

(2005) 06 KL CK 0006
In the High Court Of Kerala
Case No : M.F.A. No. 1134/99

Sasidharan K.S. alias Sasindran

APPELLANT

Vs

P. Sukumaran and Others

RESPONDENT

Date of Decision : 30-06-2005

Acts Referred:

Kerala Torts (Miscellaneous Provisions) Act, 1976 — Section 7

Citation : (2005) 4 ACC 125 : (2006) ACJ 945 : (2005) 3 ILR (Ker) 849 : (2005) 2 KLJ 721 : (2005) 3 KLT 1063

Hon'ble Judges : K.R. Udayabhanu, J;J.B. Koshy, J

Bench : Division Bench

Advocate : V.V. Asokan, for the Appellant; Sajeev Kumar K. Gopal and Binoy Vasudevan, for the Respondent

Judgement

J.B. Koshy, J.—Appellant in this case was injured in a motor accident. While he was sitting in the cabin of lorry bearing registration No. KLM 5455, bus No. KRP 1436 driven by the first respondent hit behind the lorry. Consequently, he suffered serious injuries. He filed claim petition claiming compensation of Rs. Four lakhs. The tribunal found that the accident occurred due to the negligence of the lorry driver as well as the bus driver. Since only driver, owner and insurance company of the bus were impleaded as parties, only 50% compensation calculated was awarded. The total compensation calculated was Rs. 54,240/- against a claim of Rs. Four lakhs. Out of Rs. 54,240/-, 50% was deducted and only balance Rs. 27,120/- was ordered to be paid to the claimant. It is the contention of the appellant/claimant that if the driver of the bus as well as the driver of the lorry are negligent, being joint tortfeasors, compensation can be directed to be paid by one of the tortfeasors, in this case the bus owner and insurer who are made parties and, in turn, they can recover it from the lorry driver, owner and insurer of the lorry, if it is insured depending upon the terms of the policy. It is also contended that the compensation awarded was too meagre and it should be enhanced. Section 7 of the Kerala Torts (Miscellaneous Provisions) Act, 1977 relied by the appellant in support of his contention provides

as follows:

Proceedings against, and contribution between joint and several tortfeasors:-

(1) Where damage is suffered by any person as a result of a tort (whether a crime or not),-

(a) judgment obtained against any tortfeasor liable in respect of that damage shall not be a bar to an action against any other person who would, if sued, have been liable as a joint tortfeasor in respect of the same damage.

(b) If more than one action is brought in respect of that damage by or on behalf of the person by whom it was suffered, or for the benefit of his estate, or of the dependents of that person, against tortfeasors liable in respect of the damage (whether as joint tortfeasors or otherwise), the sum recoverable under the judgments given in those actions by way of damages shall not in the aggregate exceed the amount of the damages awarded by the judgment first given; and in any of those actions, other than that in which judgment is first given, the plaintiff shall not be entitled to costs unless the court is of opinion that there was reasonable ground for bringing the action.

(c) any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or would if sued have been, liable in respect of the same damage, whether as a joint tortfeasor or otherwise so however that no person shall be entitled to recover contribution under this section from any person entitled to be indemnified by him in respect of the liability in respect of which the contribution is sought.

(2) In any proceedings for contribution under this section, the amount of the contribution recoverable from any person shall be such as may be found by the court to be just and equitable having regard to the extent of that person's responsibility for the damage; and the court shall have power to exempt any person from liability to make contribution, or to direct that the contribution to be recovered from any person shall amount to a complete indemnity.

It is submitted that since joint tortfeasor against whom the liability is fixed is entitled to recover from the other, it should be implied that only one of the joint tortfeasors need be made a party. The above section only provides that if a judgment is obtained against the joint tortfeasor, he can recover it from the other person who is also jointly or severally responsible for the damages. The above Act provides an exception to the common law rule accepted in *Merryweather v. Nixon* ((1799) 8 Term Rep 186). Under the above rule, no action for contribution was maintainable by one wrong doer against another although he might have been compelled to satisfy the full damages. The above rule is virtually abandoned in England also because of later Statutes like Law Reform (Married Women and Tortfeasors) Act, 1935, Civil Liability (Contribution) Act, 1978 etc. But, we are of the opinion that the above Kerala Act relied on by the appellant only authorizes the joint tortfeasors to recover damages from the other

tortfeasor after paying the amount. It did not lay down that negligence or responsibility for causing damages can be fixed on another tortfeasor who is not a joint tortfeasor without impleading or hearing him in the proceedings. If joint and several liability is found, the aggrieved party can recover it from one of the parties and then the person who paid the amount can recover it from the other depending upon the responsibility fixed. The above position in no way authorise the court to fix the liability for negligence on another independent tortfeasor who was not given an opportunity of hearing. It will be against the fundamental principles of natural justice. If this is allowed, fake and fraudulent claims also can arise.

2. Contributory negligence, joint negligence and concurrent negligence are different. A person who is guilty of contributory negligence cannot claim damages from the opposite side. He is free to insure that liability also separately. All persons who aid or acting in conceit or advise or conspire or join in the committal of a wrongful act are joint tortfeasors. Persons are not joint tortfeasors mainly because their independent, wrongful or neglect act have resulted common damage. Such persons are several tortfeasors even though their acts are concurrent. Joint liability arises under three circumstances:

- (i) By concerted action, when one person engages another to do a tortuous act or an act which turns out to be tort;
- (ii) Vicarious liability arising from master and servant, principal and agent, etc.
- (iii) Joint action when two or more persons either directly or indirectly joint together to commit an act which finally result in a tortuous act.

Joint tortfeasors are jointly and severally liable for the entire damage resulting from the tort. Each is responsible for the injury sustained. Aggrieved party can claim it from all or any one of the joint tortfeasors. Therefore, if the driver of a vehicle is guilty of neglect, his employer, owner of the vehicle is a joint tortfeasor and claim petition can be filed against the driver or owner or both. Mere omission to sue one or mere non-impleading of one will not be a ground for refusal of the claim. The mere omission to implead some of the joint tortfeasor will not disentitle the claimant in claiming the full relief against those who are sued. But, it is totally different from a several tortfeasor. When a person is injured due to the negligent act of the drivers of two vehicles, the drivers are not joint tortfeasors unless they do the same act in concert. Here, a wrongly parked lorry was hit by a bus driver in a rash and negligent driving as a result of which a person is injured. Damage is caused not by joint action but separate actions independent of each others resulting in the same injury. Without hearing the driver or owner or insurance company of the lorry in the proceeding we cannot impose tortuous liability on them.

3. In *United India Fire and General Insurance Co. Ltd. v. Varghese* (1998 (2) KLT 871), a Division Bench of this Court held that in case of composite negligence, injured has option to proceed against all or any of the joint tortfeasors. Such

liability of the joint tortfeasor is joint and several. But, in that case, there was a collision between the bus and jeep and both drivers were made parties. So, liability of 75% and 25% were fixed after hearing both drivers. But, court held that it can be executed from any one of the tortfeasors so that a party who paid the amount can recover the same from the other joint tortfeasor. Another Division Bench decision cited is Velunni v. Vellakutty (1989 (2) KLT 227). In that case, the Division Bench held that in the case of composite negligence, there is joint and separate liability and there is no necessity to apportion the negligence unlike the case of contributory negligence. In that case, court proceeded on the basis that both drivers were joint tortfeasors and no contention was raised to the effect that they are several tortfeasors. In Anuradha Varma and Others Vs. State of Kerala, it was held that claim u/s 166 of the Motor Vehicles Act is maintainable even if the driver as such is not impleaded as one of the joint tortfeasor, owner is made a party. He became liable because his employee driver was negligent. In National Insurance Co. Ltd. v. Sivasankara Pillai (1995 (1) KLT 51), it was held that the tribunal is required to make appointment of compensation awarded as against each of the owners of the vehicle in proportion to the negligence of respective drivers. It was also held that when two vehicles are involved and accident happened due to the negligence of both drivers, they are not joint tortfeasors. Earlier decisions in 1988 (2) KLT 871 and 1989 (2) KLT 227 were also explained and distinguished as in this case arguments were placed by both sides as both parties are joint tortfeasors. But, they are several tortfeasors. In the case decided in Anuradha Varma and Others Vs. State of Kerala, , only driver was not impleaded. But, owner was impleaded. Owner is liable for the liability only to the extent of negligence of the driver. Therefore, driver and owner of the same vehicle are the joint tortfeasors. Owner and driver of another vehicle involved in the accident can only be one of the several tortfeasors. If two vehicles are involved and only if one vehicles's driver and owner are made parties, no liability can be case on the other party directly or indirectly without impleading them. If he was made a party, he would have got an opportunity that he is not at all responsible for the accident or amount claimed is high. In this case, the accident occurred on 19-10-1992. 13 years have passed. Driver, owner and insurance company are not made parties. The tribunal held that the liability of the bus driver is 50%. If the contention of the appellant is accepted the insurance company can be directed to deposit the entire amount and recover 50% of the amount from the owner of the lorry. If it is done, the liability will be mulcted on them without affording them an opportunity to defend their case. Even if notice is issued at this distance of time, it may not be possible for the owner of the lorry to remember who was the driver at that time and to find out his address. He also may not remember who is the insurer of the lorry at that time. He may not also be able to produce any evidence at this distance of time by citing witnesses to prove negligence. Records also may not be available in the police station after about more than 13 years. The bus driver, owner and insurer were made as parties. After considering the evidence, the bus driver (R2) was found to be 50% negligent and owner of the bus, being vicariously liable, was

also made liable for paying 50% of the compensation granted jointly and severally being joint tortfeasors and insurance company was directed to indemnify it. We are of the view that we cannot compel the third respondent insurance company to pay the entire amount and recover half of it from a party who was not heard at all. Insurance company who is made party in the case as insurer of the bus has no privity of contract with the owner of the lorry. Following the decision in 1995 (1) KLJ 51, we see no reason to interfere in the award in so far as only 50% liability was case on the respondents. We see no infirmity in the award. Claimant was aged 25 at the time of accident. He is a manual labourer engaged in the granite breaking. The tribunal found that there is 10% disability. Claimant was admitted in various hospitals. Ext.A3 is the discharge summary which shows that he was undergoing treatment in West Fort Hospital from 20-10-1992 to 22-12-1992 as an inpatient. He was again admitted in the hospital. Exts.A2 and A3 certificates would show that he was treated as an inpatient for 63 days. Ext.A3 discharge summary would show that the claimant has slight rigidity to abdomen and is unable to move both legs and has fracture to the pelvis and has spent 63 days as an inpatient. He was only a labourer engaged in granite breaking. Even though disability certificate was not produced, considering the above, the tribunal assessed 10% disability stating that fracture to pelvis which is a pivotal part of human body. Ext.A2 is the wound certificate was produced before the tribunal. The tribunal has seen the claimant who was examined. Therefore, we are unable to change the percentage of disability found by the tribunal. But the tribunal has taken only 10 as the multiplier. Multiplier fixed under the Second Schedule for persons between 25 and 30 is 18. If compensation is awarded taking 18 as the multiplier, compensation payable will be Rs. 32,400/- instead of Rs. 18,000/- awarded by the tribunal. So, the appellant will be entitled to an additional amount of Rs. 14,000/- under this head. Petitioner was under treatment for about 63 days as an inpatient in a private hospital and he has claimed Rs. 25,000/- for treatment expenses. The tribunal has allowed only Rs. 2,5000/-. We are of the opinion that Rs. 10,000/- should have been awarded towards medical expenses. So, additional amount payable will be Rs. 21,900/-. So, the liability of third respondent insurance company will be 50% of the same, i.e., Rs. 10,950/-. We see no ground to increase the compensation awarded under other heads. Rs. 10,950/-now awarded shall be deposited by the third respondent insurance company with 9% interest from the date of application till its deposit within three months from the date of receipt of a copy of this judgment. On deposit of the amount, claimant will be free to withdraw the same.