



C.M.A. No. 1712 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 30.10.2023

CORAM:

THE HONOURABLE MR. JUSTICE K.RAJASEKAR

C.M.A. No. 1712 of 2021
and C.M.P. No.9054 of 2021

New India Assurance Company Limited,
Sethu Krishna Trade Centre,
Trichy Main Road, Gugai,
Salem - 6.

... Appellant/ 2nd Respondent

Vs.

1. Prakash ... 1st Respondent/ 1st Respondent
2. Vasantha
3. M. Munusamy
4. M. Ravi
5. Andi
6. M. Kalaivani
7. M. Sasikumar
8. Nandhini
9. Kandammal ... Respondents 2 to 9/ Petitioners

Civil Miscellaneous Appeal filed under Section 173 of the Motor Vehicles Act, 1988 to set aside the decree and judgement dated 10.02.2020 made in M.C.O.P. No. 715 of 2018, on the file of the Special District Judge, Motor Accident Claims Tribunal, Dharmapuri.



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For Appellant : M/s. S.R. Sumathy
For R1 : No Appearance
For RR 2 and 9 : Mr. Simimathew

JUDGMENT

This Civil Miscellaneous Appeal is filed by the Insurance Company against the Judgment and decree dated 10.02.2020 made in M.C.O.P. No.715 of 2018, on the file of the Special District Judge, Motor Accident Claims Tribunal, Dharmapuri, wherein the Tribunal has awarded compensation for a sum of Rs.9,99,280/- along with interest @ 7.5% per annum from the date of filing of petition till the date of realization.

2. For the sake of convenience, the parties are referred to herein according to their litigative status before the Tribunal.

3. On 15.05.2018 at about 8:00PM, the deceased Munusamy, pedestrian, was crossing the Coimbatore - Salem National Highway from south to north in front of Trhirumalai Hallow Bricks Company, Salem at that time a Bajaj Pulsar motorcycle bearing Registration No.TN-56-E-6647



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came from west to east direction in rash and negligent manner, dashed against the deceased. Due to the impact, the deceased fell down in the road and an unknown vehicle ran over him and caused death to him. A criminal case was also registered in Cr.No.253/2018 U/s.279, 337 & 304-A of I.P.C. on the file of the Perundurai Police Station, Erode District against the first respondent, who rode the motorcycle. Due to the loss of deceased Munusamy, the claimants herein, who are the legal heirs have come forward with a claim petition seeking compensation for a sum of Rs.25,00,000/- under section 166 of the Motor Vehicles Act, 1988.

4. The first respondent is the owner cum rider of the motorcycle bearing Registration No.TN-56-E-6647 has not contested the claim and remained ex-parte. The second respondent is the insurer of the motorcycle has filed a counter and disputed the age, income and occupation of the deceased and also contended that the accident was happen only due to the negligence on the part of the deceased, who negligently crossed the road without observing the on coming vehicles. The insurance company also stated that the first respondent vehicle has no valid registration and insurance certificate and the rider of the motor cycle has no valid driving



licence at the time of occurrence.

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5. Before the Tribunal, on the side of the claimants, P.W.1 was examined and Exs.P.1 to P.25 were marked. On the side of the respondents, R.W.1 and R.W.2 were examined and Ex.R.1 was marked.

6. Based on the evidence placed on record, the Tribunal in point no.1, has held that the accident was taken place only due to the rash and negligence riding of the rider of the Bajaj Pulsar motorcycle bearing Registration No.TN-56-E-6647. In point no.2, the Tribunal has quantified and granted compensation for a sum of Rs.9,99,280/- along with interest @ 7.5% per annum from the date of filing of petition till the date of realization. In point no.3, the Tribunal has fixed the liability on the second respondent - insurance company to indemnify the first respondent and to pay compensation to the claimants.

7. Aggrieved over the award, the insurance company has filed this appeal, disputing liability to pay compensation and quantum of compensation fixed by the Tribunal. The claimants have not filed any



appeal against the award.

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8. The learned counsel appearing for the insurance company has submitted that the age of the deceased was not considered by the Tribunal and the notional income fixed for the deceased is also on the higher side. She further submitted that the driver of the unknown vehicle, which ran over the deceased and caused instantaneous death to the deceased is the tortfeasor, hence, this respondent – insurance company is not liable to pay the entire compensation and prays to modify the award of the Tribunal.

9. The learned counsel appearing for the claimant has submitted that there is ample evidence placed on record before the Tribunal that the rash and negligence act of the rider of the two wheeler resulted in accident, after considering the same, the Tribunal has awarded a just compensation, hence prays to confirm the award of the Tribunal.

10. I have considered the submissions of both sides and perused the documents placed on record:



11. The Tribunal after considering the evidence placed on record, more particularly the Ex.P.1- F.I.R and Ex.P.7 - final report filed by the police has concluded that the first respondent is the tortfeasor and his rash and negligence act is the major cause for the accident. Before the Tribunal, the insurance company has not adduced any evidence to show that the deceased has also negligently crossed the road, thereby invited the accident. The insurance company has also examined the Investigation Officer of the criminal case, who has stated that cause of death to the deceased is due to the ran over of the unknown vehicle, and he admitted that initially the deceased was hit by the rider of the first respondent and fell down on the road, which leads to further occurrence and the Tribunal has also considered this evidence. In the absence of any evidence to show negligence on the part of the deceased and the manner in which the accident had taken place shows that, the deceased was died due to composite act of the two vehicle operators. The first respondent is the one who contributed more to the accident by negligently riding the two wheeler and knocked down the deceased in the middle of the road. It is admitted case of the claimants that after knock down, the other vehicle ran over the deceased. Hon'ble Apex Court in *Khenyei Vs. New India Assurance Company Limited and others*



[(2015) 9 SCC 273] has considered the liability of tortfeasor for paying

compensation in the case of composite negligence has held in paragraph 15,

16 and 17 as follows:

“15. There is a difference between contributory and composite negligence. In the case of contributory negligence, a person who has himself contributed to the accident 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 due to the outcome of combination of negligence of two or more other persons. This Court in T.O. Anthony v. Karvarnan has held that in case of contributory negligence, the injured need not establish the extent of responsibility of each wrongdoer separately, nor is it necessary for the court to determine the extent of liability of each wrongdoer 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 : (SCC pp. 750-51, paras 6-7)

“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 wrongdoers, it is said that the person was injured on account of the composite negligence of those wrongdoers. In such a case, each wrongdoer, 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 wrongdoer separately, nor is it necessary for the court to determine the extent of liability of each wrongdoer separately.



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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 on 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 stand 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."

16. In Pawan Kumar v. Harkishan Dass Mohan Lal , the decisions in T.O. Anthony and Hemlatha have been affirmed, and this Court has laid down that where the plaintiff/claimant himself is found to be negligent jointly and severally, liability cannot arise and the plaintiff's claim to the extent of his own negligence, as may be quantified, will have to be severed. He is entitled to damages not attributable to his own negligence. The law/distinction with respect to contributory as well as composite negligence has been considered by this Court in Machindranath Kernath Kasar v. D.S. Mylarappa and also as to joint tortfeasors. This Court has referred to Charlesworth



and Percy on Negligence as to cause of action in regard to joint tortfeasors thus : (Machindranath Kernath Kasar case , SCC p. 212, para 42)

“42. Joint tortfeasors, as per 10th Edn. of Charlesworth & Percy on Negligence, have been described as under:

‘Wrongdoers are deemed to be joint tortfeasors, within the meaning of the rule, where the cause of action against each of them is the same, namely, that the same evidence would support an action against them, individually.... Accordingly, they will be jointly liable for a tort which they both commit or for which they are responsible because the law imputes the commission of the same wrongful act to two or more persons at the same time. This occurs in cases of (a) agency; (b) vicarious liability; and (c) where a tort is committed in the course of a joint act, whilst pursuing a common purpose agreed between them.’”

17. The question also arises as to the remedies available to one of the joint tortfeasors from whom compensation has been recovered. When the other joint tortfeasor has not been impleaded, obviously question of negligence of non-impleaded driver could not be decided. Apportionment of composite negligence cannot be made in the absence of impleadment of joint tortfeasor. Thus, it would be open to the impleaded joint tortfeasors after making payment of compensation, so as to sue the other joint tortfeasor and to recover from him the contribution to the extent of his negligence. However, in case when both the tortfeasors are before the court/Tribunal, if evidence is sufficient, it may determine the extent of their negligence so that one joint tortfeasor can recover the amount so determined from the other joint tortfeasor in the execution proceedings, whereas the claimant has right to recover the compensation from both or any one of them.”

12. In this case, the claimants have chosen to claim compensation from the first respondent, who is one of the tortfeasor and they are entitled



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to make such claim against the respondent herein. This Court finds no infirmity in the above finding of the Tribunal and the insurance company is liable to pay compensation as ordered by the Tribunal. Accordingly, this Court is inclined to confirm the same.

13. With regard to the quantum of compensation, the major contention raised by the respondent - insurance company is that the age of the deceased has not been proved. On perusal of the award, the age of the deceased is fixed as 55 years, by the Tribunal based on the post-mortem report, which is marked as Ex.P.2. The insurance company has contended that the age of the deceased is more than 60 years, in order to prove the same, the insurance company has not adduced or produced any evidence before the Tribunal or before this Court. The Tribunal has fixed the age, based on the available evidence and the approach of the Tribunal is proper and same is permissible.

14. The other contention raised by the insurance company is with regard to monthly notional income of the deceased fixed by the Tribunal. This Court is of the view that admittedly, the claimants have not proved the income of the deceased, who was a casual labour. In the absence of any



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evidence, fixing notional income is the proper approach in awarding compensation. The Tribunal after taking note of age of the deceased, date of accident fixed the notional income and the same is just and reasonable, hence this Court is inclined to confirm the notional income fixed by the Tribunal. The Tribunal has awarded a just compensation under the conventional head and same are hereby confirmed. In view of the discussion made supra, the appeal filed by the insurance company has no merit and liable to be dismissed.

15. In the result, this Civil Miscellaneous Appeal is dismissed. Consequently, connected civil miscellaneous petition stands closed. No costs.

30.10.2023

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Index:Yes/No

Speaking Order:Yes/No

Neutral Citation Case: Yes/No

To:

1. Special District Judge,
Motor Accident Claims Tribunal,
Dharmapuri.
2. The Section Officer,
V.R.Section,
High Court, Chennai.



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K. RAJASEKAR, J.

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