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C.M.A.No.2217of 2017

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 09.08.2023

CORAM:

The HONOURABLE MR.JUSTICE K.RAJASEKAR

C.M.A.No.2217 of 2017

and

C.M.P.No.11779 of 2017

Cholamandalam MS General Insurance Company Limited,
“Dare House”, 2nd Floor,
SC Bose Road, Chennai-1. ...Appellant

Vs.

1.V.A.Srijith
2.G.Gunasekaran
3.United India Insurance Company Limited,
2/117, PRS Road,
Chennimalai, Erode District.

4. M.Mohamedelias

5. S.Saravanakumar ...Respondents

Prayer : Civil Miscellaneous Appeal filed under Section 173 of the Motor Vehicles Act, 1988 against the Judgment and decree dated 15.07.2016 made in M.C.O.P.No.226 of 2014 on the file of the Motor Accident Claims Tribunal, Special Subordinate Judge, Erode.



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WEB COPY For Appellant : M/s.N.Vijayaraghavan

For Respondents : M/s.S.Kaithamalai Kumaran for R1

: M/s.S.P.Yuaraj for R2

JUDGMENT

This Civil Miscellaneous Appeal has been filed by the insurance company challenging the award passed in MCOP.No.266 of 2014, dated 15.07.2016 on the file of the Motor Accident Claims Tribunal, Special Sub Judge, Erode, disputing the liability as well as quantum of compensation.

2. The parties are referred to hereunder according to status and ranking before the Tribunal.

3. The case of the claimant is as follows:

On 25.02.2010 at about 09.30 p.m., the claimant was travelling as passenger a Maruthi Esteem Car bearing Reg.No.TN 39 F 3393, from Mettupalayam to Erode, on the West to East Direction and the car was



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driven by the 1st respondent in a rash and negligent manner near Avinasi to Palankari Velur Pirivu, at the same time a goods vehicle Tata ACE BS II bearing Reg.No.TN 33 AT 4655 came in the opposite direction in high speed and hit against the Maruthi Esteem car. Due to the accident, the claimant sustained grievous injuries. The alleged accident was occurred due to the rash and negligent driving of the first and third respondents who are drivers of both vehicles. The first respondent is the driver cum owner of the Maruthi Esteem car in which the the claimant was travelled and the second respondent is the insurer of the vehicle. The third respondent is the driver and fourth respondent is the owner of the Tata ACE BS II, and fifth respondent is the insurer of the vehicle. For the injuries sustained, the claimant has filed claim petition under Section 166 of Motor Vehicles Act seeking compensation of Rs.10,00,000/- from all the respondents.

4. The first respondent remained exparte and has not contested the case. The second respondent filed counter and contended that there is no policy coverage for the passengers travelled in the car and the driver of the Tata ACE BS II, is responsible for the accident and prays for



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dismissal of the claim petition against them.

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5. The third and fourth respondents remained exparte and has not contested the case.

6. The fifth respondent has filed the counter and contended that driver of the Tata ACE BS II, is not responsible for the accident and only the driver of the Maruthi Esteem car drove the vehicle in rash and negligent manner without following the traffic rule came into the wrong side and dashed against the Tata ACE BS II. F.I.R., also against the first respondent i.e., driver of the car bearing Reg.No.TN 39 F 3393 in Crime No.581 of 2010 on the file of Avinashi Police Stationtherefore, the first and second respondents are liable to pay the compensation.

7. Before the Tribunal, on the side of the claimant, P.W.1 and P.W.2 were examined and exhibits Exs.P1 to P.15 were marked in support of their claim and on the side of the second respondent/ Insurance company R.W1 was examined and exhibit Ex.R1 was marked in support of their contention. On the side of the fifth respondent no witness was examined and no documents were marked.



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8. On the basis of the evidence placed on record, the Tribunal in Point No.1 has held that due to the composite negligence of the both the drivers i.e., the Driver of the Maruthi Esteem car as well as the driver of the Tata ACE BS II the accident had taken place. In Point No.2, the Tribunal has quantified the quantum of compensation and awarded Rs.8,23,500/- together with interest at the rate of 7.5% per annum and directed the first and fifth respondents to pay the compensation jointly and severally to the claimants after exonerating the insurance company of Maruthi Esteem Car i.e., second respondent Aggrieved over the award of compensation, fifth respondent i.e, insurance company of the goods vehicle has filed this Civil Miscellaneous Appeal.

9. Learned counsel for the fifth respondent would submit that the Tribunal in Point No.1 after holding that both the drivers are responsible for the accident, instead of fixing the liability equally by apportioning 50% each, directed both the first and fifth respondents to satisfy the award jointly and severally which requires modification and liability has to be fixed only 50% on the side of the Insurance Company and 50%



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liability for the owner of the Maruthi Esteem car. Learned counsel would further submit that the quantum of compensation granted to the claimant by adopting multiplier method for the injuries sustained by the claimants is not sustainable and also not in accordance with the evidence produced. There is no evidence produced on the side of the claimants to prove the loss of earning capacity and in the absence of any evidence of loss of earning capacity, adopting of multiplier method is not proper and prays to set aside the same.

10. Learned counsel for the claimants would submit that the petitioner has sustained grievous injuries all over his body and more particularly two fractures on the hip and on thigh and he has undergone bone grafting. The doctor who has assessed the disability has given evidence before the Tribunal to the effect that knee and hip movement drastically restricted, thereby the regular activities of the claimant is restricted to a larger extent and based on this evidence, the Tribunal has rightly adopted the multiplier, hence prays to confirm the award.

11. Learned counsel for the first respondent owner of the car



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would submit that the Tribunal has wrongly held that there is a composite negligence and the driver of the car also sustained grievous injuries and he has also filed a separate claim petition seeking compensation for the injuries sustained by him in this accident, the fifth respondent has come forward to settle the claim amount, and the same is also recorded.

12. I have considered the submissions of both sides and perused the records.

13. The Tribunal in point No.1 has considered the evidence adduced on the side of the claimant with regard to the accident. Neither fifth respondent nor the first respondent have adduced evidence to controvert the evidence of the claimant. Based on the uncontroverted evidence of P.W1 placed on the record, Tribunal has held that the accident has occurred due to the composite negligence of both the drivers. Hon'ble Apex Court already settled the issue of fixing liability to pay compensation in the case of composite negligence in two Judgements
1. [Khenyei Vs. New India Assurance Company Limited & Others](#), reported in 2015 (9) SCC 273
2. [Pawan Kumar and Another vs. Harkishan Dass](#)



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Mohan and others reported in (2014) 3 SCC 590.

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14. The Hon'ble Apex Court in [Khenyei Vs. New India Assurance Company](#)

[Limited & Others](#), in paragraph Nos. 4 & 18 has held as follows:

"4. It is a case of composite negligence where injuries have been caused to the claimants by combined wrongful act of joint tort feorsors. In a case of accident caused by negligence of joint tort feorsors, all the persons who aid or counsel or direct or join in committal of a wrongful act, are liable. In such case, the liability is always joint and several. The extent of negligence of joint tort feorsors in such a case is immaterial for satisfaction of the claim of the plaintiff/claimant and need not be determined by the by the court. However, in case all the joint tort feorsors are before the court, it may determine the extent of their liability for the purpose of adjusting inter-se equities between them at appropriate stage. The liability of each and every joint tort feorsor vis a vis to plaintiff/claimant cannot be bifurcated as it is joint and several liability. In the case of composite negligence, apportionment of compensation between tort feorsors for making payment to the plaintiff is not permissible as the plaintiff/claimant has the right to recover the entire amount from the easiest targets/solvent defendant.

18. This Court in Challa Bharathamma &Nanjappan (supra) has dealt with the breach of policy conditions by the owner when the insurer was asked to pay the compensation fixed by the tribunal and the right to recover the same was given to the insurer in the executing court concerned if the dispute between the insurer and the owner was the subject-matter of determination for the tribunal and the issue has been decided in favour of the insured. The same analogy can be applied to the instant cases as the liability of the joint tort feorsor is joint and several. In the instant case, there is determination of inter se liability of composite negligence to the extent of negligence of 2/3rd and 1/3rd of respective drivers. Thus, the vehicle - trailor-truck which was not insured with the insurer, was negligent to the extent of 2/3rd. It would be open to the insurer



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being insurer of the bus after making payment to claimant to recover from the owner of the trailer-truck the amount to the aforesaid extent in the execution proceedings. Had there been no determination of the inter se liability for want of evidence or other joint tort feisor had not been impleaded, it was not open to settle such a dispute and to recover the amount in execution proceedings but the remedy would be to file another suit or appropriate proceedings in accordance with law.

What emerges from the aforesaid discussion is as follows :

(i) In the case of composite negligence, plaintiff/claimant is entitled to sue both or any one of the joint tort feisors and to recover the entire compensation as liability of joint tort feisors is joint and several.

(ii) In the case of composite negligence, apportionment of compensation between two tort feisors vis a vis the plaintiff/claimant is not permissible. He can recover at his option whole damages from any of them.

(iii) In case all the joint tort feisors have been impleaded and evidence is sufficient, it is open to the court/tribunal to determine inter se extent of composite negligence of the drivers. However, determination of the extent of negligence between the joint tort feisors is only for the purpose of their inter se liability so that one may recover the sum from the other after making whole of payment to the plaintiff/claimant to the extent it has satisfied the liability of the other. In case both of them have been impleaded and the apportionment/ extent of their negligence has been determined by the court/tribunal, in main case one joint tort feisor can recover the amount from the other in the execution proceedings.

(iv) It would not be appropriate for the court/tribunal to determine the extent of composite negligence of the drivers of two vehicles in the absence of impleadment of other joint tort feisors. In such a case, impleaded joint tort feisor should be left, in case he so desires, to sue the other joint tort feisor in independent proceedings after passing of the decree or award."

emphasis added"



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15. In [Pawan Kumar and another v. Harkishan Dass Mohan Lal and others](#) reported in (2014) 3 SCC 590, the Hon'ble Apex Court has held in para No.6 as under:

"WHERE two or more people by their independent breaches of duty to the Plaintiff cause him to suffer distinct injuries, no special rules are required, for each tortfeasor is liable for the damage which he caused and only for that damage. Where, however, two or more breaches of duty by different persons cause the Plaintiff to suffer a single injury the position is more complicated. The law in such a case is that the Plaintiff is entitled to sue all or any of them for the full amount of his loss, and each is said to be jointly and severally liable for it. This means that special rules are necessary to deal with the possibilities of successive actions in respect of that loss and of claims for contribution or indemnity by one tortfeasor against the others. It is greatly to the Plaintiff's advantage to show that that he has suffered the same, indivisible harm at the hands of a number of Defendants for he thereby avoids the risk, inherent in cases



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where there are different injuries, of finding that one Defendant is insolvent (or uninsured) and being unable to execute judgment against him. The same picture is not, of course, so attractive from the point of view of the solvent Defendant, who may end up carrying full responsibility for a loss in the causing of which he played only a partial, even secondary role.

16. In the case on hand, the Tribunal has arrived its conclusion based on the motor vehicle report as well as the rough sketch Exs.P3 to P5, held that the accident occurred in middle of the road and it is head on collusion, which means both the drivers are equally responsible for the accident. The claimant herein is a passenge entitled to claim compensation from any one of the tort feasor or both the persons, the Tribunal has directed both the persons to pay the compensation since the claimant is entitled to claim from any one of the tort feasor. For the early disposal of compensation, this Court inclined to direct the fifth respondent to pay the entire compensation since there is no coverage for the passenger of car. Since the Tribunal has held that both the drivers are



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responsible for the accident, the owner of car shall also equally held liable and liability fixed on him is joint and several. I am of the view that as held in para No.18 (iii) of the Khenyei judgement cited supra, the fifth respondent is entitled to recover 50% of the compensation from the first respondent.

17. With regard to quantum of compensation, Tribunal based the evidence of P.W2- the Doctor who has assessed the disability has accepted the disability as 50%. The Hon'ble Apex Court in ***Raj Kumar vs. Ajay Kumar reported*** in 2011 (1) SCC 343 has held that if the injury sustained by the claimant has prevented him doing earlier avocation that the claimant is entitled for compensation under the head loss of future earning capacity.

18. As contended by the fifth respondent herein, the claimant has not succeeded in proving that he was employed in a company and was having regular income. He also failed to prove that due to the accident he was incapacitated from doing any job including his earlier avocation. The discharge summary and disability certificate, shows that the petitioner



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undergone in-patient treatment from 26.02.2010 to 05.03.2010. The surgery performed on femoral bone joint, subsequently he was admitted in Jubilee Mission Medical College Hospital and Research Institute, Thrissur, Kerala and underwent treatment as inpatient from 19.03.2010 to 27.03.2010 and during this period he has undergone one more surgery on the third of right femur by renailing and bone grafting, thereafter, due to inplant failure, he was admitted at Jubilee Mission Medical College Hospital and Research Institute, Thrissur, Kerala on 21.02.2011 and discharged on 06.03.2011 and during this period another surgery was conducted on the very same place. These discharge summaries shows that the injured has sustained fracture in the right joint femur and for nearly undergone treatment for one year. Eventhough there was no evidence produced to show that he was incapacitated from doing any work, the nature of injury sustained by him and subsequent evidence of the Doctor who has deposed that there is a restriction of movement in the right leg, knee and drastic reduction of the regular physical activities of the claimant, it has to be taken that these injuries have incapacitated him from doing his earlier avocation but not to the extent of 50%. However considering the fracture on the femour joint and right tibia which resulted



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in restoration of movement of both hip and knee fixed 30% of loss of earning capacity would be proper. In view of the above discussion, the disability is modified from 50% to 30% and the claimant is also entitled for future prospects 40%. Thereby, the loss of earning power is modified as $(4,500 \times 40/100 = 1800 + 4500) \times 12 \times 17 \times 30/100 = \text{Rs.}3,85,560/-$. The compensation under the loss of earning capacity is awarded for the disability suffered, compensation awarded under the head disability is hereby cancelled. Considering the fact that claimant undergone treatment for more than one year I am inclined to enhance the compensation awarded under the head Extra Nourishment from Rs.30,000/- to 50,000/-. The Tribunal has not awarded compensation under the head loss of amenities and this Court inclined to award Rs.25,000/- under this head. This Court finds that the compensation awarded under other heads are just and reasonable, thereby same are confirmed.

19. In the light of the above discussion, the award of the Claims Tribunal is modified as follows:



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S.N	Description	Amount awarded by Tribunal (Rs)	Amount awarded by this Court (Rs)	Award confirmed or enhanced or granted
1.	Loss of Income	54,000/-	54,000/-	Confirmed
2.	Transport Expenses	10,000/-	10,000/-	Confirmed
3.	Extra Nourishment	30,000/-	50,000/-	Confirmed
4.	Damages for clothes and articles	500/-	500/-	Confirmed
5.	Medical Expenses	1,20,000/-	1,20,000/-	Confirmed
6.	Pain and sufferings	50,000/-	50,000/-	Confirmed
7	Disability	1,00,000/-	-	Cancelled
8	Loss of earning power	4,59,000/-	3,85,560/-	Reduced
9	Loss of Amenities	-	25,000/-	Awarded
	Total	Rs.8,23,500/-	Rs.6,95,060/-	Reduced by Rs.1,28,440/-

20. In the result:

(i) The Civil Miscellaneous Appeal is partly allowed by reducing the compensation awarded by the Tribunal to Rs.6,95,060/- from Rs.8,23,500/-



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(ii) The appellant is directed to pay the above said enhanced compensation amount along with accrued interest at the rate of 7.5% per annum within a period of eight weeks from the date of receipt of copy of the order, less the amount, if any, deposited and recover 50% of award amount from the first respondent. The claimant thereafter will be entitled to withdraw the amount by making appropriate application.

(iii) There shall be no order as to costs for this appeal.

(iv) Consequently, connected miscellaneous petition is closed.

09.08.2023

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Index : Yes/No

Neutral Citation : Yes/No

To:

1.The Special Subordinate Judge, Erode.

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



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K.RAJASEKAR, J.

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