

**(2012) 10 MAD CK 0002**  
**In the Madras High Court**  
**Case No : C.M.A. No. 2484 of 2003**

|                                                                |            |
|----------------------------------------------------------------|------------|
| Branch Manager, New India Assurance Co. Ltd., Vellore District | APPELLANT  |
| Vs                                                             |            |
| Malliga and Others                                             | RESPONDENT |

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**Date of Decision :** 03-10-2012

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Section 2(11)

**Citation :** (2012) 8 MLJ 46

**Hon'ble Judges :** Aruna Jagadeesan, J

**Bench :** Single Bench

**Advocate :** R. Sivakumar, for the Appellant; P. Tamilavel, for the Respondent

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## Judgement

Ms. Aruna Jagadeesan, J.—This appeal is preferred by the New India Assurance Co. Ltd., aggrieved against the award passed by the

learned Additional Special Judge, Motor Accede it Claims Tribunal, at Krishnagiri, Dharmapuri in M.C. O.P. No. 49 of 2002. By the impugn 2d

award, the Tribunal has found that the accident occurred solely due to the rash and negligent driving of the offending vehicle/tractor and awarded

Rs. 4,36,500/- as compensation with interest at the rate of 9% p.a., from the date of petition till the date of realization. The short facts which are

necessary for the disposal of this appeal stated as follows:

On 24.1.2001 at about 3.30 a.m., when the deceased Rangan @ Pandurangan was proceeding in Bajaj Scooter towards Vellisanthai in Pallakad

main road, a tractor bearing Registration No. TN-23-Y-5881 hit the Scooter bearing Registration No. TN-29-4950, as a result of which the

deceased and the pillion riders fell down. The deceased Rangan got multiple injuries all over the body and died on the spot.

2. Mr. R. Sivakumar, the learned counsel appearing on behalf of the Insurance Company raised contentions before this Court that the Tribunal has

committed gross error in not considering the contributory negligence on the part of the Scooterist who was proceeding by carrying two pillion

riders in the Scooter. He also raised contention that the Tribunal has totally ignored P.W.2's version who has given contradictory statement that

only two persons were travelling in the Scooter at the time of accident. He submitted that the Tribunal has committed gross error in holding that the

tractor driver is solely responsible for the accident. It was also contended that the compensation awarded by the Tribunal is on the higher side. It is

further contended that the second claimant who is the sister of the deceased was not a dependent and the Tribunal erred in apportioning the

compensation to the second respondent/sister of the deceased. The learned counsel placed reliance on the decision of this Court in Oriental

Insurance Co. Ltd., Gobichettipalayam v. Sivagami and Others 2012 (1) TN MAC 713 : LNIND 2011 MAD 273 in support of his contention

that three persons travelling in a Scooter not only amounts to violation of policy condition but also violation of provisions of Motor Vehicles Act

and also placed reliance on the decision of the Division Bench of this Court in National Insurance Co. Ltd., v. S. Chitra and Others 2010 AC J

1316: LNIND 2009 MAD 911 and also in Managing Director, Tamil Nadu State Transport Corporation (Coimbatore Division) Ltd., formerly

Cheran Transport Corporation v. Abdul and Others (2003) 1 MLJ 489, that carrying two persons on motor-cycle as pillion riders tantamount to

contributory negligence on the part of the motor cyclist as such action of the individual is illegal and unauthorized. In support of his contention that

sister of the deceased is not entitled for any compensation as she is not the dependent of the deceased, the learned counsel for the appellant placed

reliance on the decision of this Court in N. Lakshmi and Another Vs. Pichaiammal and Others, and also on the decision of the Hon''ble Supreme

Court in Amrit Bhanu Shali and Others Vs. National Insurance Co. Ltd. and Others, wherein the Hon''ble Supreme Court has observed that the

married sister of the deceased is not entitled to any share in the compensation along with her parents.

3. On the other hand, Mr. P. Tamilavel, the learned counsel appearing for the claimants submitted that the Tribunal has rightly awarded

compensation and for that the Tribunal has not committed any error warranting any interference. He submitted that the Tribunal has rightly

appreciated the oral and documentary evidence placed on record and fastened the negligence on the part of the tractor driver and therefore, this

being appreciation of facts on the basis of record after considering the FIR and evidence of P.W.2, this Court may not interfere in such findings of

facts. The learned counsel contended that in the absence of evidence on the side of the appellant that three persons travelling in motor cycle has

contributed to the accident, no negligence could be fastened on the rider of the motor cycle. He placed reliance on the decision of this Court in

Managing Director, Tamil Nadu State Transport Corporation Ltd., Salem v. Maheswari (2006) 6 MLJ 336 and the decision of the Division Bench

of this Court in the Branch Manager, United India Insurance Company Ltd., Karaikudi v. Uma and Others 2011 (1) TANMAC 136: LNIND

2010BMM 1254 and also on the decision of this Court in Kattabomman Transport Corporation Limited Vs. Vellai Duraichi and Others, .

4.I have considered the submissions made by both the counsels appearing for the parties and perused the impugned award as well as the material

evidence placed on record.

5. This accident had occurred on 24.10.2001 when the deceased was riding Scooter with two persons as pillion riders and was proceeding in

Pallakad main road towards Vellisanthai. According to the claimants, when the Scooter was proceeding near Madavanpatti Vinayagar Temple, the

first respondent driver drove the tractor very fastly in a rash and negligent manner, hit the Scooter and due to the said impact, the deceased and

pillion riders were thrown on the road. The deceased sustained fatal injuries and the pillion riders also got injured. Though the averments stated in

the claim petition does not indicate that two persons were travelling as pillion riders but in the FIR, it is averred that three persons were travelling in

the Scooter at the time of accident.

6. The FIR registered on the statement given by one of the injured who was a pillion rider indicates that two pillion riders were travelling in the

Scooter. P.W.2, an eye witness examined on the side of the claimants though stated in cross examination that two persons travelled in the Scooter

but his evidence regarding the negligence aspect, attributing to the tractor driver

has not been controverted by the appellant/Insurance Company by leading any rebuttal evidence. In the FIR, it has been averred by the injured pillion rider that the tractor was driven rashly and negligently and dashed against the scooter. In the absence of any evidence to the contrary, it was rightly held by the Tribunal that the accident was caused due to the rash and negligent driving of the driver of the tractor.

7. Mr. R. Sivakumar, the learned counsel for the appellant vehemently contended that the Tribunal has committed gross error in not considering the fact that two pillion riders were carried in the Scooter at the time of accident in violation of the provisions of Motor Vehicles Act and that contributed to the accident. Learned counsel appearing for the appellant, cited the decision of the Division Bench of this Court and a judgment of single Judge of this Court in National Insurance Co. Ltd., v. S. Chitra and Others (supra) and Oriental Insurance Co. Ltd., Gobichettipalayam v.

Sivagami and Others (supra) when it is held that a two wheeler is meant only for two persons, the rider and the pillion rider and if more than two

persons travel on a motor cycle or any of the two wheeler, undoubtedly, such action of the individual would become illegal and the rider of the

two-wheeler cannot have complete control over the vehicle. The Division Bench of this Court in Managing Director, Tamil Nadu State Transport

Corporation (Coimbatore Division) Ltd., formerly Cheran Transport Corporation v. Abdul and Others (supra) has observed thus:

When three persons travelled in a motor cycle which is meant "or two persons, this Court is of the view, the conduct of the persons who travelled

in such a manner are liable for contributory negligence; especially when their action is contrary to the statute".

8. On the other hand, in the case of Kattabomman Transport Corporation Ltd., v. Vellai Duraichi and Others (supra), a Division Bench of this

Court held that unless there is evidence to prove that it is because of the addition of one more (third person in the motor cycle instead of two) the

accident occurred, the owner/Insurance Company will be liable to make good the loss/compensation. The relevant passage is extracted below:

8. In the light of the said conclusion, we have carefully verified the factual details and the ultimate decision arrived at in the first Division Bench

decision, namely, Managing Director, Tamil Nadu State Transport Corporation

(Coimbatore Division) Ltd., formerly Cheran Transport

Corporation v. Abdul and Others (supra). As observed earlier, except stating that 3 persons travelled in a motor vehicle, which is prohibited, no

specific finding was given to the effect that travelling of three persons in a motor cycle was responsible for the accident; hence we are of the view

that the conclusion in Managing Director, Tamil Nadu State Transport Corporation (Coimbatore Division) Ltd., formerly Cheran Transport

Corporation v. Abdul and Others (supra) is to be confined to that case. In other words, merely because there is violation of the provisions of the

Act or Rules or the policy conditions, it is not automatic that in every case the principle of contributory negligence is to be applied mechanically. As

rightly observed in the other Division Bench decision, namely M. Anandavalli Amma v. Arvind Eye Hospital 2002-3 L.W. 710, unless there is

evidence to prove that the accident took place only because of such act that is taking/travelling more persons in a motor cycle which resulted in an

accident, the owner of the other vehicle and its insurer will be liable to pay compensation. To put it clear, if the appellant-Transport Corporation is

able to prove that it is because of the addition of one more (third person in the motor cycle instead of two), the accident occurred, the position

would be different. In other words, unless the owner of the vehicle or the Insurance Company is able to prove that the accident took place only

because of such act that is taking more persons than the prescribed number, the owner/Insurance Company will be liable to make good the

loss/compensation. In the case on hand the materials placed before the Tribunal show that it was the bus driver who had gone to the other side of

the road, hit the motor cycle thereby caused the accident. There is no evidence to show that the accident occurred because of travelling of three

persons in the motor cycle. In the light of the above said conclusion, we reject the contra argument made by the learned counsel for the appellant.

9. In Ratanlal & Dhirajlal, the Law of Torts by Justice G.P. SINGH, the following proposition of law regarding contributory negligence have been

stated:

It has to be noted that negligence of the plaintiff which can be described as contributory negligence must have casual connection with the damage

suffered by him.

10. The meaning of "Contributory negligence distinct from the negligence" has been very aptly brought in the decision of Hon"ble Supreme Court in

the case of Sudhir Kumar Rana v. Surinder Singh, 2008 (2) TAC 769 : (2008) 5 MLJ 1386. That was a case where the claimant driving two

wheeler met with an accident and suffered injuries. The Tribunal found claimant not possessing any driving licence and contributed to accident. The

said finding was affirmed by the High Court. In appeal to the Hon"ble Supreme Court, it was held that if a person drives vehicle without a licence,

he commits an offence and that by itself may not lead to a finding of negligence as regards accident and that there was no finding that the claimant

was driving two wheeler rashly and negligently. The Hon"ble Supreme Court held that only for not possessing a licence, he would not be guilty of

contributory negligence. The Hon"ble Supreme Court held as follows:

6. A contributory negligence may be defined as negligence in not avoiding the consequences arising from the negligence of some other person,

when means and opportunity are afforded to do so. The question of contributory negligence would arise only when both parties are found to be

negligent.

7. The question is, negligence for what? If the complainant must be guilty of an act or omission which materially contributed to the accident and

resulted in injury and damage, the concept of contributory negligence would apply. (See New India Assurance Co. Ltd. v. Avinash.)

7. In T.O. Anthony v. Karvarnan it was held:

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 wrongdoers, it is said that the person was injured on account of the composite negligence of those wrongdoers. In such a

case, each wrongdoer 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 wrongdoer separately, nor is

it necessary for the Court to determine the extent of liability of each wrongdoer 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 stand 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. The High Court has failed to correct the said error.

\*If a person drives a vehicle without a licence, he commits an offence. The same, by itself, in our opinion, may not lead to a finding of negligence as regards the accident. It has been held by the Courts below that it was the driver of the mini truck who was driving rashly and negligently. It is one thing to say that the appellant was not possessing any licence but no finding of fact has been arrived at that he was driving the two-wheeler rashly and negligently. If he was not driving rashly and negligently which contributed to the accident, we fail to see as to how, only because he was not having a licence, he would be held to be guilty of contributory negligence.

11. It is thus clear from that what has been held by the Hon"ble Supreme Court in the aforesaid decision that negligence ordinarily means breach of a legal duty to take care, whereas contributory negligence means the failure by a person to use reasonable care for the safety of either of himself or his property so that he himself or his property, becomes blameworthy in part as author of his own wrong.

12..In Oriental Fire and Genl. Ins. Co. Ltd. Vs. Sudha Devi and Others, , as a learned Judge of the Patna High Court (as he then was) was called

upon to decide whether violation of Section 85 of the Motor Vehicles act, 1939, which is in pari materia with Section 128 of the Act, amounts to

contributory negligence on the part of the driver of a two wheeler and his Lordship held that violation of the provisions of the Motor Vehicles Act

may not have anything to do with the theory of contributory negligence unless the vehicle is driven in violation of the traffic regulations.

13. Section 128 of the Act and Rule 123 of the Rules are quoted herein below:

128. Safety measures for drivers and pillion riders-

(1) No driver of a two wheeled motor cycle shall carry more than one person in addition to himself on the motor cycle and no such person shall be

carried otherwise than sitting on a proper seat securely, fixed to the motor cycle behind the driver's seat with appropriate safety measures.

(2) In addition to the safety measures mentioned in sub-section (1) the Central Government may, prescribe other safety measures for the drivers of

two wheeled motor cycles and pillion riders thereon".

R. 123-Safety devices in motor cycle- No motor cycle which has provision for pillion rider, shall be constructed without provision for a

permanent hand grip on the side or behind the driver's seat and a foot rest and a protective device covering not less than half of the rear wheel so

as to prevent the clothes of the person sitting on the pillion from being entangled in the wheel.

14. A plain reading of Section 128 of the Act quoted above, would show that sub-section (1) casts a duty on the driver of a two wheeled motor

cycle not to carry more than one person in addition to himself on the motor cycle. Similarly, Rule 123 of the Rules quoted above mentions the

safety devices to be provided while manufacturing a motor cycle. These provisions obviously are safety measures for the driver and pillion rider

and breach of such safety measures but that may not amount to "negligence" on the part of the driver of the motor cycle, unless such negligence

was partly the immediate cause of the accident or damage suffered by the rider or pillion rider as would be clear from the authorities discussed

above.

15. Therefore, I am of the considered opinion that if the accident has been caused not on account of violation of Section 128 of the Motor vehicle

Act, the rider would not be guilty of contributory negligence. In other words, if

breach of Section 128 of the Act does not have a casual connection with the damage caused to the rider or pillion riders of the vehicle, such breach would not amount to contributory negligence on the part of the rider of the vehicle or composite negligence on the part of the driver of the two wheeler. In the said view of the matter, I am in respectful agreement with the views expressed by the Division Bench of this Court in *Kattabomman Transport Corporation Ltd., rep. by its Managing Director, Vannarpettai, Tirunelveli v. Vellai Duraichi and Others (supra)*.

16. Admittedly in the instant case, the Tractor driver did not lodge any complaint finding fault with the rider of the Scooter as well as carrying of two pillion riders therein. There is not even a suggestion to the witnesses that travelling of three persons in the Scooter which is prohibited has contributed for the accident. There is no iota of evidence to show that the fatal accident had occurred because travelling of three persons in the Scooter at the time of accident. Simply because of the deceased Pandurangan and other two persons were travelling in the Scooter, that by itself does not fasten them with the responsibility of negligent driving. Therefore, in my view, the findings given by the Tribunal holding the driver of the tractor solely responsible for the accident is the correct finding based on record after considering the evidence produced on record. For that the Claim Tribunal has not committed any error and therefore, contention raised by the learned counsel for the appellant cannot be accepted and the same is rejected.

17. The learned counsel raised contention questioning the quantum of compensation that without sufficient evidence on record, the Claim Tribunal has determined the quantum at Rs. 4,36,500/- in favour of the claimants. He submitted that the Tribunal fixed Rs. 2,000/- per month being the loss of dependency but since he was unmarried, 50 percent of his salary should have been deducted towards his personal expenses. He also contended that the second respondent/second claimant being the sister of the deceased is not entitled for any compensation and the Tribunal committed gross error in granting the compensation in favour of the second respondent/second claimant.

18. It is claimed that the deceased was a contractor, doing centering work and was earning Rs. 6,000/- per month. May be that the claimants have

not produced any document to prove the income. But having regard to the testimony of P.W.1., mother of the deceased, the Tribunal has taken

the daily income at Rs. 100/- as even a daily worker would earn not less than Rs. 100/- per day and determined the monthly income at Rs.

3,000/- per month. Having regard to the date of accident and the testimony of P.W.1, I do not think it fit to interfere with the income fixed by the

Tribunal.

19. As far as the question whether the Tribunal was justified in deducting one-third towards personal expenses of the deceased is concerned, the

learned counsel for the appellant relied on the judgment of the Apex Court in *Sarala Verma v. Delhi Transport Corporation*, 2009 ACJ 1298

(SC): (2009) 4 MLJ 997. Therein, the Hon'ble Apex Court, no doubt, has held that in the manner of deduction towards personal expenses of the

deceased where the deceased is a bachelor, the deduction should be normally be 60 per cent. On the other hand, the learned counsel for the

respondents, however pointed out that statute provides for deduction of one-third of the income towards the expenses of the deceased. In the

instant case, the first claimant is the mother and the evidence indicated that there is no other source of income to the claimants and the deceased

was the only son to his mother. There is also evidence to the effect that the claimants were depending upon the income of the deceased.

20. It is not a rule of thumb that in each and every case of death of a bachelor, 50 per cent of his income has to be deducted. Deduction on

account of personal expenditure of the deceased from his income at the time of death is required to be made to assess the dependency of the

parents, bearing in view the facts and circumstances of each case. In the case on facts, the Tribunal is justified in deducting one-third from the

income of the deceased towards his personal expenses. I am supported in taking the view that deduction from the income of an unmarried earning

son or daughter by more than 1/3rd to determine just compensation to the dependent parents may not be permissible by two judgments of the

Hon'ble Apex Court in *Bijoy Kumar Digar v. Bidyadhar Dutta*, 2006 ACJ 1058 (SC): (2006) 2 MLJ 213 and *Bikish v. United India Insurance*

Co. Ltd., 2008 ACJ 1357 (SC); *LNIND* 2008 SC 655 where while assessing the dependency, one-third was held appropriate to be deducted

from the income of the deceased who was a bachelor. Thus calculated, the monthly dependency of the deceased in the present case would be Rs.

2,000/- per month and Rs. 24,000/- per year.

21. Learned counsel for the appellant raised yet another contention that there was no justification in granting compensation to the second claimant

who is the sister of the deceased. According to the respondents/claimants that the sister was dependent on the income of the deceased. The

evidence indicated that she was unmarried at the time of accident. There is no suggestion that she was married and was not dependent on her

brother.

22. The words "'legal representative'" is defined u/s 2(11) of Code of Civil Procedure, which reads as under:

Legal representative" means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the

estate of the deceased and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the

party so suing or sued.

23. In case of Manjuri Bera v. Oriental Insurance Co. Ltd., 2007 ACJ 1279 (SC) : (2007) 4 MLJ 906 relying upon the decision rendered in

Custodian of Branches of Banco National Ultramarino Vs. Nalini Bai Naique, the Hon"ble Apex Court held that legal representative would include

heirs as well as persons who represent the estate even without title either as executors or administrators in possession of the estate of the

deceased.

24. Certainly when the second claimant was depending upon her unmarried brother by all means and she was living with him and her mother, it

would be deemed that she represent the estate of the deceased and intermeddles with the estate of the deceased. The evidence clearly indicated

that the earnings of the deceased is the main source of livelihood to the claimants who were dependent on the deceased and therefore, the second

claimant/sister of the deceased is entitled to get compensation.

25. Keeping in view of the aforesaid position of law and keeping in view the facts in this case, it can safely be said that the second claimant/sister of

the deceased is entitled for compensation on account of the death of her brother in the accident and the Tribunal has rightly apportioned

compensation to her. The mother of the deceased was 50 years old at the time of accident. Having regard to her age, the appropriate multiplier is

13 and not 18 as adopted by the Tribunal. In computing the compensation by applying the multiplier of 13, the loss of dependency is computed to

be Rs. 3,12,000/-. Adding Rs. 40,000/- towards loss of love and affection, Rs. 5,000/- towards funeral expenses, the total compensation payable

to the claimants is computed to be Rs. 3,57,000/-. In the result, the civil miscellaneous appeal is partly allowed. The award passed by the Tribunal

is reduced from Rs. 4,36,500/- to Rs. 3,57,000/- together with interest 9% p.a. from the date of petition till the date of deposit. In the said award

amount, the claimant/mother is entitled to receive Rs. 2 lakhs with proportionate interest and sister/claimant is entitled to receive Rs. 1,57,000/-

with proportionate interest. The appellant/Insurance Company is directed to deposit the balance amount with proportionate interest less the amount

already deposited by them if any within a period of eight weeks from the date of receipt of a copy of this order. On such deposit being, the

claimants are permitted to withdraw their share with proportionate interest after giving credit to the amount already withdrawn by them if any.

There shall be no order as to costs.