
(2011) 06 MAD CK 0530
In the Madras High Court
Case No : C.M.A. No. 1749 of 2008

Sakthi

APPELLANT

Vs

M. Sundararaj and Another

RESPONDENT

Date of Decision : 30-06-2011

Acts Referred:

Penal Code, 1860 (IPC) — Section 168, 169, 279, 337

Citation : (2013) 2 ACC 636 : (2013) ACJ 926

Hon'ble Judges : K.B.K. Vasuki, J

Bench : Single Bench

Advocate : N. Balakrishnan, for the Appellant; J. Anandkumar and Mr. S. Srinivasa Raghavan, for the Respondent

Judgement

K.B.K. Vasuki, J.—The appellant-claimant is the injured in the accident occurred at 8 a.m. on 16.2.1998 at Valayenvayal Road near Namanasamudram on Tirumayam-Pudukkottai Road. The appeal is filed by claimant-appellant against the apportionment of liability to pay the compensation between the tortfeasors, i.e., rider of both the vehicles involved in the accident, on the ground of composite negligence and the direction issued against the respondent Nos. 1 and 2, who are the owner and insurer of one of the vehicles, to pay 50 per cent of the compensation amount. The date, time, place and factum of the accident are not denied. The two vehicles involved in the accident are (i) Hero Honda bearing registration No. TN 67-D 698 which was ridden by one Rajan having the claimant as pillion rider and owned by the respondent No. 1 and insured with the respondent No. 2 and (ii) VIP Hero Honda Majestic Panther bearing registration No. TN P-4718 ridden by one Subramaniam and owned by one Manikkam at the time of the accident. For easy understanding both the vehicles are hereinafter referred to as "Hero Honda" and "VIP Hero Honda" respectively. The rider and pillion rider of Hero Honda vehicle sustained injuries in the accident and the injured was immediately taken to the Government Hospital, Pudukkottai, where he was given first aid and admitted as inpatient for further treatment and from there intimation was given to Namanasamudram Police Station. On receipt of the

intimation, the Head Constable rushed to the hospital and obtained statement from the claimant-injured at 10 a.m. and the same was registered in Crime No. 18 of 1998 for the offence under sections 279 and 337 of Indian Penal Code, against VIP Hero Honda vehicle and in the course of investigation of F.I.R., both the vehicles were inspected by Motor Vehicle Inspector and rough sketch regarding the scene of occurrence is also prepared by the Investigating Officer. Exhs. A3 to A5 are the Motor Vehicle Inspector's reports regarding both the vehicles involved in the accident and rough sketch about the scene of occurrence showing the position of the vehicles. After the investigation, charge-sheet was filed against the rider of VIP Hero Honda. The rider of the same as an accused was summoned and he appeared and admitted his guilt before the concerned Judicial Magistrate's Court and on the basis of such admission, he was convicted and sentenced to pay fine and the accused paid fine of Rs. 850.

2. In the meanwhile, claimant-injured has come forward with the claim petition against the owner and insurer of Hero Honda vehicle in which he travelled as pillion rider for compensation, as if the rider of Hero Honda was by his rash and negligent driving of the vehicle responsible for the accident. The claimant has admittedly not impleaded the rider, owner and insurer of other VIP Hero Honda vehicle in his claim petition. The claimant has in paras 5 and 7 of the claim petition and in his complaint given to the Head Constable narrated the manner of the accident as due to rash and negligent driving of rider of Hero Honda vehicle. But the same was recorded as if the accident is caused due to rash and negligent driving of VIP Hero Honda vehicle. It is further stated therein that even if both the vehicle drivers are responsible for the accident, the victim of the accident is entitled to proceed against one of the tortfeasors and he is not bound to implead owner-cum-rider and insurer of both the vehicles and the claim can be initiated against one of the vehicles. The claim was not contested by the respondent No. 1, owner of Hero Honda vehicle in which the claimant travelled as a pillion rider and it is contested only by the insurer of the vehicle.

3. The Tribunal has in the course of trial mainly considered three aspects: (1) contradictory versions regarding the manner of the accident put forth on the side of the claimant on different occasions, i.e., F.I.R., claim petition and witness-box; (2) denial of manner of accident as due to any rashness of Hero Honda vehicle rider by the contesting respondent No. 2, insurer; and (3) conviction and sentence of VIP Hero Honda rider. The Tribunal has thereafter decided to fix the liability equally upon the riders of both the vehicles and accordingly directed the owner and insurer of Hero Honda, which is held to be one of the offending vehicles, to pay 50 per cent of the compensation. Hence, this appeal by the claimant-injured before this court.

4. Heard the rival submissions made on both sides.

5. The relevant provisions of law under the Motor Vehicles Act and the legal principles laid down by Apex Court, our High Court and other High Courts in catena of cases, few of which are cited below, is that in cases of accident due to

the composite negligence of two vehicles, the liability shall not be normally apportioned as both wrongdoers are jointly and severally liable for whole loss and it is only in the case of contributory negligence that the liability should be apportioned between the injured and other tortfeasor in proportion to their contributory negligence. The authorities cited in support of such proposition of law are: (a) T.O. Anthony Vs. Karvarnan and Others, ; (b) The Oriental Insurance Company Limited Vs. Kalaivani and Others, (c) Kusumben Vipinchandra Shah and Another Vs. Arvindbhai Narmadashankar Raval and Others, ; (d) National Insurance Company Vs. Kastoori Devi and Others and Shanti Devi and Others, and (e) United India Insurance Co. Ltd. v. Premakumaran, 1988 ACJ 597 (Kerala).

6. In this case, the Tribunal on the basis of the available records arrived at a conclusion that as per Exh. A5, tough sketch of police Investigating Officer, the accident occurred in the middle of the road, as such the riders of both the vehicles are equally guilty of rash and negligent driving of their respective vehicles and apportioned the payment of compensation in equal proportion and directed the owner and insurer of Hero Honda vehicle, who are before the Tribunal arrayed as respondent Nos. 1 and 2, to pay 50 per cent of the compensation. Though this appeal is filed by the claimant mainly against the apportionment of the liability and direction of payment of only 50 per cent of compensation made against owner and insurer of Hero Honda, the owner remained ex parte before the Tribunal.

7. The respondent No. 2, the insurer, contested the claim and has during trial, summoned the Head Constable attached to Namanasamudram Police Station and the Assistant Administrative Officer of the respondent insurance company as RW 1 and RW 2 to speak about the fact that criminal case is registered only against VIP Hero Honda vehicle and no criminal case is registered against Hero Honda vehicle and to speak about non-involvement of Hero Honda vehicle in the accident. The insurer also raised the issues relating to non-joinder of necessary parties, i.e., the owner and insurer of VIP Hero Honda and joinder of unnecessary parties, i.e., the respondent Nos. 1 and 2. But the insurer has not filed any independent appeal against the Claims Tribunal finding on composite negligence on the part of riders of both the vehicles and apportionment of liability to pay compensation between the owner and insurer of both the vehicles. In that event this court is of the considered view that the finding of the Tribunal on the negligence aspect having been not challenged, warrants no interference.

8. Regarding the main dispute raised herein by the claimant, i.e., direction for payment of 50 per cent of the amount, the issue is also equally well settled in the judgments referred to above. Our Supreme Court has in the judgment in T.O. Anthony Vs. Karvarnan and Others, clearly held that in the case of composite negligence, each wrongdoer is jointly and severally liable to the injured for payment of entire damages and the injured person has the choice of proceeding against all or any of them and 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.

9. The Division Bench of Gujarat High Court has under identical circumstances in the judgment in *Kusumben Vipinchandra Shah and Another Vs. Arvindbhai Narmadashankar Raval and Others*, held that the tortfeasor who is compelled to pay entire compensation has the right of recovery in appropriate proceedings initiated by him against other tortfeasor. That being so, the Tribunal ought to have held that the riders of both the vehicles are jointly and severally liable to pay entire compensation and directed the respondent Nos. 1 and 2, owner and insurer of one of the vehicles, to pay entire compensation with liberty given to the insurer of the vehicle to initiate appropriate proceedings against the owner and insurer of other vehicle to recover portion of compensation amount from other joint tortfeasor who are not made parties in the present proceedings. On the failure of the Tribunal to adopt such approach the direction of the Tribunal for payment of 50 per cent by the respondent Nos. 1 and 2 deserves modification to make the liability to full extent.

10. Regarding quantum of compensation, Claims Tribunal has on the basis of available records awarded compensation of Rs. 60,000 under the following heads:

11. While the learned counsel for the appellant has in this appeal sought for enhancement of compensation by disputing the award of compensation of Rs. 10,000 for loss of earning capacity as too low and meagre, according to the learned counsel for the respondent No. 2, insurer, award of compensation of Rs. 35,000 for permanent disability without the medical officer who issued the permanent disability certificate being examined is excessive and baseless.

12. In this case, the evidence adduced to prove the nature and extent of disability sustained by the injured are the oral evidence of PW 1 and Exhs. A2 - the wound certificate, A6 - discharge summary, A7 - X-ray and A8 - permanent disability certificate issued by one Dr. Gopannah. It is not in dispute that all the medical records including Exh. A8 as referred to above are marked only through injured, PW 1. As a matter of fact, Exh. A1 to Exh. A5 documents are produced at the first instance on 20.3.2002, but the discharge summary, X-ray, permanent disability certificate, identity card are produced as Exhs. A6 to A9 only on 4.8.2004, after the injured was recalled. The injured, PW 1, at the time of producing the documents deposed that the doctor, who issued disability certificate, Exh. A8, on 20.8.1998 on the basis of Exhs. A6 and A7, discharge summary and X-ray, was not alive. That compelled the contesting respondent to seriously object to the reception of the documents through PW 1 on the ground that the author of the documents was not available to prove the same and to subject himself for cross-examination. In view of such objections, Exhs. A8 and A9 are received subject to such strong objections and subject to proof of nature and extent of permanent disability sustained by the claimant. However, the claimant, PW 1, has not examined any other competent expert witness to prove the disputed aspects such as nature and extent of his permanent disability as referred to in Exh. A8. On his failure to do so, the objection suggested to him

was that he did not sustain any permanent disability and document Exh. A8 is obtained wrongly and against the procedure to suit his claim and the same cannot be accepted as evidence in support of his case. The same stand is seriously reiterated on the side of the insurer before this court also.

13. Whereas, the learned counsel for the appellant-claimant cited the authorities in *United India Insurance Co. Ltd. Vs. Udaysinh Chandansinh Thakor and Others*, and *Managing Director, North East Karnataka Road Trans. Corpn. Vs. T. Prabhakar and Others*, as answer to such objection and in support of reception and acceptance of the documents in question as evidence. In my opinion, the observation of Gujarat High Court and Karnataka High Court in the authorities cited above are not strictly applicable to the facts of the present case as they stand factually distinguishable. In the case decided by Karnataka High Court, the document which is the subject-matter of dispute is the wound certificate issued by the government hospital and is hence public document and the same was marked with the consent of both the parties. Karnataka High Court having found the same being public document and admissible in evidence under the relevant provisions of law, negated the objection raised by the revision petitioner Transport Corporation as hyper-technical in nature and against the legal principles laid down by the Apex Court as well as Karnataka High Court.

14. In the judgment decided by Gujarat High Court, the Neuro Surgeon, who had issued the certificate of disability, was not examined, as he had already retired, and his correct address could not be traced out. When identical objection was raised before the Tribunal as well as the High Court, the Division Bench of Gujarat High Court negated the same on the ground that the Motor Vehicles Act is a beneficial piece of legislation and the procedure envisaged under it is a summary one and, therefore, strict rules of evidence are not applicable to the proceedings under the Act and if any document is produced during the course of the proceedings, the genuineness and probative value of which is not in doubt and which has not been proved to be false, then the Tribunal can look into the same and come to a just and reasonable conclusion on the basis of the same. It is further pointed out in Gujarat High Court case that there is ample material on record pointing to the permanent disability suffered by the claimant and to support the finding arrived at by Claims Tribunal. Gujarat High Court hence negated the objection raised by the opponent to be hyper-technical which is likely to defeat the very object and purpose behind the beneficial enactment, which is meant for providing immediate relief in the form of just and reasonable compensation to the unfortunate victims of accident.

15. Though this court does agree with the view expressed by the Division Bench of Gujarat High Court, this court still is of the view that the same is not applicable to the present case. Unlike in Gujarat case, here the only evidence that could be considered reliable is medical evidence and the genuineness of the same is seriously disputed by the opponent and the same is permitted to be received subject to proof.

That being so, either of the doctors, who treated the injured-claimant or who examined him subsequently to assess the extent of permanent disability or any other medical practitioner who will be competent to render any opinion on the assessment already made, ought to have been brought into the witness-box to speak about the nature and extent of permanent disability sustained by the injured. The view so expressed by this court is only following the guidelines issued by the Apex Court in the judgment in Raj Kumar v. Ajay Kumar. 2011 ACJ 1 (SC). The Supreme Court has in paras 9 to 12 of the judgment laid down that Tribunal shall first ascertain whether there is any disablement, permanent or temporary, and if permanent, actual extent of permanent disability based on medical evidence and thereafter ascertain the extent to which such permanent disability is likely to affect his earning capacity. The Apex Court has in paras 10 and 11 of its judgment explained in detail the nature of evidence to be adduced and the manner of appreciation of the same. For better appreciation, the observation in paras 11 and 12 of the judgment is extracted below:

(11) The Tribunal should not be a silent spectator when medical evidence is tendered in regard to the injuries and their effect, in particular the extent of permanent disability. Sections 168 and 169 of the Act make it evident that the Tribunal does not function as a neutral umpire as in a civil suit, but as an active explorer and seeker of truth who is required to "hold an inquiry into the claim" for determining the "just compensation". The Tribunal should therefore take an active role to ascertain the true and correct position so that it can assess the "just compensation". While dealing with personal injury cases, Tribunal should preferably equip itself with a medical dictionary and a handbook for evaluation of permanent physical impairment [for example Manual for Evaluation of Permanent Physical Impairment for Orthopedic Surgeons, prepared by the American Academy of Orthopedic Surgeons or its Indian equivalent or other authorised texts] for understanding medical evidence and assessing the physical and functional disability. The Tribunal may also keep in view Schedule I to the Workmen's Compensation Act, 1923, which gives some indication about the extent of permanent disability in different types of injuries, in the case of workmen. If a doctor giving evidence uses technical medical terms, the Claims Tribunal should instruct him to state in addition, in simple non-medical terms, the nature and the effect of the injury. If a doctor gives evidence about the percentage of permanent disability, the Tribunal has to seek clarification as to whether such percentage of disability is the functional disability with reference to the whole body or whether it is only with reference to a limb. If the percentage of permanent disability is stated with reference to a limb, Tribunal will have to seek the doctor's opinion as to whether it is possible to deduce the corresponding functional permanent disability with reference to the whole body and if so, the percentage.

(12) The Tribunal should also act with caution, if it proposed to accept the expert evidence of doctors who did not treat the injured but who give "ready to use" disability certificates, without proper medical assessment. There are several

instances of unscrupulous doctors who without treating the injured, readily give liberal disability certificates to help the claimants. But where the disability certificates are given by a duly constituted Medical Board, they may be accepted subject to evidence regarding the genuineness of such certificates. The Tribunal may invariably make it a point to require evidence of the doctor who treated the injured or who assessed the permanent disability. Mere production of a disability certificate or discharge certificate will not be proof of the extent of disability stated therein unless the doctor who treated the claimant or who medically examined and assessed the extent of disability of the claimant, is tendered for cross-examination with reference to the certificate. If the Tribunal is not satisfied with the medical evidence produced by the claimant, it can constitute a Medical Board (from a panel maintained by it in consultation with reputed local hospitals/ medical colleges) and refer the claimant to such Medical Board for assessment of the disability.

16. The Supreme Court in para 16 of the same judgment is also appreciative of the difficulties of the claimants in securing the presence of busy surgeons or treating doctors for giving evidence and reluctant attitude of such experts which most of the time is found to be not satisfactory, and laid down solution as to how and in what manner evidence of such experts can be secured without any delay and without causing them any inconvenience or waste of their valuable time. The Apex Court has observed in para 16 as follows:

(16)...Solution does not lie in coercing the doctors to attend the Tribunal to give evidence. The solution lies in recognising the valuable time of doctors and accommodating them. Firstly, efforts should be made to record evidence of the treating doctors on commission, after ascertaining their convenient timings. Secondly, if the doctors attend the Tribunal for giving evidence, their evidence may be recorded without delay, ensuring that they are not required to wait. Thirdly, the doctors may be given specific time for attending the Tribunal for giving evidence instead of requiring them to come at 10.30 a.m. or 11 a.m. and wait in the court hall. Fourthly, in cases where the certificates are not contested by the respondents they may be marked by consent, thereby dispensing with the oral evidence. These small measures as also any other suitable steps taken to ensure the availability of expert evidence, will ensure assessment of just compensation and will go a long way in demonstrating that the courts/Tribunals show concern for the litigants and witnesses.

17. Thus the Supreme Court has in the above judgment answered the issue involved in the present case as to whether the examination of the doctor who treated the injured or who examined the injured to assess the permanent disability is essential or not and the basis on which the certificate issued by the doctor, who is not the treating doctor, can be accepted and the factors to be considered and precaution to be exercised before accepting the medical evidence in this regard. The Apex Court has also clearly laid down that mere production of a certificate is not enough and the author of the same or any other expert has to

be necessarily brought to the court for explaining the details or for clarifying the doubts if any raised by the Tribunal.

18. That being the law laid down by the Supreme Court, non-examination of either the treating doctor or any other qualified orthopaedic medical practitioner to prove the genuineness of the document and to prove the extent of disability as stated in the document, is fatal to the present case. The guidelines issued by the Supreme Court in the above judgment are forcibly applicable to the facts of the present case, wherein serious objection is raised by the insurer that too at the earliest possible time against the receipt of Exh. A8 through PW 1 and against the non-examination of expert to prove the genuineness of the same subject to which it is received. In that event, on the failure of the claimant to produce expert evidence, the Tribunal is right in rejecting the document, but wrongly awarded compensation of Rs. 35,000 for permanent disability. Applying the ratio laid down by Hon'ble Supreme Court, the award of compensation of Rs. 35,000 and Rs. 10,000 for permanent disability and loss of earning capacity is but erroneous.

19. However, as the appeal is filed by the claimant both against apportionment of award of compensation between the insurer of both the vehicles and for enhancement of the compensation, the question of reducing the compensation already awarded by the Tribunal, in the absence of any independent appeal either by the insurer or insured, does not arise herein. But the guideline issued by our Apex Court in the authority regarding the evidentiary value to be attached to the medical records produced before the Tribunal, without examining the competent medical officer such as the treating doctor or the doctor who examined him for assessing the permanent disability or any other competent qualified witness and other aspects as discussed above in the same judgment are to be necessarily kept in mind by the Tribunal and are to be applied forcibly in all appropriate cases.

20. As far as the liability to answer the award is concerned, the same, in view of the authority cited above, need not be apportioned between the owner and insurer. Insofar as the finding on liability to the effect that the riders of both the vehicles are guilty of composite negligence and the owner and insurer of both the vehicles are jointly and severally liable to pay the compensation is concerned, the same does not call for any interference. However, the award of the Tribunal insofar as it relates to apportionment of liability between the insurer of both the vehicles is legally unsustainable. The respondent No. 2, insurer of Hero Honda vehicle, is fastened with the entire liability of answering the entire award with right to recover the apportioned amount from the insurer of other vehicle by initiating appropriate recovery proceedings. In the result, award dated 26.7.2005 made in M.C.O.P. No. 400 of 1999, on the file of Motor Accidents Claims Tribunal/ Additional District-cum-Fast Track Court, Pudukkottai is modified by directing the respondent No. 2, the insurer, to satisfy the entire compensation award with the right of recovering the apportioned amount from the owner and insurer of the

other vehicle and the award is confirmed in other respects. This civil miscellaneous appeal is accordingly disposed of. No costs.