



CMA(MD).Nos. 1326 to 1328 of 2016

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : 23.06.2023

PRONOUNCED ON : 12.07.2023

CORAM

THE HONOURABLE MR.JUSTICE R.VIJAYAKUMAR

C.M.A(MD)Nos.1326 to 1328 of 2016

and

CMP(MD).Nos. 11247 to 11249 of 2016

CMA(MD).No.1326 of 2016:

Cholamandalam M.S.General Insurance Co.,Ltd.,
2nd Floor, Tape Complex
Trichy -1

.....Appellant

Vs.

1.A.Saira Banu

2.J.Sridharan

3.V.Anandan

4.The Branch Manager
M/s.National Insurance Company Ltd.,
Jerome Building, First Floor
Fort Station Road
Trichy -2

...Respondents



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CMA(MD).No.1327 of 2016:

Cholamandalam M.S.General Insurance Co.,Ltd.,
2nd Floor, Tape Complex
Trichy -1

.....Appellant

Vs.

1.A.Mohamed Abubucker

2.J.Sridharan

3.V.Anandan

4.The Branch Manager
M/s.National Insurance Company Ltd.,
Jerome Building, First Floor
Fort Station Road
Trichy-2

...Respondents

CMA(MD).No.1328 of 2016:

Cholamandalam M.S.General Insurance Co.,Ltd.,
2nd Floor, Tape Complex
Trichy -1

.....Appellant

Vs.

1.Abdul Samadh

2..Saira Banu

3.Sakila Banu

4.J.Sridharan



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5.V.Anandan

6.The Branch Manager
M/s.National Insurance Company Ltd.,
Jerome Building, First Floor
Fort Station Road
Trichy-2

...Respondents

PRAYER in CMA (MD).No.1326 of 2016: Civil Miscellaneous Appeal filed under Section 173 of Motor Vehicles Act, 1988 to set aside the fair and decreetal order dated 07.03.2015 made in MCOP.No.322 of 2013 on the file of the Motor Accident Claims Tribunal (Special District Judge), Trichy and allow this civil miscellaneous appeal.

PRAYER in CMA (MD).No.1327 of 2016: Civil Miscellaneous Appeal filed under Section 173 of Motor Vehicles Act, 1988 to set aside the fair and decreetal order dated 07.03.2015 made in MCOP.No.323 of 2013 on the file of the Motor Accident Claims Tribunal (Special District Judge), Trichy and allow this civil miscellaneous appeal.

PRAYER in CMA (MD).No.1328 of 2016: Civil Miscellaneous Appeal filed under Section 173 of Motor Vehicles Act, 1988 to set aside the fair and decreetal order dated 07.03.2015 made in MCOP.No.324 of 2013 on the file of the Motor Accident Claims Tribunal (Special District Judge), Trichy and allow this civil miscellaneous appeal.

For Appellant : M/s.K.R.Shivashankari
in all the appeals



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For Respondents : Mr.N.Sudhagar Nagaraj
for R1, Mr.J.S.Murali for R4
and no appearance for R2 & R3
in CMA.Nos.1326 & 1327 of 2016

: Mr.N.Sudhagar Nagaraj
for R1 to R3, Mr.J.S.Murali for R6
and no appearance for R4 & R5
in CMA.No.1326 of 2016

COMMON JUDGMENT

All the appeals have been filed by the insurance company challenging the award passed by the Motor Accident Claims Tribunal, Trichy in MCOP.Nos.322 of 324 of 2013.

2.Factual Background:

A Santro Car owned by one Anandan was driven by one Ahamed Hussain. While the vehicle was proceeding from Madurai to Trichy on 21.04.2009 at about 3.20 p.m, a Qualis Car belonging to the first respondent and insured with the second respondent was driven in a rash and negligent manner and dashed against the Santro Car. In the said accident, the driver of the Santro Car namely Ahamed Hussain and his wife Katheeja Beevi had passed away in the said accident. Their daughter Saira Banu and a grandson Mohammed Abubakkar who were the occupants of the said Car got injured.



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3.For the death of their father Ahamed Hussain, the son Abdul Samathu and his daughters namely Saira Banu and Shahila Banu had filed MCOP.No.1898 of 2009 on the file of the III Additional District Court (FTC II), Trichy. The said claim petition was filed under Sections 140, 143 and 167 of Motor Vehicles Act seeking compensation of Rs.4,00,000/-. In the said claim petition, the owner of the Santro Car and the insurance company of the Santro Car alone were impleaded as parties. The claimants therein had contended that their father Ahamed Hussain had lost his control and dashed against the Qualis Car. It was further contended by them that their father was a driver under the first respondent Anandan and drawing a monthly salary of Rs.5,000/-.

4.The Tribunal after considering the oral and documentary evidence had arrived at a finding that an F.I.R has been registered only as against the deceased namely Ahamed Hussain and therefore, the accident has taken only due to the rash and negligent driving on the part of the deceased Ahamed Hussain. The claimants have also admitted the said fact and without impleading the owner or the insurance company of the Quslis Car, they have filed a claim petition as against the owner insurer of the Santro Car.



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5. On the said findings, the Tribunal proceeded to pass an order under Section 167 of the Motor Vehicles Act granting a compensation of Rs.1,40,000/-.

6. For the death of Katheeja Beevi who was the occupant of the Car, her daughter Shahila Banu and Saira Banu and her son Abdul Samathu had filed MCOP.No.324 of 2013. For the injuries sustained by Saira Banu, she had filed MCOP.No.322 of 2013. For the injuries sustained by Mohammed Abubakkar, MCOP.No.323 of 2013 was filed. In all the claim petitions namely MCOP.Nos. 322 to 324 of 2013, it is contended that the accident has taken place solely due to the rash and negligent driving on the part of the driver of the Qualis Car.

7. The Tribunal after considering the oral and documentary evidence, had arrived at a finding that the accident has taken place only due to the rash and negligent driving on the part of the Qualis Car and thereafter, proceeded to pass an award as against the owner and the insurer of the Qualis Car. Challenging these three awards, the present appeals have been filed by the insurance company of the Qualis Car.



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8.Contentions of the learned Counsel appearing for the appellant:

(i).The learned counsel appearing for the appellant had contended that the same claimants have filed MCOP.No.1898 of 2009 before the Motor Accident Claims Tribunal, Trichy contending that the accident has taken place only due to the rash and negligent driving on the part of the driver of the Santro Car. In the said claim petition, the owner of the Qualis Car or the insurer of the Qualis Car were not impleaded. There is a specific finding in the said award that the accident has taken place only due to the rash and negligent driving on the part of the driver of the Santro Car.

(ii).The learned counsel for the appellant had further contended that the same claimants while filing MCOP for the death of her mother Katheeja Beevi and for the injuries sustained by them, had contended that the accident has taken place not only due to the negligence on the part of the driver of the Santro Car but also due to the negligent on the part of the other vehicle namely Qualis Car. When the finding relating to the negligence has already been arrived by a competent Court in which the present claimants were also arrayed as parties, the said finding would operate as res judicata.



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(iii).The Tribunal ought not to have considered the issue of negligence independently and passed the award as against the owner and the insurer of the Qualis Car.

(iv).The learned counsel had further contended that the award in MCOP.No.1898 of 2009 has been marked as Exhibit R2 in the present claim petitions and there was a pleading and submissions to the said effect. However, the Tribunal has chosen to reject the said contention on the ground that the owner and the insurer of the Qualis Car were not parties to the said claim petition. The same claimants having pleaded negligence on the part of the Santro Car, suffered a finding that the driver of the Santro Car was responsible for the accident, thereafter cannot turn around and contend that the driver of the Qualis Car alone was responsible for the accident. In fact, the Tribunal in MCOP.No.1898 of 2009 has specifically pointed out that the claimants have consciously omitted to implead the owner and the insurer of the Qualis Car admitting negligence of the driver of the Santro Car. Therefore, the non impleading of the owner and the insurer of the Qualis Car cannot be taken advantage by the claimants in the present claim petition. In fact, the present claimants were the claimants in MCOP.No.1898 of 2009 and therefore,



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they cannot take advantage of non-impleading the owner and the insurer of the Qualis car which is their own fault.

(v).The learned counsel for the appellant had further contended that once a finding is rendered by a Tribunal with regard to the negligence that would operate as res judicata in the subsequent claim petitions arising out of the same accident. Hence, he prayed for allowing the appeals and to exonerate the insurer of the Qualis Car.

9.Contentions of the learned counsel appearing for the claimants:

(i).The learned counsel for the claimants have contended that the claim petition in MCOP.No.1898 of 2009 was filed under Section 167 of M.V.Act. The deceased Ahamed Hussain was a driver under one Anandan. Instead of filing a claim petition under Workmen Compensation Act, a claim petition was filed under Motor Vehicles Act. It is settled position of law, whenever a claim petition is filed under Workmen Compensation Act, the negligence on the other side need not be proved and even if there is negligence on the part of the deceased, compensation has to be awarded. Therefore, any finding rendered by the Tribunal in MCOP.No.1898 of 2009 as against the deceased person will not operate as res judicata.



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(ii).The learned counsel for the claimants had further contended that the said claim petition was filed relating to the death of the driver of the Santro Car and the present claim petitions have been filed due to the death/injuries of the occupants of the Santro Car. Therefore, the award in MCOP.No.1898 of 2009 cannot operate as res judicata in the present claim petitions in MCOP.No.322 to 324 of 2013.

(iii).The learned counsel for the claimants had further contended that the claimants have let in evidence before the Tribunal with regard to the rash and negligent driving on the part of the driver of the Qualis Car. Only based upon the said evidence, the Tribunal had arrived at a finding that the accident has taken place only due to the rash and negligent driving on the part of the driver of the Qualis car. Therefore, the finding relating to the negligence cannot be found fault with.

(iv).The learned counsel for the claimants had further contended that the owner or insurer of the Qualis Car were not made parties in MCOP.No.1898 of 2009 and therefore, the said finding would not be binding upon them. Now for the first time, a finding has been rendered as against the owner and the insurer of the Qualis Car. Therefore, the plea of res judicata would not arise in the present case. Hence, he prayed for



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sustaining the awards passed by the Tribunal.

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10.I have considered the submissions made on either side and perused the materials available on record.

11.The claimants in MCOP.No.322 and 324 were the claimants in MCOP.No.1898 of 2009. The claimant in MCOP.No.323 of 2013 was not a claimant in MCOP.No.1898 of 2009. However, his mother Saira Banu was one of the claimants in MCOP.No.1898 of 2009.

12.A perusal of the award in MCOP.No.1898 of 2009 which is marked as Exhibit R2 indicates that the claimants have taken a specific stand therein that the accident has taken place due to the fact that the driver of the Santro Car namely Ahamed Hussain had lost control of the vehicle. The Tribunal in the said claim petition has arrived at a finding that the accident has taken place only due to the rash and negligent driving on the part of the driver of the Santro Car. The Tribunal has also pointed out that the claimants have also accepted the case of negligence on the part of the Santro Car and only because of the said fact that they have not impleaded the owner or insurer of the Qualis Car.

13.Though the claim petition in MCOP.No.1898 of 2009 has been filed under Section 167 of Motor Vehicles Act, having pleaded and



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suffered a finding relating to the negligence, the same claimants cannot turn around and contend that the finding relating to the negligence will not operate as res judicata with regard to the other claim petitions arising out of the same accident.

14. The Tribunal has chosen to reject the plea of res judicata mainly on the ground that the owner and the insurer of the Qualis car were not parties to the said MCOP.No.1898 of 2009. The Hon'ble Supreme Court in a judgment reported in **(1979) 4 SCC 163 (Pandit Ishwardas Vs. State of Madhya Pradesh and others)** in Paragraph No.7 has held as follows:

“7....In order to sustain the plea of res judicata it is not necessary that all the parties to the two litigations must be common. All that is necessary is that the issue should be between the same parties or between the parties under whom they or any of them claim..... Once the questions at issue in the two suits are found to be the same, the fact that the material which led to the decision in the earlier suit was not again placed before the Court in the second suit cannot make the slightest difference. The plea of res judicata may be sustained without anything more, if the questions at issue and the parties are the same, subject of course to the other conditions prescribed by Section 11 Civil Procedure Code....”



15. Therefore, it is clear that a mere non impleading of owner and the insurer of the Qualis Car will not permit the claimants to wriggle out the bar enunciated under Section 11 of C.P.C.

16. Our High Court in a judgement reported in **2014 SCC Online Madras 9922 (K.Priya and others Vs. The Managing Director, Tamil Nadu State Transport Corporation, Karaikudi)** has categorically held that the earlier finding would operate as res judicata insofar as the finding of negligence is concerned.

17. The High Court of Gujarat at Ahmedabad in judgement reported in **2008 ACJ 528 in F.A.No.2150 of 1983 (United India Insurance Co.Ltd., Vs. Laljibhai Hamirbhai and others)** in Paragraph No.21 has held as follows:

“21.....The Tribunal has given a categorical finding on the basis of the material that the truck driver ought to have maintained safe distance between the two vehicles and the distance of 8 to 10 ft could not be called safe distance. But again in para 25, the issue of negligence has been discussed by the Tribunal and, thereafter, it has come to the conclusion that negligence of truck driver was 70 per cent, whereas that of ST.driver was 30 per cent. In view of the same, by no stretch of imagination, it can be said that the finding given by the Tribunal in earlier case is not significant and it cannot operate as bar res judicata in subsequent proceedings.....”



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18. In view of the above said facts, it is clear that while filing a claim petition seeking compensation for the death of their father, the claimants have attributed negligence upon their own father and obtained compensation. Later when they found that the policy of the vehicle in which they have travelled is only an Act Only Policy and it will not cover the occupants of the Car, they have changed their stand and started attributing negligence on the part of the opposite party namely the Qualis Car. The claimants cannot be permitted to approbate and reprobate. The claimants being parties to MCOP.No.1898 of 2009 cannot now turn around and contend that it was a claim under Section 167 of the Motor Vehicles Act. It is not the provision of law under which a claim petition is filed decides the issue of res judicata. When two claim petitions arise out of the same accident, the finding relating to the negligence arrived at, in one of the claim petitions will certainly operate as res judicata in the other claim petitions irrespective of provisions of law under which both the claims came to be filed.

19. It is pertinent to point out that MCOP.No.1898 of 2009 was not filed under Section 163-A of the Motor Vehicles Act where proving of negligence on the opposite party is not mandatory.



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20.In view of the findings of the Tribunal in MCOP.No.1898 of 2009, it is clear that the driver of the Santro Car himself is the tortfeasor and the owner and the insurer of the other vehicle namely the Qualis Car are no way responsible for the said accident. The Santro Car has got only a Liability Only Policy which does not cover the occupants. Therefore, the Tribunal was not right in rejecting the award in MCOP.No.1898 of 2009 and arriving at a different finding relating to negligence.

21.In view of the above said deliberations, the award passed against the appellant/insurance company is not sustainable and the same is shifted to the third respondent in the claim petition/third respondent in the appeal namely the owner of the Santro Car. The quantum of compensation and the apportionment are hereby confirmed.

22.Accordingly, the Civil Miscellaneous Appeals are partly allowed to the extent as stated above. No costs. Consequently, connected miscellaneous petitions are closed.

12.07.2023

Index : Yes/No
Internet : Yes/No
NCC : Yes/No
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To
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1. The Motor Accident Claims Tribunal
/Special District Judge, Trichy

2. The Record Keeper,
Vernacular Section,
Madurai Bench of Madras High Court,
Madurai.



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R.VIJAYAKUMAR,J.

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Pre-delivery Common Judgement made in
C.M.A(MD)Nos.1326 to 1328 of 2016
and
CMP(MD).Nos. 11247 to 11249 of 2016

12.07.2023