
(2006) 12 MP CK 0022
In the Madhya Pradesh High Court

Narmada Prasad Vishwakarma and Others

APPELLANT

Vs

Sureshchand and Others

RESPONDENT

Date of Decision : 15-12-2006

Acts Referred:

Employees Compensation Act, 1923 — Section 4, 4A
Motor Vehicles Act, 1988 — Section 140, 147, 163A, 163B, 166
Penal Code, 1860 (IPC) — Section 279, 304A, 338

Citation : (2008) ACJ 493

Hon'ble Judges : P.K. Jaiswal, J;Abhay Gohil, J

Bench : Division Bench

Judgement

P.K. Jaiswal, J.—This appeal u/s 173 of Motor Vehicles Act, 1988 (for short "the Act") has been filed by the appellants-claimants who are father, mother, wife, sons and daughter of deceased Raj Narayan Vishwakarma, challenging the award dated 29.3.2000 passed by the Third Additional Motor Accidents Claims Tribunal, Gwalior in Claim Case No. 39 of 1993.

2. Brief facts of the case are that on 8.6.1993 Raj Narayan Vishwakarma, driver of the mini truck bearing registration No. MP 04-D 0072 owned by Surendra Singh Rathore, the respondent No. 4 and insured by the respondent No. 5 had loaded a consignment of liquor from K.C.T. Drinks Pvt. Ltd. at Bhopal and left for Gwalior for delivering the same at Gwalior (along with Gopal Giri, employee of liquor company). On 9.6.1993 at about 11 a.m. when the said mini truck was 15 km away from Gwalior near brick kiln situated at Neemuch Dhaba on A.B. Road, at that time the truck driver Raj Narayan Vishwakarma was driving the truck very slowly and consciously on the left side of the road. A passenger bus bearing registration No. MP 06-1599 was coming from the opposite direction, the driver of the passenger bus Suresh Chand, respondent No. 1, was driving the bus very rashly and negligently and hit the truck. As a result of which the driver of the truck Raj Narayan Vishwakarma and two other persons who were sitting in the cabin of the truck, namely, Sitaram and Bhura died on the spot. Sitaram was the second driver of the said mini truck and Bhura was cleaner in the said truck. The

impact of the accident was such that the bodies of all the three persons were stuck in the cabin and after cutting the cabin of the truck the bodies of the deceased and two persons were removed from the said cabin. Gopal Giri, AW 2, who was sitting along with the consignment on the back side of the truck had also received injuries. The matter was reported at Police Station, Panihar, against the bus driver and Crime No. 7 of 1993 was registered under Sections 304A, 279, 338, Indian Penal Code against respondent No. 1. After investigation challan was filed and bus was also seized. The respondent No. 1 is the driver of the bus bearing No. MP 06-1599 and respondent No. 2 is the owner of the said bus. The bus was insured with United India Insurance Co. Ltd., respondent No. 3. Surendra Singh Rathore, respondent No. 4, is the owner of mini truck bearing registration No. MP 04-D 0072. It is averred that the mini truck was insured with New India Assurance Co. Ltd., respondent No. 5.

3. The appellants who are legal heirs of the deceased filed a claim petition u/s 166 of the Act claiming compensation of Rs. 12,80,000 on the ground that the deceased was driver of the truck and he was earning Rs. 2,000 as monthly salary + Rs. 40 as daily diet. The deceased spent Rs. 2,000 on the appellants and Rs. 40 per day on his personal expenses. At the time of accident the deceased was 26 years of age. Accident had occurred due to rash and negligent driving of the bus by respondent No. 1 and, therefore, the respondents are jointly and severally liable to pay the amount of compensation.

4. The respondent Nos. 1 and 2, bus driver and bus owner, were proceeded ex parte before the Tribunal.

5. The respondent No. 3, insurer of the bus, in its written statement denied all the allegations made in the claim petition and averred that at the time of accident, i.e., 8.6.1993 and 9.6.1993, the bus bearing registration No. MP 06-1599 was never insured by them and vide cover note No. 058515 filed by the appellant, tractor No. CPG 6800 owned by Baj Nath Prasad was insured by insurance company, respondent No. 3. The appellants wrongly impleaded the respondent No. 3 because vehicle was never insured and forged cover note was filed, therefore, criminal action be taken against the appellants-claimants and the respondent No. 3 is not liable to pay any compensation to the appellants.

6. Surendra Singh, owner of the mini truck bearing registration No. MP 04-D 0072, respondent No. 4, filed his written statement before the Claims Tribunal and in para 1 admitted that the deceased Raj Narayan Vishwakarma was employed by him as a driver and at the time of accident on 9.6.1993 he was driving his mini truck. His salary was Rs. 1,000 per month. In para 2, the respondent No. 4 admitted that the mini truck was coming from Bhopal to Gwalior with the consignment of K.C.T. Drinks Pvt. Ltd. In para 5 it is averred that the bus was coming from the wrong side of the road which was driven by respondent No. 1 in a rash and negligent manner and was at high speed and it hit the truck which was on the left side of the road. It is also averred that the truck was insured with the respondent No. 5 and, therefore, if any liability comes

on him the respondent No. 5 is liable to indemnify the same.

7. The insurer of mini truck, respondent No. 5, in its written statement stated that the accident had occurred due to rash and negligent driving by the respondent No. 1 and, therefore, respondent Nos. 1 to 3 are liable to pay the amount of compensation.

8. The statement of the appellant No. 1, Narmada Prasad, AW 1, was recorded before the Tribunal. He has deposed that the deceased was working as a driver on the mini truck bearing registration No. MP 04-D 0072 owned by respondent No. 4 and his salary was Rs. 2,000 per month, apart from the salary he was also getting diet at the rate of Rs. 40 per day, i.e., Rs. 1,200 per month. The appellants were dependent on the salary of the deceased and deceased used to pay Rs. 2,000 per month to the appellants and he was spending Rs. 40 per day on his personal expenses. No salary certificate was filed nor any written document was filed to prove the salary of the deceased. He in para 2 of his statement admitted that he on 9.6.1993 at 4 p.m. received the intimation about the accident in which his son died and at that time he was at Bhopal. He in para 9 of his statement admitted that at the time of accident he was not present. He also admitted that he has not filed any details about income of his son.

9. Gopal Giri, AW 2, the employee of K.C.T. Drinks Pvt. Ltd., who was at the time of accident sitting in the back side of the mini truck along with the consignment in his evidence stated that there was mechanical defect in the vehicle, i.e., the mini truck and in between Bhopal and the place of incident, the truck had stopped a number of times. He stated that there was some defect in the steering and bus driver was driving the bus very rashly and negligently and there was head-on collision. Due to the said accident he was also injured. The appellants in para 2 of the claim petition stated that Gopal Giri, AW 2, was sitting along with the consignment and due to breakage of bottles he received injuries.

10. Narayan Singh, AW 3, who was produced as an independent witness, in his evidence stated that both the vehicles are responsible for the accident. He further stated that he was owner of truck and at the time of accident he was sitting in the dhaba and from the said dhaba he had seen the accident. In cross-examination he was asked to give his vehicle number but he failed to give the details of his vehicle, but he knew the number of two vehicles involved in the accident and, therefore, the Tribunal disbelieved this witness.

11. The respondent No. 3 recorded the statement of Harish Arora, NAW 1, who in his statement very specifically stated that Exh. D1 and Exh. D2 are the document and cover note of tractor. The number of cover note is 058515 and by the said cover note tractor No. CPG 6800 was insured and bus was never insured nor the said cover note is in respect of the insurance of bus bearing registration No. MP 06-1599.

12. The Tribunal after considering the pleadings of the parties and oral evidence of the appellants and respondents came to the conclusion that Gopal Giri, AW 2,

had not seen the accident because at the time of accident he was sitting along with the consignment and he was not sitting in the cabin. The Tribunal also disbelieved his statement on the ground that there was head-on collision and the impact of the accident was such that all the three persons who were sitting in the cabin of the mini truck died and when the police authorities cut the cabin of the mini truck by the gas cutter then the bodies of all the three persons had come out in pieces and Gopal Giri, AW 2, had also received injuries but his injuries are not grievous in nature and disbelieved his evidence. The Tribunal held that the bus driver was guilty of rash and negligent driving of bus, but the driver of the mini truck was also negligent and contributed to the accident. It is a case of contributory negligence and both vehicles are responsible for contributory negligence and apportioned the compensation on the basis of degree of negligence between the two offending vehicles, i.e., mini truck and bus and held that the responsibility of both the vehicles are 50 per cent each. The Tribunal after considering the evidence of the appellants came to the conclusion that the income of the deceased was Rs. 2,000 per month, i.e., Rs. 24,000 per year and he was also getting diet at the rate of Rs. 40 per day. Tribunal after deducting his personal expenses has held that the annual dependency of the appellants comes to Rs. 24,000. As per post-mortem report, Exh. P9, at the time of death the deceased was 28 years of age. The Claims Tribunal assessed the lump sum compensation at Rs. 4,00,000 and after apportioning the same held that respondent Nos. 1, 2, 4 and 5 are liable to pay Rs. 2,00,000 to the appellants. Out of this amount the respondent Nos. 1 and 2 are liable to pay Rs. 1,00,000 (rupees one lakh) and respondent Nos. 4 and 5 are liable to pay Rs. 1,00,000 towards compensation to the appellants and dismissed the claim against the respondent No. 3, i.e., insurer of bus by holding that vehicle was not insured. The Tribunal further held that the appellants are responsible for delaying the matter and, therefore, awarded interest at the rate of 3 per cent per annum from the date of filing of the claim petition, i.e., from 7.7.1993 to 29.3.2000 and from the date of award at the rate of 12 per cent per annum till its realisation.

13. The appellants aggrieved by the said impugned award filed this appeal, challenging the award on the ground that the Tribunal committed error in holding that the driver of mini truck was negligent in driving the vehicle and the deceased also contributed to the accident by his negligence and apportioned the liability on the negligence of the driver of the mini truck and drew the inference that the deceased's contributory negligence was to the extent of 50 per cent. It is submitted that this case is of composite negligence and, therefore, the respondents are liable to pay the whole amount of compensation and reduction of compensation to the tune of 50 per cent on account of contributory negligence is against the settled principle of law. The appellants further averred in the appeal that the Tribunal committed error in disallowing the diet at the rate of Rs. 40 per day and committed error in not including the same while assessing the dependency of the appellants. It is lastly submitted that the Tribunal committed error in rejecting the amendment and wrongly applied the multiplier of 16 and

loss of dependency. On the above grounds the appellants challenged the impugned award passed by the Tribunal.

14. On the other hand, learned Counsel for insurance company, respondent No. 5, in whose favour the award of Rs. 1,00,000 was passed filed a cross-objection challenging the award on the ground that the deceased himself was negligent in driving the vehicle and, therefore, amount awarded by the Claims Tribunal is illegal and claim petition is not maintainable as Raj Narayan Vishwakarma died on account of his own negligence. Application as filed by the heirs of Raj Narayan is not maintainable.

15. Learned Counsel for the appellants Mr. N.D. Singhal, Advocate, advance the arguments at length and drew our attention to the pleading of the parties and evidence of Narmada Prasad, AW 1; Gopal Giri, AW 2 and Narayan Singh, AW 3 and placed reliance on the following decisions:

- (i) Ved Prakash Garg Vs. Premi Devi and others, ;
- (ii) Smt. Rita Devi and Others Vs. New India Assurance Co. Ltd. and Another, ;
- (iii) National Insurance Co. Ltd. Vs. Savitri and Others,
- (iv) United India Insurance Co. Ltd. Vs. Angammal and Others,
- (v) Ramji Porte and Others Vs. Premabai Patel and Others, ;
- (vi) Smt. Sushila Bhadoriya and Others Vs. M.P. State Road Transport Corporation and Another, and
- (vii) Managing Director, M.P. State Road Transport Corporation Vs. Bhagwanti Bai and Others,

16. On the other hand, learned Counsel for respondent No. 5 Mr. B.K. Agarwal placed reliance on the following decisions:

- (i) National Insurance Co. Ltd. Vs. Sunita Yadav and Others,
- (ii) Kanhaiyalal and Another Vs. Sitabai and Others, ;
- (iii) Santosh Kumar Sultania and Another Vs. Ratanlal Surajmal and Others,
- (iv) Tamil Nadu State Transport Corporation, Tanjore, rep. by its MD Vs. Natarajan and Others, ;
- (v) Krishna Mourya and Others Vs. J.P. Sharma and Others,
- (vi) National Insurance Co. Ltd. Vs. Shinder Kaur and Others,
- (vii) Guddibai and Others Vs. Mishrilal Ahirwar and Another,
- (viii) Minu B. Mehta v. Balkrishna Ramchandra Nayan 1977 ACJ 118 (SC);
- (ix) Bijoy Kumar Dugar Vs. Bidyadhar Dutta and Others, ;

- (x) Ashok Kumar Gupta Vs. Kishanlal and Others,
- (xi) National Insurance Co. Ltd. Vs. Mastan and Another, ;
- (xii) Pankajbhai Chandulal Patel Vs. Bharat Transport Co. and Another, ;
- (xiii) Banju Devi and Another Vs. Uttam Kumar Gadia and Others, ; and
- (xiv) Sunil Dixit v. Sunita Dixit M.A. No. 449 of 1997; decided on 11.1.2005 (MP).

And submitted that the claimants are not entitled to compensation on account of negligence on the part of driver and claim petition as filed is not maintainable against respondent No. 5.

17. We have heard the learned Counsel for the parties and perused the record.

18. It is not in dispute that at the time of accident the deceased was driving the mini truck and was coming from Bhopal with the consignment of liquor of K.C.T. Drinks Pvt. Ltd. and Gopal Giri, AW 2, who was working in the said company was also sitting along with the consignment in the said truck. The appellants in para 2 of the claim petition very specifically stated that Gopal Giri was sitting along with the consignment at the back side of the mini truck and due to the accident the bottles were broken and he sustained injuries. In para 3 of the claim petition it is averred that dead body of the deceased and other two persons were stuck in the cabin and were removed after cutting the cabin of the truck. In the claim petition there is no pleading regarding the mechanical defect of the vehicle. Appellant No. 1 Narmada Prasad, AW 1, was first examined before the Tribunal on 16.3.2006 on that date he had not stated that there was mechanical defect in the vehicle. During his cross-examination learned Counsel for the appellants prayed for adjournment on the ground that he wants to file an application for amendment. Thereafter amendment application was filed and in the said amendment application, it was stated that there was mechanical defect in the mini truck. The said application was rejected on 11.3.1998 and thereafter on 13.11.1998 evidence of the appellant No. 1 Narmada Prasad, AW 1, was again recorded before the trial court and in the said evidence he developed the story of mechanical defect of the vehicle. As per para 9 of his statement at the time of accident he was not present, he came to know about the accident at 4 p.m. in the afternoon. He in para 10 of his cross-examination though stated that his son was getting salary at the rate of Rs. 2,000 per month, but neither documents to this effect were filed nor he examined the owner of vehicle to prove the salary of the deceased nor any document like salary certificate, etc. was filed. Gopal Giri, AW 2, in his statement stated that there is a mechanical defect in the steering of mini truck which was driven by Raj Narayan Vishwakarma. He also admitted the head-on collision, but in para 5 of his cross-examination he admitted that he did not know the owner of the mini truck. He admitted that the accident had occurred in the mid of the road. The Tribunal rightly disbelieved his evidence that there was mechanical defect in the steering of the vehicle because he was sitting along with the consignment at the back side of the vehicle. The impact of the

accident was so high that the mini truck was badly destroyed and cabin was badly damaged and dead body of the deceased was stuck in the cabin and it was removed in pieces. All the three persons who had died in the said accident were sitting in the cabin of the mini truck and their bodies were removed after cutting the cabin of the mini truck whereas no severe injury was received by Gopal Giri, AW 2, therefore, his statement that he had seen the accident and he was sitting along with the deceased at the cabin of the mini truck is factually not correct and the same cannot be relied upon. The Tribunal rightly disbelieved the statement of Narayan Singh, AW 3, that at the time of accident he was sitting in the dhaba and he has seen the accident but he being the owner of the vehicle did not know even the number of his own vehicle whereas he knew the number of both the offending vehicles which were involved in this accident and, therefore, his statement cannot be relied upon. Nor it can be said that accident had occurred in his presence or he has seen the accident. Thus there is no mechanical defect in the mini truck and accident had occurred on the negligence of mini truck driver as well as the negligence of bus driver and it is the case of contributory negligence and the deceased who was driving the mini truck and his contribution was to the extent of 50 per cent. The said finding of the Tribunal is just and proper and based on evidence on record.

19. Mr. Singhal, learned Counsel for the claimants submitted that the income of the deceased, who was working as driver was Rs. 2,000 per month. Apart from the salary he was also getting allowance at the rate of Rs. 40 per day. Mr. Singhal further submitted that as per post-mortem report, Exh. P9, the age of the deceased was 28 years and, therefore, the Tribunal should have applied the multiplier of 18 instead of 16 as per Second Schedule to Motor Vehicles Act, 1988. In respect of daily allowance the Apex Court in the case of Gurmeet Kaur v. Harnarayan 1999 SCC 1146, held that the daily allowance is not the income of the deceased, therefore, the same cannot be said to be his earnings and after excluding the said amount held that the annual earnings of the deceased was Rs. 24,000. The family of the deceased comprised himself, his wife, his two minor sons and his minor daughter. Treating the deceased and his wife as two units each, two minor sons, one daughter and his mother as one unit each, the expenses on the deceased works out at $\frac{2}{8\text{th}} = \frac{1}{4\text{th}}$ and loss of dependency is accordingly worked out to $\frac{3}{4\text{th}}$ of the income for the claimants. Accordingly, the total loss of dependency is calculated as follows:

Rs. 2,000 x $\frac{3}{4\text{th}}$ x 12 x 18 = Rs. 3,24,000

Appellants are also entitled for Rs. 5,000 towards loss of consortium, Rs. 2,000 towards funeral expenses, Rs. 2,500 towards loss to estate, Rs. 6,500 towards loss of love and affection suffered by three minor children. Thus, the total compensation is determined at Rs. 3,40,000 (Rs. 3,24,000 + Rs. 5,000 + Rs. 2,000 + Rs. 2,500 + Rs. 6,500).

20. In the case of Ved Prakash Garg Vs. Premi Devi and others, , the question which arises for consideration was where an employee receives a personal injury

in a motor accident arising out of and in the course of his employment while working on the motor vehicle of the employer, whether insurance company which has insured the employer-owner of the vehicle against third party accident claim under the Act are liable for compensation under the provisions of the Workmen's Compensation Act, 1923. Sub-clause (b) of Section 147(1) read with the proviso lays down a statutory scheme of compulsory coverage of liability incurred by the employer, vis-a-vis, his employees when they sustain injuries by the use of motor vehicles during their employment and on account of the motor accidents arising out of and in the course of their employment. But the statutory coverage for such liability would be limited to the extent of liability of the insured employer arising under the Workmen's Compensation Act in respect of death or bodily injury to such employees. As the motor accidents resulted in fatal injuries to the employees who were either driving or were being carried in the goods carriage as cleaner whatever liability was incurred by insured owners of the goods vehicles in connection with proceedings arising out of the Workmen's Compensation Act was covered by the statutory liability of the respondent insurance company. Apex Court has held that the insurance company which has insured the employer-owner of the vehicle against the third party risk and against claims for compensation arising out of proceedings under the Workmen's Compensation Act is liable for the interest imposed against the employer. The Supreme Court further held that the insurance company is not liable to pay the penalty u/s 4A(3) of the Workmen's Compensation Act, 1923 and they are liable to pay the compensation amount only as per the provisions of Section 4 of the said Act.

21. In the case of Smt. Rita Devi and Others Vs. New India Assurance Co. Ltd. and Another, , one Dasarath Singh was a driver of an autorickshaw owned by Lalit Singh. The vehicle in question was registered as a public carrier vehicle used for hire by the passengers and was insured. On 22.3.1995, it is stated that some unknown passengers hired the above autorickshaw from rickshaw stand at Dimapur. Later on report was lodged that autorickshaw was stolen and the dead body of the driver Dasarath Singh was recovered the next day, but the said autorickshaw was never recovered. A claim petition was filed by the legal representatives of the deceased Dasarath Singh claiming compensation u/s 163A for the death during the course of his employment as a death caused in accident arising out of the use of the vehicle. The Tribunal held that death was caused by an accident coming within the purview of Motor Vehicles Act and allowed compensation against the owner and insurer of the vehicle. In an appeal filed by the insurance company, High Court held that there was no motor accident as contemplated under the Act and it was a murder, hence a petition for claim under the Act did not arise. The Apex Court held that the driver was duty-bound to have accepted the demand of fare paying passengers to transport them to the place of their destination. Passengers committed an act of felony of stealing the autorickshaw and they eliminated the driver. The murder was due to accident arising out of use of motor vehicle and the claimants are entitled to compensation and it is also held that the provisions of Workmen's Compensation

Act are applicable. Apex Court held that the Tribunal rightly came to the conclusion that the claimants were entitled for compensation as claimed and High Court was wrong in coming to the conclusion that death of Dasarath Singh was not caused by an accident involving the use of motor vehicle. The Apex Court further held that u/s 167 of the Act as per which provision, it is open to the claimants either to proceed with the compensation application under the Workmen 's Compensation Act or under Motor Vehicles Act. As both the enactments are beneficial enactments operating in the same field, hence judicially accepted interpretation of the word "death" in Workmen's Compensation Act is, applicable to the interpretation of the word "death" in the Motor Vehicles Act also.

22. In the case of National Insurance Co. Ltd. Vs. Savitri and Others, on the death of truck driver during course of his employment in an accident between a truck and jeep a claim petition was filed under the Motor Vehicles Act. The Tribunal found that truck driver was negligent in causing the accident and held owner and insurance company of truck liable for compensation. An appeal was filed by the insurance company on the ground that when deceased himself was negligent, insurance company cannot be held liable and the claimant should have preferred their claim under Workmen's Compensation Act and it is held that assuming the finding of the Tribunal to be correct that accident had been caused due to negligence of truck driver who died in accident, liability of insurance company and owner of truck is not lessened because of the provisions of the Workmen's Compensation Act. The learned single Judge has held that the claimants could or should have approached the authority under the provisions of Workmen 's Compensation Act only the matter already stands settled by the Apex Court in Smt. Rita Devi and Others Vs. New India Assurance Co. Ltd. and Another, and held that claim petition filed under the Motor Vehicles Act is maintainable.

23. In the case of United India Insurance Co. Ltd. Vs. Angammal and Others, with reference to the limitation of the liability in respect of death of the driver the appellant insurance company by reasons of endorsement No. 16 had agreed to indemnify the insured even as against the liability that they arise under the common law and u/s 110AA of the Act and dependants are given a choice of filing a claim petition before the Motor Accidents Claims Tribunal or the Commissioner for Workmen's Compensation, as the case may but not before both. In view of the appellant having agreed to cover a larger liability even under the common law, the insurance company would be liable for the larger amount under the common law to the claimants of deceased driver who opted to file the claim petition under Motor Vehicles Act.

24. In the case of Ramji Porte and Others Vs. Premabai Patel and Others, , from the evidence it is established that the accident occurred due to breakage of arm bolt, when the accident occurred due to a mechanical defect the owner of the vehicle has to prove that he had taken all necessary precautions and kept the

motor vehicle in a roadworthy condition and that the defect had occurred in spite of reasonable care and caution taken by the owner.

25. It is well settled that if the person elects to claim compensation against a tortfeasor under Chapter XII of the Act, he takes the burden upon himself to establish the negligence of the owner of the vehicle. On establishment of negligence, the Tribunal has to determine compensation in accordance with the provisions of the Act for the death or injury caused to a workman in motor accident by the use of motor vehicle where norms of Workmen's Compensation Act in computing the compensation cannot be applied and such claimant would be entitled for "just" compensation under common law.

26. In the case of Smt. Sushila Bhadoriya and Others Vs. M.P. State Road Transport Corporation and Another, , the Full Bench of this Court has held as under:

(i) Owner, driver and insurer of one of the vehicles can be sued and it is not necessary to sue owner, driver and insurer of both the vehicles. The claimant may implead the owner, driver and the insurer of both the vehicles or any one of them.

(ii) There cannot be apportionment of the liability of joint tortfeasors. In case both the joint tortfeasors are impleaded as party and if there is sufficient material on the record, then the question of apportionment can be considered by the Claims Tribunal. However, on general principles of law, there is no necessity to apportion the inter se liability of joint tortfeasors.

27. In the case of Sunil Dixit (supra), an appeal was filed by the owner of the vehicle praying that liability of both the truck owners is 50 per cent each and appellant owner is liable to compensate 50 per cent as per his liability and he is not liable for payment of full compensation. The Division Bench of this Court has held that:

The Tribunal has considered the evidence on record and from the facts of the case, Tribunal recorded a finding that it is a case of composite negligence and, therefore, owner and driver of truck No. 3911 are liable to pay 50 per cent of the compensation. Their liability is determined at 50 per cent. This question has been recently considered in the case of Tamil Nadu State Trans. Corporation v. Natarajan (supra). In this case, it is held that there was a collision between a Corporation bus and private bus and driver of Corporation bus sustained injuries and Tribunal held that both the drivers were equally negligent and directed that 50 per cent shall be paid by the owner and insurer of the private bus. Court has held that Corporation as an employer of the injured driver cannot be held vicariously liable for the negligence of the claimant himself and insurance company of private bus was directed to pay half of the amount awarded. The Division Bench relying the aforesaid judgment of the Apex Court has held that for the negligence of truck driver, its owner cannot be held liable. Therefore, owner is held not liable to pay the compensation.

28. In the case of National Insurance Co. Ltd. Vs. Sunita Yadav and Others, deceased Radheshyam was driving truck from Gwalior to Bhopal. On way to Bhopal, near village Bhimkhedi, Police Station Raghogarh, District Guna, M.P., truck overturned on Agra-Bombay Road on account of rain which resulted into the death of Radheshyam. The appellant insurance company submitted that the claim application was not maintainable as Radheshyam died on account of his own negligence. The Division Bench has held that claimants have not gone before the Commissioner, Workmen's Compensation. Therefore, the application as filed before the Claims Tribunal was not maintainable and was liable to be dismissed. It is held that the claimants had the option to file the claim either under Motor Vehicles Act or Workmen's Compensation Act and claimant chose the forum under Motor Vehicles Act. The driver of motor vehicle died on account of his negligence and, therefore, the claimants are not entitled to get any compensation under the provisions of the Motor Vehicles Act.

29. In the case of Kanhaiyalal and Another Vs. Sitabai and Others, , due to own negligence the driver of the vehicle died. The Claims Tribunal has found that the deceased Lokesh died on account of his own negligence, no compensation is awarded. The application filed u/s 166 of the Act was rejected. This Court held that since the driver died on his own negligence and, therefore, claimants are not entitled for compensation u/s 166 of the Act. They are entitled for compensation under Workmen's Compensation Act and, therefore, the appellants are permitted to avail the remedy available to them before Commissioner, Workmen's Compensation.

30. In the case of Tamil Nadu State Transport Corporation, Tanjore, rep. by its MD Vs. Natarajan and Others, , there was a collision between a Corporation bus and private bus and the driver of Corporation bus sustained fractures in his right leg resulting in amputation. He filed the claim against owner and insurance company of private bus. The Tribunal held that both the drivers were equally negligent and awarded Rs. 1,20,000 made payable to the extent of 50 per cent by the owner/insurer of the private bus. In appeal Division Bench suo motu impleaded Corporation as respondent in the appeal. The Division Bench upheld finding of the Tribunal that the cause of accident was contributory negligence on the part of drivers of both the vehicles and upheld the finding on negligence and enhanced the compensation equally on the Corporation and owner/insurer of private bus. It is held as under:

(9) From the facts of the case and nature of the claim stated above, we find absolutely no justification in law for the Division Bench of Madras High Court in its impugned order imposing liability to the extent of 50 per cent on the appellant Corporation. The Division Bench of the High Court completely overlooked that the claimant himself was driver of the Corporation bus and was found negligent to the extent of 50 per cent for causing accident. In view of the above finding of contributory negligence on the part of the claimant as driver of the Corporation bus, the Corporation as an employer cannot be held to be vicariously liable for

the negligence of the claimant himself. The claim petition did not make the Corporation as a party to the claim obviously because the claimant exercised option of approaching the Claims Tribunal under Motor Vehicles Act against the owner and insurer of the private bus. He did not file any claim under the Workmen's Compensation Act against the employer. Since the Corporation was not at fault and the accident was caused because of the contributory negligence of the drivers of both the buses, the Corporation could not be held liable under provisions of Motor Vehicles Act. It was not a claim based on "no fault liability". It was a claim petition filed by the claimant against the owner and the insurer of the private bus. The claimant is also represented before us and on his behalf it is stated that he has been given compassionate appointment on suitable alternative job and he never desired to obtain any other compensation from his employer. The Division Bench of the High Court, therefore, committed a serious error in apportioning and fastening 50 per cent liability of compensation on the appellant Corporation. This part of the award, therefore, deserves to be set aside. The liability of the respondent insurance company as insurer of the private bus is found to be only to the extent of 50 per cent of the total compensation determined. Total compensation determined is Rs. 2,09,800 (rupees two lakh nine thousand and eight hundred). Fifty per cent liability of the insurer of the private bus would, therefore, be Rs. 1,04,900 (rupees one lakh four thousand and nine hundred). On the aforesaid amount, the claimant would be entitled to an interest rate at 9 per cent per annum from the date of filing the claim petition as awarded.

31. The Apex Court set aside the award and held that there was contributory negligence on the part of the driver of the vehicle.

32. The Division Bench of this Court in the case of Krishna Mourya and Others Vs. J.P. Sharma and Others, has held as follows:

That in the application for compensation, negligence on the part of owner has not been pleaded nor has been proved before Claims Tribunal that the vehicle was not in roadworthy condition which resulted in the accident. On the other hand, circumstances speak that it was the deceased himself who was driving the scooter and struck against the pole, as a result of which he and the pillion rider fell down and the deceased died. Therefore, in the absence of proof of negligence on the part of the owner of the vehicle, the claimants cannot seek compensation on the basis of the provisions of the Act. But where the accident occurs out of and during the course of employment, the employer's liability is to pay compensation u/s 3, to be calculated in accordance with the provisions contained in Chapter II of the Workmen's Compensation Act.

33. In all these cases as stated hereinbefore from paras 27 to 31 negligence on the part of driver, no compensation can be paid to legal heirs of driver. The legal heirs are entitled for compensation under the Workmen's Compensation Act, 1923 and claim petition filed u/s 166 of the Act is not maintainable and claimants are not entitled to get any compensation under the provisions of Motor Vehicles

Act.

34. In the case of Guddibai and Others Vs. Mishrilal Ahirwar and Another, deceased Prakash alias Pappu Ahirwar was driving the tractor which overturned resulting into his death. Considering the pleadings of the appellant and evidence on record, Claims Tribunal has recorded a finding that appellants are not entitled for any compensation on account of negligence of driver. Claims Tribunal held that for the negligence of driver his heirs cannot claim compensation. In an appeal appellant claims that he has moved an application for converting the claim petition u/s 163A of the Motor Vehicles Act and submitted that his application for compensation be read u/s 163A of the Act in place of Sections 166 and 140 of the Act. The interim compensation of Rs. 25,000 was awarded to the appellant on the application u/s 140 of the Act. Section 163B of the Act provides that where a person is entitled to claim compensation under Sections 140 and 163A of the Act, he shall file claim under either of the said sections and not under both. The Division Bench has held that the appellants are not entitled to convert their application u/s 163A of the Act, after applying and getting benefit of Section 140 of the Act and dismissed the application for conversion as not maintainable. Here in the present case also interim compensation was awarded to the appellants for no fault liability u/s 140 of the Act and, therefore, they are entitled to get only compensation for no fault liability u/s 140 of the Act.

35. In the case of Minu B. Mehta 1977 ACJ 118 , no specific plea in the written statement was taken regarding the mechanical breakdown and no sufficient evidence on the point of mechanical breakdown. The Apex Court held that the burden of proof is on the owner of the vehicle that accident was due to mechanical defect and further held that due to mechanical defect the owner must raise a plea that the defect was latent and not discoverable by the use of reasonable care. The Supreme Court has held that if compensation is awarded without proof of negligence it would lead to strange result. Further the concept of vicarious liability without any negligence is opposed to the basic principles of law. Here in the present case also there was no pleading in an application u/s 166 of the Act that there was mechanical defect in the vehicle. The appellants during pendency of the claim petition filed an application for amendment on 19.4.1996. Application was rejected by the Tribunal vide order dated 11.3.1998. Thereafter the owner of the vehicle, i.e., mini truck, was never examined nor there is any sufficient evidence on the point of mechanical defect and, therefore, after considering evidence of Narmada Prasad, AW 1 and Gopal Giri, AW 2 and in the facts and circumstances of the case and the evidence, the claimants failed to prove that there was mechanical breakdown in the vehicle nor they examined the owner of the vehicle before the Claims Tribunal to sustain a plea that accident was due to mechanical defect. We conclude and hold that proof of negligence is necessary before the owner or the insurance company could be held liable for the payment of compensation in a motor accident claim case.

36. In the case of Bijoy Kumar Dugar Vs. Bidyadhar Dutta and Others, , a Maruti

car being driven by the deceased Raj Kumar Dugar and the offending bus had a head-on collision. M.A.C.T. has not accepted the evidence of PW 2 to prove that the driver of the offending bus was driving the vehicle at abnormal speed. If the bus was being driven by the driver abnormally in a zigzag manner, as PW 2 wanted the court to believe, it was, but natural, as a prudent man for the deceased to have taken due care and precaution to avoid head-on collision when he had already seen the bus from a long distance coming from the opposite direction. It was head-on collision in which both the vehicles were damaged and unfortunately, Raj Kumar Dugar died on the spot. M.A.C.T., in our view, has rightly observed that had it been the knocking on one side of the car, the negligence or rashness could have been wholly fastened or attributable to the driver of the bus, but when the vehicles had a head-on collision, the drivers of both the vehicles should be held responsible to have contributed equally to the accident. The finding on this issue is a finding of fact and we do not find any cogent and convincing reason to disagree with the well reasoned order of M.A.C.T. on this point. The Supreme Court upheld the finding of the Tribunal by holding that both the drivers were equally negligent.

37. The Division Bench of this Court in the case of Ashok Kumar Gupta Vs. Kishanlal and Others, has held that the spot map was not only relevant piece of evidence, but that was a crucial piece of evidence, in the facts and circumstances of the case, that would have spoken the truth and that would have been the touchstone to test the different versions given by the two sides. It was plaintiff's burden to bring that on record to corroborate his testimony that he was not only on the right side of the road, but he was all through and all along, acting within his rights and the culpability of law with the truck driver and held that onus to prove his own case lies on claimant. Here in the present case also from the spot map, Exh. P3, it is clear that the mini truck driver was also negligent in driving the vehicle and from the spot map it appears that the truck driver was not on the left side of the road. Appellant failed to prove their case and, therefore, the trial court has not committed any error in holding that the truck driver was also negligent in driving the vehicle and for negligence of truck driver, its owner cannot be held liable to pay the compensation.

38. In the case of National Insurance Co. Ltd. Vs. Mastan and Another, , the Supreme Court has held that claimant having chosen the forum under Workmen's Compensation Act for purpose of obtaining compensation cannot fall back upon the provisions of Motor Vehicles Act against his employer. Claimant electing forum under one Act cannot be permitted thereafter to raise a contention which is available to him only in the former Act. The Apex Court on applying the principle of doctrine of election being a branch of rule of estoppel has held that when two remedies are available for same relief, aggrieved party has to elect either of them but not both. In the present case the deceased was himself driving the vehicle and appellant failed to prove that the deceased was not negligent in driving the vehicle and, therefore, the claim application filed by the appellants against respondent No. 5 is not maintainable.

39. From the facts of the case and the nature of the claim stated above, we find absolutely no justification in law for the Tribunal in its impugned award imposing liability to the extent of 50 per cent on the respondent No. 5. Deceased Raj Narayan Vishwakarma himself was driver of the mini truck and was found negligent to the extent of 50 per cent for causing accident. The accident was caused because of the contributory negligence of the drivers of both the vehicles, i.e., mini truck and bus, the owner and insurer of mini truck could not be held liable under the provisions of Motor Vehicles Act. This part of the award, therefore, deserves to be set aside. The liability of the respondent No. 2-owner of the bus is found to be only to the extent of 50 per cent of the total compensation determined. The total compensation determined is Rs. 3,40,000 (rupees three lakh forty thousand). Fifty per cent liability of the bus would therefore be Rs. 1,70,000 (rupees one lakh seventy thousand). On the aforesaid amount, the claimants would be entitled to an interest at the rate of 8 per cent per annum from the date of filing the claim petition as awarded.

40. Consequently, the cross-objection of the respondent No. 5 is allowed. The learned Tribunal, therefore, committed a serious error in apportioning and fastening 50 per cent liability. The impugned award dated 29.3.2000 insofar as it fastens 50 per cent liability towards compensation on the respondent No. 5 is concerned is hereby set aside. It is held that in view of the contributory negligence on the part of the claimants, the respondent Nos. 1 and 2 being owner and driver of the bus would be liable to pay compensation in the sum of Rs. 1,70,000 (rupees one lakh seventy thousand) with 8 per cent interest from the date of filing of the claim petition till its realisation.

41. In the present case, the claimants have not gone before the Commissioner, Workmen's Compensation. The respondent No. 5 in compliance to the award dated 29.3.2000 deposited Rs. 1,00,000 as per paras 26 and 31 of the award, i.e., amount payable to the heirs of the workman, i.e., deceased Raj Narayan Vishwakarma. Now it would be very difficult for the appellant to refund the same and if any recovery is directed that would cause undue hardship to the appellants, though they are entitled under the provisions of Workmen's Compensation Act and claim under the said Act is maintainable against the respondent No. 5. However, in view of the above facts and circumstances of the case, the amount so deposited by respondent No. 5 insurance company shall be retained by appellants-claimants and will not be refunded to the insurance company and for that insurance company also has no objection and the appellants are free to recover the remaining amount from the owner and driver of the bus.

In the result, the cross-objection succeeds and is allowed and the appeal of the appellants is accordingly disposed of and award of the Claims Tribunal is partly modified as indicated hereinbefore but without any order as to costs.