasad Singh** [(1915-16) 43 IA 91 : (1916) 3 LW 544]. This doctrine encapsulates the basic principle in all judicial systems which provide that an earlier adjudication is conclusive on the same subject-matter between the same parties.

29. The above passage was quoted with approval in **GangaiVinayagar Temple v. MeenakashiAmmal,** (2009) 9 SCC 757, 768 and again in **Sri GangaiVinayagar Temple v. Meenakshi Ammal,** (2015) 3 SCC 624. The question therefore to be addressed is whether this principle can be applied to scuttle legitimate rights of the appellant. We do not think so particularly in the facts of the present case.

30. Strictly, res-judicata under section 11 of the Civil Procedure Code applies only matter in issue in a former suit which was previously in issue between the same parties, or between the parties under whom they or any of them claim, litigating under the same title, in a court of competent jurisdiction to try or suit in which such issue has been subsequently raised, and has been heard and finally decided by such.

31. Though the principal contained in the aforesaid section of Civil Procedure Code in *stricto senso* applies only in respect of the suit, yet the courts have concluded that the principles laid therein will equally apply to other proceedings as well with the view to avoid multiplicity of the proceedings. The principle of res-judicata will not apply to the facts of the present case.

32. The Hon'ble Supreme Court in **Badri Narayan Singh v. Kamdeo Prasad Singh,** (1962) 3 SCR 759 : AIR 1962 SC 338 observed that "**The decision of the High Court in the two appeals, though stated in one judgment, really amounted to two decisions and not to be one**

decision common to both the appeals."

33. Though the appellants herein were arraigned as respondents in CMA Nos. 1830, 1832 and 1833 of 2019 in the appeal filed by the insurer of the lorry namely the New India Assurance Company Limited, these appeals were disposed without notice to the appellants herein by a common order dated 18.3.2019. There are also no records to substantiate that the appellants herein served with the appeal papers.

34. The second set of appeals also filed by the insurer of the lorry namely the New India Assurance Company Limited in CMA.Nos. 4455 and 4458 of 2020 though against impugned judgment and decree in these appeals cannot act as a *res-judicata* as they were dismissed as withdrawn and disposed without any contest on the strength of the Memos filed by New India Assurance Company Limited in the light of the order dated 18.3.2019 in CMA Nos. 1830, 1832 and 1833 of 2019.

35. Both C.M.A.Nos.4455 and 4458 of 2020 were not disposed on merits so as to act as res-judicata. All that is discernible from the above background is that New India Assurance Company Limited merely

attempted to give a final seal of approval to the order of the Tribunal knowing fully well that the reasoning in the impugned judgment and decree in MCOP.Nos.179 and 180 of 2010 were flawed.

36. Dismissal of the appeal in CMA Nos. 1830, 1832 and 1833 of 2019 on 18.3.2019 cannot act as a res-judicata under Section 11 of the Civil Procedure Code.

37. Since CMA Nos. 1321 and 1327 of 2020 were dismissed at the preliminary stage itself without notice to the appellants herein in CMA Nos. 1321 and 1327 of 2020 and the appellants in CMA Nos. 1245 and 1264 of 2020, legal plea of res-judicata is not applicable to the facts of the case.

38. New India Assurance Company Limited was perhaps aware that fixation of liability on the appellant in CMA Nos. 1245 and 1265 of 2010 namely the United India Insurance Company Limited based on the evidence recorded by the Tribunal was unsustainable. It also perhaps understood that even the conclusion arrived regarding contributory negligence by the Tribunal was unsustainable.

39. We therefore answer the preliminary objection of the insurer of the lorry namely the New India Assurance Company Limited in the negative.

40. Only fault that can be attributed on both appellants is that they did not take any steps to number their respective appeals in time. CMA Nos. 1321 and 1327 of 2020 of the claimants were filed as early as 18.9.2018 but were not numbered till mid of 2020.

41. Similarly, CMA Nos. 1245 and 1264 of 2020 of United Insurance Co Ltd were filed as early as 2nd January 2019. However, no attempt was made to number the same. If these appeals were numbered in time, all the three sets of the appeals numbering in all nine as tabulated above in the Table could have been considered and disposed together.

42. We shall therefore look into the merits of the case and the grounds of challenge in these appeals against the impugned judgment and decree. We have perused the claim statement filed in MCOP Nos. 179 and

180 of 2010 filed by the claimants who are the appellants in CMA Nos. 1321 and 1327 of 2020.

43. We have also examined the exhibits which were marked by the Tribunal and the evidence recorded of the witnesses recorded by the Tribunal. There are no dispute on this aspect. There are also dispute about regarding the death and the injury and the involvement of both insured lorry and the insured car in the accident.

44. The only point for consideration in these appeals is whether the conclusion of the Tribunal that the driver of the insured car was guilty of contributory negligence or not. The date of accident is 7.3.2010. The accident took place at about 10 PM as per exhibit P1 FIR on the busy high way.

45. The claimants who are the appellants in CMA Nos. 1321 and 1327 of 2020 in their claim statement in MCOP Nos. 179 and 180 of 2010have stated that the driver of the lorry drove the lorry in a rash and negligent manner and suddenly applied brake without reducing the speed

and without giving signal to the car that was tailing behind resulted in the accident as the car hit the said lorry from behind.

46. It is stated that the driver of the car deceased Arul, drove the car in a careful manner following all the rules and regulations and tried avoiding hitting the lorry from behind but could not do so as the lorry driver applied sudden brake in the middle of the road as a result there was an accident resulting in the death of Mr.Kandasamy on the spot of the accident on 7.3.2010 while the driver of the car who was on the wheels and the other passengers who were travelling in the car sustained grievous injuries were admitted in the intensive care unit of the hospital.

47. The driver of the car Arul later died on the following day on 8.3.2010 while two of the other three passengers were in coma due to severe head injuries and trauma due to the accident.

48. The appellant in C.M.A Nos.1245 and 1264 of 2020, the United India Insurance Co Ltd was the fourth respondent before the Tribunal. In its counter in MCOP Nos. 179 and 180 of 2010 before the Tribunal, it has denied its liability on the ground that the claimants had not discharged the

burden of proof regarding the manner in which the accident had taken place.

49. It had further stated that as an insurer of the car bearing registration No.T.N. 30 J 3510, it cannot be held vicariously liable in absence of an insured or his legal heirs. It is further stated that as per exhibit P1 FIR, the accident was due to the rash and negligent driving of the driver of the insured car and therefore an insurer of the car, namely the United India Insurance Co Ltd cannot be held liable for the negligence of its driver. That apart, the appellant United India Insurance Co Ltd had also questioned the age and the income of the deceased co passenger Mr.Kandasamy for which M.C.O.P.No.179 of 2010 was filed by the claimants.

50. Insurer of the Lorry, namely New India Assurance Company Limited the contesting respondent herein was the third respondent before the Tribunal in MCOP Nos.179 and 180 of 2010. In its counter in MCOP Nos. 179 and 180 of 2010, it has initially admitted that the accident was only due to rash and negligent driving of the driver of the lorry bearing Registration No. T.N.49 R8509 insured with it.

51. However, the very next sentence the counter states that it is true that the driver of the said lorry T.N. 49 R 8509 had parked the vehicle with all care and caution properly on the left side of the road with proper indication. In the counter, it was further stated that the driver of the car did not observe the Motor Vehicles Rules and hit rear of the parked lorry from behind and hence only the owner cum driver of the insured car bearing registration No T.N. 30 4J 3510 was liable for the accident and therefore as insurer of the lorry namely the New India Assurance Company Limited cannot be made liable.

52. Before the Tribunal, three persons deposed evidence namely, the 2nd claimant/appellant Mrs.Alagarasi in CMA Nos. 1321 and 1327 of 2020 [MCOP.Nos.179 and 180 of 2010], the fellow passenger Shanti[the claimant in MCOP.No.201 of 2010] who was injured in the accident and Mr.Soundarpandian, husband of the 2ndclaimant-Mrs.Alagarasi. He was examined as PW1-3.

53. On behalf of the respondent, five witnesses tendered evidence. Mr.John Kennedy, Inspector of Police who registered P1-FIR as RW1,

Mr.Udaykumar-Deputy Superintendent as RW2, Mr.Rajkumar-driver of the insured lorry as RW3, Mrs.Komal as RW4 and Mr.Abbas as RW5. RW4 and RW5 are the employees of the respective insurance companies were examined.

54. Of the eight persons, who have deposed evidence before the Tribunal, two of them were present at the spot of accident on 07.03.2010. They are PW2 Mrs.Shanti, a victim herself of the accident who was sitting in the back side of the insured car and RW3 Rajkumar [the driver of the insured lorry]. Both are however interested witnesses. Both of them have given a diametrically opposite version of the accident. Both their evidence ought have to be seen with caution in absence of any independent evidence corroborating their version of the accident.

55. None of the other persons who have tendered evidence before the Tribunal are independent eye witnesses. Their evidence are mere hearsay evidence as far as the manner and sequence of the accident. They are no evidence in the eye of law on this aspect.

56. The PW3, is the complainant who on the following day of the accident gave a complaint. Pursuant to his complaint only Exhibit P1 FIR was registered.

57. In his complaint he had blamed his brother-in-law Deceased Arul, the Driver of the Car deceased for the accident. He has however resiled from the same on the ground that the signature was obtained in few blank sheets from him for lodging Exhibit P1 FIR to facilitate post mortem of the two deceased persons. He is also not an eye witness to the accident.

58. Therefore, the manner in which the accident took place cannot be solely judged from a reading of Exhibit P1FIR also. Negligence of the driver of insured car also cannot be determined based on Exhibit P1 as PW3 had not himself witnessed the accident. He had given complaint based on the information given to him to facilitate post-mortem of the deceased persons. In the natural course of event, it can be judicially presumed, he may have given a complaint only to facilitate post mortem of the deceased.

59. RW1-Inspector of Police who registered the FIR in his deposition has clearly stated that he cannot confirm as to whowas responsible for the accident and that only a person who investigated the case can confirm the same. RW 2-Mr.Arul, who investigated the accident has confirmed that the accident was due to the rash and negligent driving of the car by the driver of the car.

60. According to the RW3 [the driver of the insured lorry], he had parked the lorry on the left side of the road on the mud path and had gone to take dinner when he heard a crashing noise and on reaching the spot he found that the insured car had rammed on the right side of his insured lorry. According to him the accident damaged the tail lamp of his insured lorry and the car was damaged in the front portion with serious injuries to the driver and the occupants in the car.

61. In his oral deposition, the RW3 [the driver of the insured lorry] has squarely blamed the driver of the insured car deceased Arul for the accident. The Tribunal has also relied on the content of the Exhibit P1 FIR, Exhibit R1 accident sketch prepared by RW2, the deposition of RW3 [the

driver of the insured lorry] and the deposition of RW2 investigation officer from the Police Department to conclude that the driver of the insured car, deceased Arul was negligent and responsible for the accident and the ensuing death and injuries. He has also found no reason to disbelieve the content of Exhibit P1 FIR.

61-A. Though evidence of RW2 is in consonance with the evidence of lorry driver RW 3[the driver of the insured lorry] and the content of Exhibit P1 FIR, there is no basis to believe his version as well as he has not brought any independent witness to substantiate the same.

61-B. In his deposition he has clearly admitted that one Karuppian and Amrita Valli had seen the accident taking place and that they stated that it is the driver of the insured car who caused accident. Strangely, both Karuppian and Amrita Valli have not been produced as witness to corroborate his conclusion.

62. Exhibit R1 which is the accident sketch is also prepared by RW2. It merely shows that the lorry and the car were at the edge of the

four way busy highway. The fact that R2 visited the accident spot after Exhibit P1 FIR was lodged itself indicates that there was considerable time gap between the accident on 07.03.2010 and the visit by R2.

63. It is not clear as to why only accident sketch in Exhibit R1 alone was marked. It is also clear from the records that RW2 visited the accident spot and conducted investigation long after the vehicles would have been moved to the edge even if the accident had taken place as was deposed by PW2.

64. All that can be gathered from the oral evidence of the witnesses is that the an accident did take place on the Madurai-Karur Highway at about 10 PM in the night on 07.03.2010.

65. It is also not clear why no photographs were taken immediately after the accident and produced before the Tribunal. In our view, the Tribunal should have examined the facts based on the objective evidence before it and drawn a fair conclusion by applying the principle of preponderance of probability.

66. It was either possible that the RW3 driver of lorry had indeed negligently attempted to steer to the left to park the lorry to have dinner on sighting a restaurant/hotel on the opposite site of the road or had parked the vehicle on the left side of the road to have dinner in the night. Either way he was negligent.

67. As per Ex.R1-Accident Sketch, only on the opposite side of the 4 way lane road, there were two hotels. Highway is also fenced and has a divider. On the side of the road towards Karur from Madurai where the accident is said to have taken place, there are no other house other than a single house of one Palanisami. It is also at a distance separated by a fence and a service lane. The Accident Sketch also does show presence of any street lamps at the site of the accident.

68. It has to be therefore construed that R3-[driver of the insured lorry] was negligent and had abandoned the insured lorry on the road side to have dinner and had gone to a hotel on the opposite side. Leaving vehicle on a highway especially in the night time would have posed danger to the speeding vehicle on the highway. It would have attracted Rule 380

of the Tamil Nadu Motor Vehicles Rules, 1989 which reads as under:-

> "***380.Vehicle abandoned on the road – removal and custody –*** *if any motor vehicle is allowed to stand in any place other than duly appointed parking place in such a way as to cause obstruction to traffic or* ***danger*** *to any person, a police officer in uniform having jurisdiction may-*
>
> *(i) forthwith cause the vehicle to be moved under its own power otherwise to the nearest place where the vehicle will not cause undue obstruction* ***or danger****;*
>
> *(ii) unless it is moved to a position where it will not cause obstruction or danger take all reasonable precautions to indicate the presence of the vehicles; and*
>
> *(iii) if the vehicle has been stationary in one place for a continuous period of ten hours and adequate steps have not been taken for its repair or removal by the owner or his representative, remove the vehicle and its contents to a place of safe custody.*"

It is impossible for a driver of a vehicle driving the vehicle at some speed on the highway during night to guage whether a vehicle is parked in front of him or moving. Therefore, even if the insured lorry was parked, the parking was illegal and has posed danger to the Public.

69. Even if oral evidence of PW1 Mrs.Alagarasi is to be dis-believed that the accident had taken place in the middle of the road as pleaded by the claimants and as affirmed by PW2, the entire liability cannot be fixed on the driver of the car considering the fact that the accident took place in

the night at 10 P.M on a busy highway.

70. RW3, the driver of the insured lorry was not expected to leave the lorry parked on the highway especially in the night. If the indeed the lorry was on the moving ahead and the RW3 driver of the lorry had applied sudden brake without indication, 50% contributory negligence can be inferred on the part of both the drivers as of the vehicle coming from behind was expected to maintain a safe distance from the vehicle which was proceeding ahead of it.

71. However, if a vehicle was parked on the busy high way in the night, the driver of the insured car cannot be expected to notice it in time to avoid the accident. It is precisely for this reason Rule 380 of the Tamil Nadu Motor Vehicles Rules, 1989 has been framed.

72. There is also no explanation forthcoming as to how and why a lorry could have been parked by RW3 on a busy highway. RW3 had no business to park the lorry on the busy four lane highway. Whether the lorry was parked at the edge of the highway as has been stated by RW3 or whether RW3 had applied the brakes recklessly as was pleaded by the claimant's and deposed by PW1 and PW2 cannot be decided one way or the other based on the evidence of any other witnesses in absence of direct

evidence of an independent witnesses who may have witnessed the accident. The Accident Sketch in Ex.R1 merely indicates few shops in the opposite side. It is surprising why none of the two independent witnesses namely Karuppian and Amirtha Valli were called for giving evidence by the Insurance Company. If at all they could have given independent evidence.

73. The conduct of RW3 also shows he has not been truthful at all. There is also no explanation as to why RW 3 did not take any steps to file FIR soon after the accident took place and after the victims were shifted to the hospital for treatment. If the driver of the car was solely responsible for the accident, the driver of lorry namely R3 should have filed complaint before the jurisdictional police station as he was one of the person who witnessed the accident. After all lorry was also damaged still RW3 failed to lodge complaint. PW2 who was grievously injured could not have given a complaint for generating FIR.

74. The fact that RW 3 did not file any complaint against the driver of the car does raise a suspicion. Considering the fact that the driver of the lorry did not file complaint against the owner of the car also cast a shadow of doubt on the credibility and the quality of his deposition of R3. It was

incumbent on the part of the RW3 to have reported the incident with the police immediately after the accident as all the other occupant's in the car and been seriously injured. Therefore, this court is inclined to overlook the content of Exhibit P1 FIR except to the extent it corroborates the version of all the parties that an accident in fact had taken place on 7.3.2010 at about 10 PM involving the insured car and the insured lorry.

75. Instead, the complaint was given by PW3 to facilitate the procedural requirement for post-mortem of the deceased persons. Content of Exhibit P1 FIR cannot be therefore considered as the conclusive evidence of the truth surrounding the manner in which the accident had taken place.

76. In the absence of direct and independent evidence of an eyewitness regarding the manner in which the accident took place, it has to be construed that the driver of the lorry-RW3 was indeed negligent for having the parked the lorry unattended on a busy highway. Further, there is no evidence forthcoming from RW3 the driver of the lorry as to whether he had switched on the danger signal to warn the vehicles on the highway to fix entire liability on the driver of the insured car for the accident. However, on a over all facts and circumstances, we are inclined to fix 80% negligence on the part of the driver of the insured lorry and 20% on the

driver of the insured car.

77. There is preponderance of probability for inferring negligence on the part of the driver of the insured lorry for having left the lorry parked on a busy highway to fix entire liability on the driver of the insured car for the accident. However, on a over all facts and circumstances, we are inclined to fix 80% contributory negligence on the part of the driver of insured lorry and 20% on the driver of the insured car.

78. We are not disturbing the total quantum of compensation arrived by the Tribunal in the impugned judgment and decree dated 24.11.2017 in MCOP Nos.179 and 180 of 2010, the interest and costs.

79. Under these circumstances, notwithstanding the dismissal of CMA Nos. 1830, 1832 and 1833 of 2019 vide order dated 18.3.2009 and withdrawal of CMA No. 4455 of 2019 and disposal of CMA No. 4458 of 2019 vide order dated 26.8.2020, in the light of dismissal of C.M.A.Nos.1830, 1832 and 1833 of 2019, we are inclined to modify the impugned Judgment and decree in these appeals filed by the appellants herein i.e., the claimants and the insurer of the car namely United India Insurance Co Ltd by transposing 80% of the liability on the insurer of the lorry namely New India Assurance Company Limited, the third respondent

in CMA. Nos. 1321 and 1327 of 2020/sixth respondent in CMA Nos. 1245 and 1264 of 2020 and 20% of the liability on the insurer of the car namely United India Insurance Company Limited, the appellant in CMA Nos.1245 and 1264 of 2020/fourth respondent in CMA Nos.1321 and 1327 of 2020.

80. In the result,

C.M.A.Nos.1245 and 1321 of 2020

C.M.A.No.1245 of 2020

i. The liability of the appellant/Insurer of the car **[United India Insurance Company Limited]** in C.M.A.No.1245 of 2020/fourth respondent in C.M.A.No.1321 of 2020 is reduced to **Rs.92,000/-;**

C.M.A.No.1321 of 2020

ii. The liability of the third respondent/Insurer of the lorry **[New India Assurance Company Limited]** in C.M.A.No.1321 of 2020/sixth respondent in C.M.A.No.1245 of 2020 is increased to **Rs.3,68,000/-;**

C.M.A.Nos.1264 and 1327 of 2020

C.M.A.No.1264 of 2020

iii. The liability of the appellant/Insurer of the car **[United India Insurance Company Limited]** in C.M.A.No.1264 of 2020/fourth respondent in C.M.A.No.1327 of 2020 is reduced to

Rs.12,33,000/-;

C.M.A.No.1327 of 2020

iv. The liability of the sixth respondent/Insurer of the lorry **[New India Assurance Company Limited]** in C.M.A.No.1264 of 2020/third respondent in C.M.A.No.1327 of 2020 is increased to **Rs.49,32,000/-;**

v. All the Civil Miscellaneous Appeals are disposed of in terms of (i) to (iv) as stated above.

vi. Respective Insurance Companies are therefore directed to deposit the above amount of compensation quantified by us together with interest at 7.5% per annum from the date of numbering of the claim petition till the date of such deposit, less any amount already deposited by it, within a period of eight weeks from the date of receipt of a copy of this Judgment.

vii. On such deposit being made by the respective insurance companies, the claimants are permitted to withdraw the same together with interest accrued thereon, less any amount already withdrawn in the same proportion as was ordered by the Tribunal.

viii. No costs. Consequently, connected Civil Miscellaneous Petitions are closed.

(R.P.S.J.,) (C.S.N.J.,)

02.06.2021

arb

Internet : Yes / No
Index : Yes
Speaking Order/Non-speaking Order

To:

1. The Motor Accidents Claims Tribunal,
   Sub Court, Sankari.

2. The Section Officer,
   Vernacular Section,
   Madras High Court.

R.SUBBIAH,J.

and

C.SARAVANAN, J.

arb

Pre-delivery Common Judgment
in
C.M.A.Nos.1245, 1264, 1321 & 1327 of 2020
and
C.M.P.Nos.8266, 8429 & 8430 of 2020

02.06.2021