IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 08.09.2023

CORAM:

The HONOURABLE MR.JUSTICE K.RAJASEKAR

C.M.A.Nos.264 and 265 of 2017

Divisional Manager,
National Insurance Company Limited,
I and II floor, 175-56,
Ganesh Complex,
Manojeepa Street,
Thanjavur Distrist. ...Appellant in both CMA's

Vs.

1. Andal
2. Sivakumar ...Respondents in CMA No.264 of 2017

1. Loganathan
2. Sivakumar ...Respondents in CMA No.1750 of 2018

Common Prayer : Civil Miscellaneous Appeal filed under Section 173 of the Motor Vehicles Act, 1988 against the Judgment and decree dated 26.04.2016 made in M.A.C.T.O.P.Nos. 1108 of 1109 of 2013 on the file of the Motor Accident Claims Tribunal, Special Subordinate Court No.1, Salem.

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

For Respondents : Mr.S.P.Yuvaraj for R.1

COMMON JUDGMENT

These Appeals are filed by the Insurance company challenging the common award passed in MCOP.Nos.1108 and 1109 of 2013 dated 26.04.2016 on the file of Special Subordinate Court No.1, Salem, wherein the Tribunal has directed the Insurance company to indemnify the first respondent for the compensation awarded.

2. Since, both the Civil Miscellaneous Appeals are arising out the same award, both the Appeals are taken up together for hearing and common judgement is passed.

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

4. The case of the claimants are that on 02.05.2013 at about 05.30 pm,, both the claimants have travelled in the passenger auto bearing Reg.No.TN 54 B 8595 on the Namakkal to Salem National Highway, while the auto reached Dasanaickenpatty colony, the auto Driver driven the vehicle in a rash and negligent manner and lost control and hit on the

lorry and capsized. The claimants sustained several grievous injuries. Based on the complaint given by the auto Driver, a criminal case was registered against unknown lorry in Cr.No.176 of 2013 under Section 279, 337 of IPC. For the injuries sustained, one of the claimant namely Andal filed M.A.C.T.O.P.No. 1108 of 2013 and claimed Rs.10,00,000/- as compensation. The claimant Loganathan filed in M.A.C.T.O.P.No. 1109 of 2013 and claimed Rs.7,00,000/- as compensation under Section 166 of Motor Vehicles Act.

5. The first respondent owner of the auto filed counter stating that on 02.05.2013 at about 05.30 pm near Dasanaickenpatty colony, the auto met with an accident in which the claimants travelled as passengers. He driven the auto with due care and caution however he lost the control and capsized. The auto is insured with the second respondent and injured also having coverage for the injuries sustained by them, hence second respondent is liable to pay the compensation.

6. Second respondent filed counter affidavit and stated that the accident was occurred due to the negligent driving of unknown lorry. In Accident Register it is recorded that the accident had taken place near Andaloor gate. The FIR also falsely registered after three days of

occurrence. There is no merits for claiming compensation. The quantum of compensation awarded under various heads are also on higher side and prays to dismiss the claim petition.

7. On the side of the claimants P.W.1 to P.W.3 examined and Exs.P.1 to P.23 were marked. On the side of the respondents R.1 to R.3 were examined and Exs.R.1 to R.2 and Exs.X1 to X9 were marked.

8. Based on the evidence placed on record, in point No.1, the Tribunal has considered the negligent act of the auto Driver and held that both the lorry as well as auto Driver are responsible for the accident and since two vehicles are involved in the accident, compensation has to be paid by any one of the offending vehicles. In Point No.2 the Tribunal has quantified the compensation and awarded a sum of Rs.4,57,000/- to the claimant in MCOP.No.1108 of 2013 and Rs.75,000/- to the claimant in MCOP.NO.1109 of 2013. Aggrieved over the award of compensation and also directing the Insurance company of the auto, to pay the compensation, this Civil Miscellaneous Appeals have been filed.

9. Learned counsel for the Insurance company has submitted that FIR was registered after three days of occurrence and more

particularly it is stated that unknown lorry is responsible for the accident. The place of occurrence is also falsely mentioned in the FIR, even though in the Accident Register the place of occurrence is stated differently. It is further submitted that auto is not responsible for the accident, but only for getting compensation, the auto was implicated and claim was also made. The Tribunal without appreciating the evidence placed on record, has accepted the case of the claimants, hence prays to dismiss the claim petition.

10. Learned counsel for the claimant submitted that on 02.05.2013, at 05.30 pm on the Namakkal to Salem Road, auto Driver drove the vehicle in high speed, and negligently applied the sudden brake which resulted in capsizing the auto and also claimants sustained injuries. To safeguard the negligent act of the auto Driver, he has lodged the complaint as if unknonw lorry has hit on the auto which resulted in accident. She has reiterated that only due to he sudden application of the brake, auto capsized and there is no involvement of any other vehicle. She has stated that registration of FIR after delay of three days by the auto Driver. She has also reiterated that lorry was not involved in the accident.

11. The claimants during the cross examination denied the suggestion that the accident had taken place at Andaloor gate and there is involvement of lorry. To respondents have examined R.W.1, the Special Sub Inspector who has stated that case was registered in Crime No.176 of 2013 on the file of Mallur Police Station. The accident magazar and rough sketch were marked as Ex.R1 and R3 which shows that accident was taken place near Andaloor gate R.W1 has also recorded the statement of both P.W.1 and P.W.2 ie claimants herein and those statements are also produced before the Tribunal and those statements was denied by the claimants. It was suggested to him that the case was registered against the auto driver, even though there is complaint against the unknown lorry.

12. Auto Driver was examined as R.W.2 and he has stated that while he was driving the auto on 02.05.2013 near Dasanaickenpatty colony, unknown lorry hit on the auto, due to the he lost the control and capsized. According to the him, a lorry was hit on the right hand side of the auto in which claimants were travelled. Immediately after the accident, injured were admitted in Chellappa Hospital and he also lodged criminal complaint which was marked under Ex.R1. The auto was insured with the second respondent and passengers also have coverage. In the cross examination he has admitted that if he has driven the vehicle with due care

and caution, he could have avoided the accident. He has also denied that final report has been filed against him implicating him as accused in this case.

13. Insurance official was examined as R.W.2 and he admits that auto is fully insured and the passengers are also covered. The insurance company has relied on the FIR which was lodged by the auto Driver. According to the auto Driver, the unknown lorry had hit on the right side of the auto which resulted in the accident. But subsequently, the police have investigated the case and filed final report against the auto Driver. The auto driver has denied his negligence and he has also denied that no final report has been filed against him.

14. Admittedly, the claimants herein are passengers who travelled in the auto, which is insured with the second respondent herein. Even if the case of the insurance company is accepted that lorry driver has hit on the auto which resulted in accident, it is specific case of the claimants that auto Driver has also driven the vehicle in a rash and negligent manner and it was admitted by the auto Driver in his evidence that if he had driven the vehicle with due care and caution he could have avoided the accident. The above evidence clearly shows that it is not the

case of the only negligent act on the part of the lorry driver alone. According to the auto Driver, the auto was hit by the lorry from behind which may not be witnessed by the claimants. Since the passengers who were travelled in the auto is also covered by the policy.

15. Hon'ble Apex Court in ***Khenyei vs. New India Assurance Company Limited and others [(2015) 9 Supreme Court Cases 273]***. has considered the liability of insurance company in the matter of composite negligence and 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 feasors. In a case of accident caused by negligence of joint tort feasors, 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 feasors in such a case is immaterial for satisfaction of the claim of the plaintiff/claimant and need not be determined by the court. However, in case all the joint tort feasors 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 feasor 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 feasors 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 feasor 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 being insurer of the bus after making payment to claimant to recover from the owner of the trailor-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 feasor 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 feasors and to recover the entire compensation as liability of joint tort feasors is joint and several.

(ii) In the case of composite negligence, apportionment of compensation between two tort feasors 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 feasors 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 feasors 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 feasor 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 feasors. In such a case, impleaded joint tort feasor should be left, in case he so desires, to sue the other joint tort feasor in independent proceedings after passing of the decree or award.”

Emphasis added.

16. Under the said circumstances, the finding of the Tribunal that negligent act on the part of auto driver alone is responsible is not proper, however, the claimants are entitled to claim compensation from any one of the tort-feasor. In this case, the claimants/passengers are also covered by the Insurance policy of the auto, hence it mandate on the part of the insurance company of the auto to pay the compensation to the claimants.

17. Accordingly, the award passed by the Tribunal fixing the liability against the insurance company is proper and contention of the insurance company is hereby rejected. Hence, these Civil Miscellaneous Appeals are dismissed. No costs.

08.09.2023

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Index : Yes/No
Neutral Citation : Yes/No

K.RAJASEKAR, J.

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To:

1. The Motor Accident Claims Tribunal,
Special Subordinate Court No.1, Salem.

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

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