
(2019) 02 OHC CK 0023
In the Orissa High Court
Case No : MACA No.314 Of 2013

Achyuta Charan Mohanty

APPELLANT

Vs

Govt. Of Orissa & Others

RESPONDENT

Date of Decision : 06-02-2019

Acts Referred:

Motor Vehicles Act, 1988 — Section 166, 173

Citation : (2019) 02 OHC CK 0023

Hon'ble Judges : Dr. A. K. Rath, J

Bench : Single Bench

Advocate : T.C. Mohanty, Swayambhu Mishra, G.P. Dutta

Final Decision : Allowed

Judgement

DR. A.K.RATH, J

1. Â The instant appeal has been filed under Sec.173 of the Motor Vehicles Act, 1988 (in short, â??the M.V Actâ?) by the claimant assailing the

award of the Claims Tribunal.

2. The claimant-appellant filed an application under Sec.166 of the M.V Act for compensation. His case was that he was the Medical Officer of Gop

P.H.C. On 11.10.1995, he was returning to Gop in the Government jeep bearing registration number OSP-667 after finishing his work at Tarakore

Sterilization Camp. At about 7 P.M at Balinuamuhan near village Junei on Gop-Konark road, there was a collision between the jeep and the bus

bearing registration number ORX-9582 coming from opposite direction, as a result of which he sustained injuries. Immediately he was shifted to Gop

P.H.C and thereafter to SCB Medical College & Hospital for treatment.

3. Though notice had been issued to opposite parties 1 and 2, but they had

chosen not to contest the case and as such, were set ex parte. Opposite party no.3 filed a written statement denying the liability.

4. Stemming on the pleadings of the parties, learned Tribunal framed five issues. Parties led evidence, oral and documentary. On an anatomy of pleadings and evidence on record, learned Tribunal came to hold that the accident took place due to composite negligence of the drivers of both the vehicles. Held so, it awarded an amount of Rs.1,20,000/- along with interest @ 6% per annum and apportioned the compensation @ 50% between the opposite party no.1 and owner of the bus, opposite party no.2. Liability was saddled with the opposite parties on the ground that the bus was not insured with opposite party no.3.

5. Heard Dr. T.C. Mohanty, Senior Advocate along with Mr.P.K. Singh, learned counsel for the appellant, Mr. Swayambhu Mishra, learned ASC and Mr. G.P. Dutta, learned counsel for respondent no.3.

6. Dr. Mohanty, learned Senior Advocate for the appellant confined his argument with regard to composite negligence on both the vehicles. He submitted that in the case of composite negligence, it is open to the claimant to proceed against any owner of the vehicles. Learned Tribunal came to a finding that due to composite negligence of both the vehicles, the accident took place. Instead of saddling 50% liability on the owner of the bus, the Tribunal ought to have directed the opposite party no1- respondent no.1 herein, to pay the entire amount and recover the same from respondent no.2- opposite party no.2. To buttress the submission, he placed reliance on the decision of the apex Court in the case of Khenyei v. New India Assurance Company Limited and others, (2015) 9 SCC 273.

7. Per contra, Mr. Swayambhu Mishra, learned ASC submitted that the learned Tribunal came to hold that the claimant sustained injuries due to composite negligence of both the vehicles. 50% liability has been saddled with the Government of Orissa opposite party no.1. It is open to the claimant to proceed against the owner of the bus and recover rest 50%.

8. Mr. Dutta, learned counsel for the respondent no.3 submitted that the offending bus was not insured with opposite party no.3. Learned Tribunal has rightly saddled with the compensation on the owner of the vehicle.

9. The seminal question that hinges for consideration is whether it is open to a

claimant to recover entire compensation from one of the joint

tortfeasors, particularly when in the accident caused by composite negligence of drivers of jeep and bus.

10. An identical matter came up for consideration before the apex Court in the case of *Khenyei v. New India Assurance Company Limited and*

others, (2015) 9 SCC 273. On a survey of earlier decisions, the apex Court held :

“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. The

apex Court in *T.O. Anthony v. Karvarnan & Ors.* [2008 (3) SCC 748] has held that in case of contributory negligence, the injured need not establish the extent of

responsibility of each wrong doer separately, nor is it necessary for the court to determine the extent of liability of each wrong doer 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:

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

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

wrong-doer separately. 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 stands 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.â??

11. The apex Court further held that 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. As to the remedies available to one of the joint tortfeasors from whom compensation has been recovered, the apex Court held :

22. What emerges from the aforesaid discussion is as follows: 22.1. In the case of composite negligence, plaintiff/claimant is entitled to sue both or any one of the

joint tortfeasors and to recover the entire compensation as liability of joint tortfeasors is joint and several.

22.2. In the case of composite negligence, apportionment of compensation between two tortfeasors vis-a-vis the plaintiff/claimant is not permissible. He can recover

at his option whole damages from any of them.

22.3. In case all the joint tortfeasors 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 tortfeasors 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 tortfeasor can recover the

amount from the other in the execution proceedings.

22.4. 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 tortfeasors. In such a case, impleaded joint tortfeasor should be left, in case he so desires, to sue the other joint tortfeasor in independent proceedings

after passing of the decree or award.

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13. In the said case there was determination of inter se liability of composite negligence to the extent of negligence of 2/3rd and 1/3rd of respective

drivers. Since the trailer-truck which was not insured with the insurer was negligent to the extent of 2/3rd, it was held that it would be open to the

insurer of the bus after making

payment to the 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 tortfeasor 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.

14. The ratio in Khenyei (supra) proprio vigore applies to the facts of the case.

15. In the instant case, learned Tribunal came to hold that due to composite negligence of both the vehicles, the accident took place and saddled with the liability 50% each on the owner of the jeep, Government of Orissa and the owner of the bus, opposite party no.2. In view of the decision of the apex Court in the case of Khenyei (supra), the Government of Orissa opposite party no.1- respondent no.1 herein shall pay the entire award amount and recover 50% of the same from the owner of the bus, namely opposite party no.2 in the execution proceeding. The appeal is allowed to the extent indicated above.

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