



C.M.A(MD)No.1025 of 2017

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : 12.04.2023
DELIVERED ON : 01.06.2023

CORAM

THE HON'BLE MR.JUSTICE R.VIJAYAKUMAR

C.M.A(MD)No.1025 of 2017
and
C.M.P(MD)No.10608 of 2017

The Branch Manager,
National Insurance Company Limited,
5A, Sub Collector Office Road,
District Court Campus,
Dindigul Taluk, Dindigul District.

... Appellant/3rd Respondent

Vs.

1.Ramuthai

... Respondent/Petitioner

2.M.Sangeetha

... Respondent/1st Respondent

3.Murugesan

... Respondent/2nd Respondent

PRAYER: Civil Miscellaneous Appeal is filed under Section 173 of Motor Vehicles Act, to set aside the judgment and decree of the Claims Tribunal in M.C.O.P.No.2 of 2015, dated 27.06.2017 on the file of the Motor Accident Claims Tribunal, Special Subordinate Court, Dindigul allow the appeal with costs.



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For Appellant : Mr.J.S.Murali
For R1 : Mr.R.Santhanam
For R2 : Mr.O.Sivakumar
For R3 : No Appearance

JUDGEMENT

The present appeal has been filed by the insurance company against the award of the Motor Accident Claims Tribunal, Dindigul in M.C.O.P.No.2 of 2015 primarily challenging the negligence and liability.

2. According to the injured claimant, she was travelling in an auto owned and driven by the 2nd respondent and insured with the 3rd respondent. At that point of time, a Scorpio car owned by the 1st respondent came from the opposite direction and dashed against the auto in which the claimant sustained serious injuries. An F.I.R was registered in Crime No.161 of 2015 on the file of Taluk Police Station, Dindigul as against the driver of the car. She had further contended that she is a vegetable vendor aged 51 years and earning a sum of Rs.15,000/- per month. The claimant has prayed for a sum of Rs.10,00,000/- towards compensation.



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3. According to the claimant, both the auto driver and the driver of the Scorpio car had driven the vehicle in a rash and negligent manner and both of them have contributed to the accident. The owner of the car, namely the 1st respondent had remained ex parte. The owner cum driver of the auto had filed a counter contending that the entire accident has happened only due to the rash and negligent driving on the part of the car driver and therefore, he is not liable to pay any compensation. In case, if the Court arrives at a finding that there is negligence on the part of the auto driver, the same being insured with the 3rd respondent, the 3rd respondent has to pay the compensation.

4. The 3rd respondent has filed a counter contending that the accident has happened only due to the rash and negligent driving on the part of the car driver and therefore, they are not liable to pay any compensation.

5. The tribunal after considering the oral and documentary evidence, arrived at a finding that the accident has happened only due to the rash and negligent driving on the part of the car driver. The tribunal further found that the driver of the auto was having only a LMV license without a badge and therefore, he has also contributed to the said



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accident. The tribunal ultimately concluded that 90% of the negligence is attributable to the car driver and 10% of the negligence is attributable to the auto driver in view of non-possession of badge. The tribunal relied upon a judgment of the Hon'ble Supreme Court reported in **2015 ACJ 1441 (Kehnyei Vs. New India Assurance Co., Ltd and Others)** and held that even though the negligence is apportioned between the parties to the proceeding, the claimant can recover the whole of the compensation from anyone of the tortfeasors. Thereafter, the tortfeasor who had paid the compensation amount can recover the same from the other tortfeasor as per the apportionment in the order. Based upon the judgment of the Hon'ble Supreme Court, the tribunal held that the entire compensation has to be paid by the 3rd respondent insurance company who is the insurer of the auto. The tribunal further found that the claimant had sustained 30% disability and proceeded to award a sum of Rs.2,30,000/- towards compensation. The tribunal granted liberty to the insurance company to pay the amount and recover the same from the car owner and the auto owner proportionately as per the order. This award is under challenge in the present appeal.

6. The learned counsel appearing for the appellant / insurance company had contended that both the joint tortfeasors have been arrayed



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as parties to the claim petition. The tribunal has also apportioned the liability as 90% upon the car driver and 10% upon the auto driver. Once an apportionment of liability is made with regard to the negligence, the insurance company can be directed to pay only 10%, which is the negligence fixed upon the insured, namely the auto driver. As far as the 90% liability upon the car owner is concerned, the car is not insured with any insurance company. There is no contract of insurance between the car owner and the appellant insurance company. Therefore, the appellant insurance company ought not to have been directed to pay the said 90% also and collect the same from the owner of the car. Therefore, he prayed that the award of the tribunal directing the insurance company may be restricted to 10% of the award amount (the share of the auto driver). Hence, he prayed for allowing the appeal to the said extent.

7. The learned counsel appearing for the claimant has contended that a careful perusal of the judgment of the Hon'ble Supreme Court reported in **2015 ACJ 1441 (Kehnyei Vs. New India Assurance Co., Ltd and Others)** will clearly indicate that in case of composite negligence, when all the joint tortfeasors have been impleaded, the tribunal can determine inter se extent of composite negligence of the drivers.

However, the determination of the extent of negligence between the joint



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tortfeasors is only for the purpose of their inter se liability, so that they can recover the same from the other joint tortfeasor. However, they can recover the amount from the other tortfeasor only after making whole of the payment to the claimant to the extent which they have satisfied the liability of the other. Therefore, in the present case, the tribunal has determined the inter se extent of composite negligence of the drivers as 90% upon the car driver and 10% upon the auto driver. Therefore, the claimant has an option to proceed as against one of the tortfeasors or his insurance company to recover the entire claim amount. After payment of the entire claim amount to the claimant, the insurance company is entitled to recover the same from the other tortfeasor, namely the owner and driver of the car. Therefore, the award of the tribunal in mulcting the 100% liability upon the insurance company and granting liberty to the said company to recover the 90% from the car owner is perfectly legal and the same does not warrant any interference.

8. I have carefully considered the submissions made on either side and perused the material records.

9. The accident has taken place on 28.02.2015 at 4.45 p.m., and an F.I.R has been registered at 08.00 p.m., on the same day. One of the



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occupants of the auto has lodged a F.I.R alleging that the entire accident has happened only due to the rash and negligent driving on the part of the Bolero car driver. The claimant through her counsel had issued a legal notice on 18.05.2015 to the car owner (Exhibit P.6) alleging that the accident has taken place only due to the rash and negligent driving on the part of the driver of the car and she had called upon the car owner to pay a compensation of Rs.15,00,000/-. However, at the time of filing of the claim petition, the claimant has taken a U turn and has contended that both the auto driver and the car driver were guilty of rash and negligent driving.

10. The claimant was examined as P.W.1. In her cross-examination, she has admitted that the accident has happened only due to the rash and negligent driving on the part of the car driver and therefore, the owner of the car is liable to pay compensation. However, in the latter portion of the cross-examination, she has contended that the accident has happened only due to the composite negligence of both the drivers. After considering the deposition of P.W.1, Exhibit P.1- F.I.R and Exhibit P.6- legal notice, the tribunal has arrived at a definite finding that the accident has happened only due to the rash and negligence driving of the car driver. However, the tribunal found that the auto driver was not holding a



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badge and therefore, mulcted 10% composite negligence on the part of the auto driver for not possessing a valid driving license at the relevant point of time.

11. The tribunal has to assess the negligence only based upon the oral and other documentary evidence and it cannot be based upon the non-possession of a badge. Non-possession of a badge would only result in breach of policy conditions and consequently, lead to pay and recovery. Unless the tribunal on the basis of oral and documentary evidence arrives at a finding that the driver of the auto was negligent in some manner in causing the accident, 10% of composite negligence cannot be fixed upon the auto driver merely on the ground that he did not possess a valid driving license.

12. The Hon'ble Supreme Court in a judgment reported in **2017 (14) SCC 663 (Mukund Dewangan Vs. Oriental Insurance Company Ltd.,)** has held that as far as LMV vehicles are concerned, non-possession of an endorsement cannot be considered to be breach of policy condition. The vehicle in which the claimant has travelled is a LMV vehicle and therefore, the LMV driving license held by the 2nd respondent is a valid and effective driving license. The tribunal was not



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right in fixing 10% liability upon the auto driver for not possessing the endorsement at the relevant point of time in view of the judgment of the Hon'ble Supreme Court.

13. In view of the above said deliberations, the F.I.R under Exhibit P.1, legal notice under Exhibit P.6 and the finding of the tribunal would clearly indicate that the accident has happened only due to the rash and negligent driving on the part of the driver of the car owned by the 1st respondent. There was no negligence on the part of the auto driver at all. Therefore, fixing of 10% composite negligence on the part of the auto driver is not legally sustainable. When the accident has happened solely due to the rash and negligent driving on the part of the car driver, there is only one tortfeasor and hence, apportioning the negligence will not arise.

14. Only when there is composite negligence shared by 2 or 3 tortfeasors, the question of invoking the judgment of the Hon'ble Supreme Court reported in **2015 ACJ 1441 (Kehnyei Vs. New India Assurance Co., Ltd and Others)** would arise. Therefore, the tribunal was not right in arriving at a finding that there is composite negligence and the appellant insurance company has to deposit the entire award amount and thereafter, recover 90% of the award amount from the owner of the



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car. When there is no negligence at all on the part of the auto driver, the insurer of the said auto is not liable to pay any compensation at all. The car which is solely responsible for the accident has not been insured with any insurance company. Therefore, the 1st respondent in the claim petition is liable to pay the entire award amount as arrived at by the tribunal.

15. In view of the above said deliberations, the award as against the appellant insurance company is hereby set aside and the appellant is exonerated. The quantum of award arrived at by the tribunal is neither excessive nor unreasonable. Therefore, the entire award amount has to be satisfied only by the 1st respondent in the claim petition/owner of Bolero car. If any amount has been deposited by the appellant insurance company before the tribunal, the same shall be refunded along with accrued interest. However, if any amount has already been withdrawn by the claimant, the same shall not be recovered from the claimant. The claimant is at liberty to execute the award as against the 1st respondent in the claim petition. The quantum of the award and the interest fixed by the tribunal are not disturbed.



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16. With the said observations, the appeal stands allowed to the extent as stated above. No costs. Consequently, connected Civil Miscellaneous Petition is closed.

01.06.2023

NCC : Yes / No
Index : Yes / No
Internet : Yes / No

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To

- 1.The Motor Accident Claims Tribunal,
Special Subordinate Court,
Dindigul.
- 2.The Section Officer,
Vernacular Section,
Madurai Bench of Madras High Court,
Madurai.



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R.VIJAYAKUMAR ,J.

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Pre-delivery order made in
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