
(2012) 11 MAD CK 0181

In the Madras High Court

Case No : Civil Miscellaneous Appeal No. 2544 of 2009 and M.P. No. 1 of 2009

The New India Assurance Co. Ltd.

APPELLANT

Vs

L. Agnes and Others

RESPONDENT

Date of Decision : 02-11-2012

Acts Referred:

Penal Code, 1860 (IPC) — Section 279, 304A, 337

Citation : (2012) 11 MAD CK 0181

Hon'ble Judges : R. Subbiah, J; R. Banumathi, J

Bench : Division Bench

Advocate : M. Krishnamoorthy, for the Appellant; P.A. Audikesavalu for R1 to R4, Mr. K.S. Narasimhan for R6, for the Respondent

Judgement

R. Subbiah, J.—Being aggrieved over the finding rendered by the Motor Accidents Claims Tribunal (Additional District Judge, Fast Track Court), Tirupatthur, in M.C.O.P. No. 212 of 2008, in fixing 50% liability on the part of the insurer of a lorry bearing registration No. HR 38 H 9672 as well as the quantum of compensation awarded by the Tribunal, New India Assurance Company Limited has filed the present appeal. Appellant herein is the 4th respondent before the Tribunal. Respondents 1 to 4 herein are the claimants. 5th respondent is the owner of one Scorpio Car bearing registration No. TN 23 J 8611. 6th respondent is the insurer of the said Car. 7th respondent is the owner of the lorry bearing registration No. HR 38 H 9672 and the same was insured with the Appellant Insurance Company.

2. Brief facts of the case are that on 21.05.2005, one Lakshmikanthan, a Head Constable at Natrampalli Police Station, who was working on deputation at D.S.P. Office, Vaniyambai, was returning from Bangalore after attending his office duty along with his colleagues in a Scorpio Car bearing registration No. TN 23 J 8611 belonging to the 5th respondent and insured with the 6th respondent. The said car met with an accident at 3.00 AM on Outer Ring Road, opposite to Surabi Furniture Point, Marthahalli, Bangalore City from North to South. The car, in

which the said Lakshmikanthan was travelling, was driven by its driver in a rash and negligent manner and as a result of which, the said car dashed against a stationed lorry bearing registration No. HR 38 H 9672 belonging to the 7th respondent and insured with the Appellant Insurance Company and thus involved in the accident. In the said accident, the occupants of the car including Lakshmikanthan had sustained severe injuries and he died on the spot. A criminal case was registered in Crime No. 97 of 2005 on the file of Airport Traffic Police Station as against the drivers of both vehicles for the offences punishable under sections 279, 337 and 304-A IPC. Hence, the legal representatives of the deceased Lakshmikanthan, namely, wife, two sons and one daughter filed the claim petition seeking compensation of Rs. 20,00,000/- against the owner and insurer of both vehicles. One K. Gandhi, who had also sustained injury in the said accident, had also filed a separate claim petition.

3. Resisting the said claim petition, Appellant Insurance Company filed a counter stating that the accident had occurred only due to the rash and negligent driving of the driver of the car, in which the deceased had travelled. Absolutely there was no negligence on the part of the driver of the lorry. Hence, they are not liable to pay compensation. Further, the Insurance Company has also denied the age, income and occupation of the deceased.

4. In order to prove the claim, before the Tribunal, the wife of the deceased examined herself as P.W.1. One Gandhi who had travelled along with the deceased was examined as P.W.2. One Dr. Selvanathan was examined as P.W.3 and totally Exs. P-1 to P-22 were marked. One Vaitheeswaran, Legal Adviser of 6th respondent insurance company was examined as R.W.1 and one Gandhi, the Development Officer of Appellant Insurance Company was examined as R.W.2 and the copy of insurance policy of the car was marked as Ex. R-1.

5. Upon consideration of oral and documentary evidence, the Tribunal has come to the conclusion that the accident had occurred only due to the rash and negligent driving of the driver of the car and the lorry, which was parked on the road in a dangerous manner without any caution is also one of the reasons for the accident. Thus, the Tribunal held that the drivers of both vehicles are equally liable for the accident. After coming to such a conclusion, the Tribunal had assessed compensation under various heads and passed an award for a sum of Rs. 12,78,000/- as under:

6. Though the Tribunal has come to the conclusion that the drivers of both vehicles are equally liable to pay compensation amount, Tribunal has held that as per the policy, insurer of the car Royal Sundaram Alliance Insurance Company is liable to pay only a sum of Rs. 70,000/- stating that in respect of gratuitous passengers, they are eligible to get compensation Rs. 70,000/- in case of death or injury and as such, the Tribunal directed the 7th respondent to pay Rs. 70,000/- out of the total compensation of Rs. 12,78,000/- and also directed the Appellant Insurance Company i.e. the insurer of the lorry to pay the balance compensation amount. Aggrieved over the said finding, the Insurer of the lorry

has filed the present appeal.

7. Submission of the Appellant Insurance Company is three folds; At the time of accident, the lorry, insured with the Appellant Insurance Company, was in stationary position. Hence, question of fixing 50% contributory negligence on the part of the driver of the lorry does not arise in this case; The Tribunal, after having come to the conclusion that the drivers of both vehicles are equally responsible for the accident, ought not to have directed the Appellant Insurance Company to pay the entire compensation deducting Rs. 70,000/- merely for the reason that under the policy, the insurer of the car is liable to pay only a sum of Rs. 70,000/-; Quantum of compensation awarded by the Tribunal is highly exorbitant.

8. Heard the learned counsel appearing for the 6th respondent Insurance company, the insurer of the car in question as well as respondents 1 to 4 - claimants with regard to the contentions raised by the Appellant Insurance Company.

9. With regard to the rash and negligence aspect, it is the submission of the Appellant Insurance Company that at the time of accident, the insured lorry was in a stationary position and when the vehicle was not in motion, the question of fixing contributory negligence on the part of its driver does not arise. But, by a perusal of the records, we find that the accident had occurred on the small hours of 21.05.2005 at 3.00 AM. It is the specific case of the insurer of the car that at the time of accident, the lorry was stationed in a dangerous position on the road without switching on the reverse park lamp so as to enable the motorists plying on the road to have a glimpse over the said lorry. Only in such circumstances, the Tribunal has come to a conclusion that the parking of the lorry in the middle of the road in a dangerous position is also one of the contributory factors for the accident. Therefore, we do not find any infirmity in fixing 50% negligence on the part of the driver of the lorry insured with the Appellant Insurance Company.

10. With regard to the finding of the Tribunal that Appellant Insurance Company is liable to pay entire compensation after deducting Rs. 70,000/-, it is submitted by the Appellant Insurance company that when the Tribunal has come to the conclusion that the drivers of both vehicles are equally responsible for the accident, it ought not to have directed the Appellant Insurance Company to pay the entire compensation amount after deducting Rs. 70,000/-, which is payable by the insurer of the car as per policy. But it is the submission of learned counsel appearing for 6th respondent Insurance Company that the accident is the result of composite negligence. Under such circumstances, the owners of both vehicles are jointly and severally liable to pay compensation amount and the Appellant Insurance Company after paying the compensation amount, can recover of balance 50% from the owner of the car bearing registration No. TN 23 J 8611 since as per the policy taken by the owner of the Car, the liability of the 6th respondent insurance company is limited to the extent of Rs. 70,000/- only so far as the occupants of the car is concerned.

11. On the contrary, it is the submission of the learned counsel appearing for the claimants that since the accident is the result of composite negligence of lorry and Scorpio car, claimants can choose any one of the owners of the vehicle and its insurer to get compensation. When such being the position, direction given to the Appellant Insurance Company to pay entire amount minus Rs. 70,000/- (i.e. the amount payable by the 6th respondent as per policy), does not suffer from any infirmity.

12. We find, from the evidence available on record, that the deceased was the occupant of Scorpio car bearing registration No. TN 23 J 8611, insured with the 6th respondent Insurance Company. So far as the occupant of the car is concerned, he cannot be construed as a third party. The occupants of the car are eligible to get compensation only when additional premium is paid by the owner of the vehicle, covering the occupants of the car. In the instant case, as per the endorsement made in the insurance policy taken by the owner of the car, marked as Ex. R-1, the liability of the 6th respondent insurance company is limited to Rs. 70,000/-. Since the liability of the insurer of the car is limited, the Tribunal has directed the Appellant Insurance Company to pay entire compensation deducting the sum of Rs. 70,000/- from the total compensation amount, holding that there was a contributory negligence on the part of both vehicles. Hence, we find no infirmity to interfere with the finding rendered by the Tribunal with regard to the payment of compensation by 6th respondent Insurance Company to the extent of Rs. 70,000/-.

13. But, it is the submission of the claimants that when there is composite negligence, they can choose any one of the owners of the vehicles to make a claim. When that being the position, no infirmity could be found in the direction given by the Tribunal to pay the entire compensation after deducting Rs. 70,000/- payable by the 6th respondent insurance company under the policy. In support of this contention, the Claimants relied on the judgment reported in T.O. Anthony Vs. Karvarnan and Others, wherein the Hon"ble Supreme Court has held that where a person suffers injury, partly due to negligence of another person or persons, and partly by his own negligence, then negligence on the part of the injured is referred to as his contributory negligence. Relevant passage reads as under:

6. "Composite negligence" refers to the negligence on the part of the two or more persons. Where a person is injured as a result of negligence on the part of two or more wrongdoers, it is said that the person was injured on account of composite negligence of those wrongdoers. In such a case, each wrongdoer, is jointly and severally liable to the injured for payment of the entire damages and the injured person has the choice of proceeding against all or any of them. In such a case, the injured need not establish the extent of responsibility of each wrongdoer separately, nor is it necessary for the court to determine the extent of liability of each wrongdoer separately. On the other hand, where a person suffers injury, partly due to negligence on the part of another person or persons, and

partly as a result of his own negligence, then the negligence on the part of the injured which contributed to the accident is referred to as his contributory negligence. Where the injured is guilty of some negligence, his claim for damages is not defeated merely by reason of the negligence on his part but the damages recoverable by him in respect of the injuries stand reduced in proportion to his contributory negligence.

14. Relying upon the said judgment, it is submitted by the learned counsel appearing for Respondents 1 to 4 claimants that on account of composite negligence, the wrong doers are jointly and severally liable to the injured for the payment of entire compensation and as such, nothing wrong in the finding rendered by the Tribunal directing the Appellant Insurance Company, as one of the wrong doers, to pay the compensation amount.

15. Learned counsel appearing for the 6th respondent Insurer of the Car has also relied upon an unreported judgment of this Court dated 24.06.2010 delivered in C.M.A. Nos. 1840 and 1841 of 2000 and 61 of 2001 in support of the same proposition.

16. Absolutely, there cannot be any controversy in accepting the proposition laid down in the said decision that in the event of any composite negligence, the wrong doers are jointly and severally liable to pay compensation in respect of any death/injury to third parties. So far as the present case is concerned, the question that had arisen in this case is, whether respondents 1 to 4/claimants are entitled to choose any one of the insurer of the vehicle to claim compensation. The factual aspects of the case would show that the deceased was only the occupant of Scorpio car and he cannot be construed as third party so far as the car is concerned. The occupants of the car are entitled to get compensation from the insurer of the car in which they travelled only on account of additional premium that is payable by the owner of the vehicle and not in the capacity of third parties. In the case of composite negligence, unless the deceased/injured person is in the position of third party in respect of all the vehicles involved in the accident, he is not entitled to choose any one of the vehicles to claim compensation. Hence, we are of the view, the finding rendered by the Tribunal in directing the Appellant Insurance Company to pay the entire compensation amount minus Rs. 70,000/- is not legally sustainable.

17. In this regard, a reference could be placed in the judgment relied upon by the 6th respondent Insurance Company on the decision reported in *The National Insurance Co. Ltd., Madurai vs. Sujaya C. Moorthy & Others* (2004 (1) TN MAC (DB) 276), wherein a Division Bench of this Court, after holding that there was a composite negligence in causing the accident on the part of driver of the Ambassador car and driver of lorry apportioning negligence at 25% on the part of the Ambassador car and 75% on the part of the lorry driver, the Division Bench directed both insurance companies to pay respective share of the award amount. In that case, we find that both the vehicles were covered under the policy and the deceased was travelling in the car at the time of accident.

18. It is the contention of the learned counsel for the Appellant Insurance Company, by relying upon the said judgments that when the Tribunal has held that there is a composite negligence equally on the part of both drivers, it ought not to have directed one of the insurance companies to pay the compensation amount. Both the insurance companies have to be directed to pay the respective share. In the event of non-payment of any additional premium in respect of one of the vehicles, the owner of the said vehicle has to be directed to pay compensation.

19. We find some force in the said submission made by the Appellant Insurance Company for the following reasons; The occupant of the car cannot be construed as third party and he is entitled to compensation only when the owner of the car has paid additional premium. Only if the person is in the position of third party in respect of all the vehicles which are involved in the accident, he can choose one of the owners of the vehicle to make a claim; when the deceased is not a third party in respect of one of the vehicles is concerned, then he cannot choose any of the vehicles to make compensation; In such an event, both the owners of the vehicles and their insurers cannot be said to be jointly and severally liable to pay compensation; in the instant case, the liability of one of the insurer, namely, Insurer of the Car is limited to 70,000/-. In such situation, the claimants have to work out to recover 50% of compensation only from the owner of the car.

Therefore, we are of the opinion that the submission made by the learned counsel appearing for the claimants that in the accident of composite negligence, the claimant can choose any one of the owners of the vehicle and its insurer to make a claim and hence, the direction given by the Tribunal to the Appellant Insurance Company to pay the entire compensation amount is not legally sustainable.

20. Therefore, we hereby set aside the finding rendered by the Tribunal that Appellant Insurance Company is liable to pay entire compensation amount after deducting Rs. 70,000/-. We hold that the Appellant Insurance Company is liable to pay only 50% of the compensation amount. The insurer of the car is liable to pay a sum of Rs. 70,000/- and the owner of the Car is liable to pay the balance compensation amount.

21. With regard to the quantum of compensation, it is the case of respondents 1 to 4 that the deceased was working as Head Constable in Natrampalli Police Station. As could be seen from Ex. P-9, Pay Certificate that the gross salary was Rs. 8,216/- and his net salary was Rs. 7,396/-. Placing reliance upon Ex. P-9, Pay Certificate and taking into consideration the fact that had the deceased been alive, he would have earned Rs. 12,000/- per month, the Tribunal has taken the income of the deceased at Rs. 12,000/- per month. After deducting 1/3rd amount towards personal expenses of the deceased i.e. Rs. 4,000/-, the deceased would have contributed Rs. 8,000/- per month to the family. The deceased was aged 49 years at the time of accident and therefore, as per II Schedule, the Tribunal adopted 13 multiplier and calculated Rs. 12,48,000/- (Rs.

8,000/- x 12 months x 13 years) as loss of dependency. After granting amounts under conventional damages, Tribunal has awarded total compensation of Rs. 12,78,000/-.

22. Now, it is the submission of the Appellant Insurance Company that the deceased was aged about 49 years. Since he has crossed 40 years, Tribunal while calculating the amount under the head of "loss of dependency" ought not to have added 50% towards future prospects, whereas the Tribunal by fixing Rs. 8,000/- as monthly income and thereafter by adding 50% of that amount, namely, Rs. 4,000/- has fixed Rs. 12,000/- as monthly loss of income. As per the dictum laid down in Smt. Sarla Verma and Others Vs. Delhi Transport Corporation and Another, since the deceased had crossed 40 years, only 30% of his salary has to be taken into consideration towards future prospects. Therefore, proper reduction has to be made in the amount awarded by the Tribunal towards loss of dependency.

23. Considering the future promotional opportunities, we are of the view that the amount fixed by the Tribunal at Rs. 12,000/- as monthly contribution cannot be said to be on the higher side. But, following the decision rendered by the Hon'ble Supreme Court reported in Sarala Verma's case (supra), only 30% of the salary has to be added towards future prospects since the deceased had crossed the age of 40. If the sum of Rs. 8,000/- is fixed as monthly salary and if we add 30% of the same towards future prospects (Rs. 2,400/-), the amount comes to Rs. 10,400/- which sum could be arrived at monthly contribution. Since the claimants are four in numbers, it is proper to deduct 1/4th amount towards personal expenses and after deducting 1/4th amount, Rs. 7,800/- (Rs. 10,400/- minus Rs. 2,600/- being 1/4th amount) could be taken as monthly loss of contribution. So, the annual loss of contribution comes to Rs. 93,600/-. After adopting the proper multiplier, according to Schedule II of Motor Vehicles Act, namely "13", the amount comes to Rs. 12,16,800/- (Rs. 93,600/- x 13 years). Hence, Rs. 12,48,000/- awarded by the Tribunal towards Loss of dependency is hereby reduced to Rs. 12,16,800/-. Amounts awarded under other heads, in our view, are proper and hence, they are confirmed. Thus, the total compensation awarded by the Tribunal is reduced to Rs. 12,46,800/- as under:

In the result, the compensation of Rs. 12,78,000/- awarded by the Tribunal in M.C.O.P. No. 212 of 2008 dated 30.01.2009 on the file of Additional District Judge, Fast Track Court, Tirupathur is reduced to Rs. 12,46,800/- payable with interest at the rate of 7.5% per annum from the date of petition till the date of deposit and the Appeal is partly allowed as under:

Appellant New India Assurance Company is directed to pay 50% of the modified amount and 6th respondent Royal Sundaram Alliance Insurance Company Limited is directed to pay Rs. 70,000/- and the 5th respondent the owner of Scorpio Car in question is directed to pay the balance amount within six weeks from the date of receipt of a copy of the judgment.

It was stated before us that Appellant Insurance Company has deposited the entire compensation amount along with accrued interest, Appellant is permitted to withdraw the excess compensation amount more than that of their share of 50% along with proportionate accrued interest.

Out of modified amount, 1st respondent wife of the deceased is entitled to Rs. 6,46,800/- and respondents 2 to 4 children of the deceased are equally entitled to the balance amount. On such deposit, respondents 1 to 4 the claimants are permitted to withdraw their respective share amount with proportionate accrued interest.

There is no order as to costs. Consequently, M.P. is closed.