

(2016) 06 KL CK 0111
In the High Court Of Kerala
Case No : MACA. No. 961 of 2013

National Insurance Company Ltd.

APPELLANT

Vs

Anusha A Nair (Minor)

RESPONDENT

Date of Decision : 29-06-2016

Acts Referred:

Motor Vehicles Act, 1988 — Section 166, Section 4

Citation : (2017) AAC 1275 : (2017) 2 KerLJ 521 : (2017) 2 KLT 147

Hon'ble Judges : Mr. C.T. Ravikumar and Mr. K.P. Jyothindranath, JJ.

Bench : Division Bench

Advocate : Sri. Mathews Jacob and Sri. P. Jacob Mathew, Advocates, for the Appellant; Sri. K. Janardhanan and Sri. K.J. Manu Raj, Advocates, for the Respondent No. 1

Final Decision : Dismissed

Judgement

Ravikumar, J.—The captioned appeals arise respectively from the judgment and award dated 18.2.2013 in O.P.(MV).Nos.105 of 2010 and 108 of 2010, a common award, passed by the Motor Accidents Claims Tribunal, Ernakulam. Both the claim petitions are filed by two minors through their next friend, Sri.Anil Kumar, who is their father claiming compensation for the injuries sustained by them in a motor vehicle accident occurred on 14.11.2009 at about 12.30 p.m. On that day, the petitioner in O.P.(MV).No.108/2010, who was then hardly 16 years, was riding a Hero Honda motor cycle bearing Reg.No.KL-07/W-5204 with the petitioner in O.P.(MV).No.105 of 2010 on its pillion. She is his younger sister then aged 13 years. When they entered into Ernakulam-Muvattupuzha Road at Manathadam from a pocket road, a car bearing Reg.No.KL-07 AM 5089, driven by the first respondent, came from east and dashed against their motor cycle. Both of them sustained injuries and they were taken to Medical Trust Hospital, Ernakulam. They underwent treatment there as inpatients for some days. It is in the said circumstances that the above mentioned claim petitions were filed under section 166 of the Motor Vehicles Act

seeking compensation for the injuries sustained by them.

2. A joint enquiry was conducted by the Tribunal in the claim petitions and as per the impugned common award, both the claim petitions were allowed. In O.P.M(V).No.105 of 2010, an amount of Rs. 2,02,100/- was granted as compensation and in O.P.(MV).108/2010, an amount of Rs. 1,61,900/- was granted. Interest @ 8% from the date of the petition till realisation was allowed in both the cases. The captioned appeals have been filed by the insurer of the car involved in the accident mainly contending that the Tribunal had erred in not finding contributory negligence on the part of the claimants while entering into finding as to whether the accident occurred due to the negligence of the first respondent, the first common issue. Though a ground was taken in the appeal that there was absolutely no negligence on the part of the driver of the car, the first respondent therein, the aforesaid contention alone was pressed into service.

3. We have heard the learned senior counsel Sri. Mathews Jacob appearing for the appellant and Advocate Sri. Janardhanan, appearing for the first respondent in both the appeals.

4. In the light of the arguments advanced before us, we are of the view that it would only be appropriate to consider firstly, the question of negligence. Essentially, the contention of the appellant-insurance company is that, at the time of the accident, the rider of the motor cycle was not having driving licence and therefore, on that sole score, he ought to have been held to have contributed to the accident. Obviously, then, the age of the rider of the motor cycle viz., the claimant in OP.(MV).No.108/2010 was only 16 years. Presumably, the contention of contributory negligence was alleged against the claimant in O.P. (MV).No.105/2010 based on the doctrine of *volenti non-fit injuria*. We will deal with the said contention a little later and we will proceed to consider the contention raised against the rider of the motor cycle. While considering the said question, it has to be borne in mind that he was then aged only 16 years. In the contextual situation, it is only apposite to refer to the finding of the Tribunal while repelling the aforesaid contention taken up by the appellant and it, in so far as relevant, reads thus:-

"Admittedly, the motor cycle rider was a minor and he did not have driving licence at the time of the accident. There is nothing on record to show that the motor cycle rider had no skill or experience to ride motor cycle."

5. We are at a loss to understand the *raison d'être* for making such an observation as obviously, the Tribunal had already taken note of the fact that the rider of the motor cycle was then, aged only 16 years. The tenor of the said observation would make it appear that the appellant was to establish that the minor applicant who was only aged 16 years, had no skill or experience to ride a motor cycle. In the contextual situation, it is only appropriate to refer to sections 3 and 4 of the M.V. Act. They read thus:-

3. Necessity for driving licence.-(1)No person shall drive a motor vehicle in any

public place unless he holds and effective driving licence issued to him authorising him to drive the vehicle; and no person shall so drive a transport vehicle other than a motor cab or motor cycle hired for his own use or rented under any scheme made under sub-section (2) of section 75 unless his driving licence specifically entitles him so to do.

(2) The conditions subject to which sub-section (1) shall not apply to a person receiving instructions in driving a motor vehicle shall be such as may be prescribed by the Central Government.

4. Age limit in connection with driving of motor vehicles.-(1) No person under the age of eighteen years shall drive a motor vehicle in any public place:

Provided that a motor cycle with engine capacity not exceeding 50cc may be driven in a public place by a person after attaining the age of sixteen years.

(2) Subject to the provisions of section 18, no person under the age of twenty years shall drive a transport vehicle in any public place.

(3) No learner's licence or driving licence shall be issued to any person to drive a vehicle of the class to which he has made an application unless he is eligible to drive that class of vehicle under this section.

6. The motor cycle involved in this case is a Hero Honda motor cycle. Admittedly, its engine capacity was more than 50cc. The rider was aged only 16 years. In such circumstances, when there is a statutory inhibition for such a person to drive it in public place and for issuing a driving licence or even a learners licence to drive (here ride) the vehicle owing to his lack of eligibility due to age bar under section 4 of the M.V. Act, it has to be taken as inopportune observation. At any rate, in view of the statutory inhibition, the question whether such a minor got skill or experience is not at all a matter that could be gone into as, such a person is prohibited statutorily from driving or riding motor vehicle except the permitted class of vehicle viz., invalid vehicle, in public place. But, when it comes to the question of negligence, he rode the motor cycle despite being disqualified (is it "not eligible") under section 4 of the M.V. Act owing to age bar and thereby not entitled to possess a driving licence, by themselves, could be a reason to hold him negligent and consequently, to have contributed negligence, causing the accident? Certainly, we hold a negative view. According to us, while considering the question who was responsible for the accident, the said question has to be answered by looking in to the materials on record to find out whether he had actually contributed to the cause of the accident. The mere fact of violation of section 4 would only make liable to face penal consequences. Even the claimant-rider could not have been permitted to establish that he was then, having the required skill or experience to ride a motor cycle. In respect of a matter which is statutorily impermissible to do owing to the age bar, the question of acquiring skill or experience to do the same during the inhibition period, does not arise at all.

7. In this case, the negligence on the part of the driver of the car involved in the accident is not seriously disputed. We may hasten to add that the contention is that the claimants were also guilty of contributory negligence. In this case, the first question to be considered is whether the accident occurred due to the negligence on the part of the rider of the motor cycle and the driver of the car. In other words, whether there is composite negligence. There cannot be any doubt with respect to the position that the road regulations require a person entering into main road to give a pass to a vehicle running on the main road. In other words, before entering into the main road, the person coming from the link road or pocket road has got a duty to see whether any vehicle is running through the main road and he is supposed to enter the road or use the same only once such vehicle passes. In the said context, Rules of Road Regulations, 1989 framed in exercise of the powers conferred by section 118 of the M.V. Act also become relevant. Regulation 9 therein reads thus:-

9. Giving way to traffic at road junction.- The driver of a motor vehicle shall, on entering road intersection at which traffic is not being regulated, if the road entered is a main road designated as such, give way to the vehicles proceeding along that road and in any other case give way to all traffic approaching the intersection on his right hand.

8. It is to be noted that no oral evidence was adduced by both sides. Ext.A5 is the AMVI report in respect of the car. As against serial No.7 in the report, the details regarding the damage sustained to the said vehicle due to the accident was incorporated as hereunder:-

"wind shield glass broken. Bonnet dent and distorted. Right head light broken. Front bumper broken at right side. Right fender dent and distorted. Front left wheel punctured."

(emphasis added)

9. Ext.A2 is the scene mahazar and Ext.A3 is the charge sheet. The evidence on record would reveal that the car was running in the east-west direction through southern side. The pocket road in question is on the southern side. The total width of the road is 8.7 metres. The place of accident is 1.60 metres towards the north from the southern road margin. These facts are discernible from Ext.A2 scene mahazar. It is thus evident that the car was proceeding through the correct side. The damage caused to the car which is discernible from Ext.A5 AMVI report in such circumstances would undoubtedly go to show that the right side of the car hit on the motor cycle. Taking into account all those aspects, it can only be said that the rider of the motor cycle had also contributed to the accident. But at the same time, it is to be noted that the damage to the car was on the right side. It would indicate that the driver of the car must have seen the rider of the motor cycle taking the motor cycle into the main road and in such circumstances, the driver of the car was also having a duty to slow down the vehicle to avert the accident. The AMVI report, if any, relating the motor cycle

was not brought on record. In Ext.P3 charge sheet the driver of the car alone is the accused therein and he was charge sheeted for offences punishable under sections 279 and 338, IPC. In a claim petition for compensation filed under sections 166 of the M.V.Act, on the question of negligence, a final report in a crime registered in connection with the accident in question could be treated as a sufficient prima facie evidence. See the decision in *New India Assurance Company Ltd. v. Pazhani Ammal* reported in 2012 ACJ 1370). The first respondent before the Tribunal/the second respondent herein had not adduced any rebuttal evidence. But in view of Regulation 9 as extracted above and in view of Ext.A5 AMVI report revealing the nature of the damage caused to the car, we are of the considered view that composite negligence of both the driver of the car and the rider of the motor cycle is the cause of the accident. In other words, it is their combined negligence that caused the accident. The directions at which the vehicles involved in the accident were then moving, as discernible from Ext.A2 scene mahazar and Ext.A5 AMVI report would indicate that the motor cycle was virtually crossing the road. Nature of the damage, as mentioned above, would indicate that the motor cycle had almost crossed the road. But then, going by Regulation 9, it can be said that the rider of the motor cycle ought to have given way to the vehicle/vehicles proceeding along the main road viz., in this case, to the car. We are inclined to apportion the degree of negligence among the driver of the car and the rider of the motor cycle in the ratio 70:30. It is held accordingly.

10. Now, we will consider the question whether the attribution of contributory negligence on the claimant in O.P.(MV).105/2010 from which M.A.C.A. No. 961/2013 arose, based on the doctrine of *volenti non-fit injuria* could be sustained. True that the doctrine of *volenti non-fit injuria* can also be suggested as one of the bases that forms the foundation of the doctrine of contributory negligence. As per the doctrine of *volenti non-fit injuria*, "he who consents cannot receive an injury" or "that to which a man consents cannot be considered as an injury. To succeed under the maxim, one who propounds the same as a defence has to prove that the person injured knew of the danger, appreciated it and voluntarily took the risk. At the same time, it is to be noted that the person injured had some knowledge of the danger is not a sufficient ground to succeed under the said maxim. A child is not expected to be as careful for his safety as an adult or it cannot be said that while mounting on a pillion of a motor cycle, a child should be presumed to have the knowledge of danger, appreciated and voluntarily took the risk. In this case, the claimant in O.P.(MV).No.105/2010 was aged only 13 years at the time of the accident. It will be too much to comprehend a contention that such a child should be presumed to have the knowledge that her brother being statutorily disqualified under section 4 of the M.V Act and not possessed of a driving licence was riding the motor cycle and therefore, by riding on it as a pillion rider she is voluntarily taking a risk. We do not find a blameworthy action capable of rendering her dis entitled to claim compensation by applying the doctrine of *volenti non fit injuria*, in the

circumstances obtained in this case. No other bases which could form the foundation for contributory negligence such as penal theory, being joint-tort-feasors cannot be imputed against the claimant in O.P.(MV).No.105/2010, the first respondent in M.A.C.A No.961/2013. In fact, no other circumstances capable of fixing contributory negligence against the said claimant, have been pleaded and proved against her. It is also to be noted that there is absolute absence of any challenge against quantum of compensation in the appeal.

11. We have already found that the cause of the accident is the composite negligence of the rider of the motor cycle as also the driver of the car. The only other contention made against the common judgment and award to the extent it pertains to O.P.(MV). No.105/2010 is that the claimant had failed to implead the owner and insurer of the motorcycle and therefore, the claim petition is bad for non-joinder of parties. Such a contention is not specifically raised or seriously pressed into service either before the Tribunal or before this Court. Even if it is raised, in the light of the Kerala Torts (Miscellaneous Provisions) Act, 1996, such a contention is not available to be raised to defeat the claim of the petitioner in O.P.(MV). 105/2010. By virtue of the combined effect of sections 7 and 8(3) of the said Act, if in an accident two vehicles are involved, the failure to bring on record the driver/rider, owner or the insurer of the other vehicle cannot be a reason to defeat the application from a claimant. In such circumstances, we are of the view that the contention of the appellant that the Tribunal ought to have found contributory negligence on the part of the claimant and proportionate reduction ought to have been made from the quantum of compensation assessed in O.P.(MV).No.105/2010 cannot be sustained. No appeal or cross objection has been preferred by the claimant/first respondent seeking enhancement of compensation. In such circumstances, we are of the view that there is no reason to interfere with the judgment and award dated 18.2.2013 in so far as it pertains to O.P.(MV).No.105/2010. In short, M.A.C.A. No. 961 of 2013 is liable to fail and accordingly, it is only to be dismissed.

12. As regards M.A.C.A. No.973 of 2013 arising from O.P.(MV). No.108/2010, the first respondent in the appeal was the rider of the motor cycle involved in the accident. He was aged only 16 years at the time of the accident viz., on 14.11.2009. We have already discussed the nature of the accident and we have found that the cause of the accident is the composite negligence from his part and the driver of the car involved in the accident. We have also apportioned the degree of negligence among them as 30:70. When that be so, the contention of the appellant that the Tribunal had erred in not finding contributory negligence on the part of the petitioner/the first respondent herein and consequently in making proportionate reduction from the quantum of compensation is having considerable force. The principle underlying the doctrine of contributory negligence is the application of the maxim "in pari delicto, potior est conditio defendentis" which means when both parties are equally to blame, neither can hold the other liable. There is clear difference between "contributory negligence" and "composite negligence". Where a person is injured without any act or

omission from his part, but as a combined effect of the negligence of two or more persons it is a case of "composite negligence" and not a case of "contributory negligence". The expression "contributory negligence" applies solely to the conduct of the claimant, in a case of personal injury and in case of compensation for death it applies to the conduct of the victim. It means that there was an act or omission from the part of the injured-claimant or victim, which has materially contributed to the damage. As noticed hereinbefore, in O.P. (MV).No.108/2010, the claimant was the rider of the motor cycle which collided with the car in question. We have already apportioned the degree of negligence among them as 30% on the part of the rider of the motor cycle and 70% on the part of the driver of the car. Therefore, there can be no impediment for the claimant who is the injured-rider to claim compensation to the extent of 70% of the assessed compensation as he can be attributed only with 30% contributory negligence. It will not render him absolutely dis entitled to compensation. In this appeal, the claimant/the first respondent in the appeal had not taken up any cross-objection. No separate appeal has also been filed by him seeking enhancement of compensation. The appellant-insurance company has not made any challenge against the quantum of compensation. The Tribunal has granted an amount of Rs. 1,61,900/- as the compensation in O.P.(MV). No.108/2010. In the light of the apportionment of contribution made by us, the first respondent is entitled only to get 70% of the award amount i.e., Rs. 1,13,330/-. Hence, the award must stand modified to that extent. It is modified accordingly. In the result, M.A.C.A. No.961 of 2013 is dismissed and M.A.C.A. No.973 of 2013 is partly allowed and the award in O.P.(MV).No.108/2010 is scaled down to Rs. 1,13,330/- and the award stands modified to the aforesaid extent. We maintain the rate of interest fixed by the Tribunal in this case. There will be no order as to costs.