Minor M.Balaji vs S.Venkatachalam on 8 September, 2016

Author: T.Raja

Bench: T.Raja

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 08.09.2016

CORAM

THE HONOURABLE MR.JUSTICE T.RAJA

C.M.A.Nos.2141 to 2143 of 2011

Minor M.Balaji
rep. by his father M.Murugesan .. Appellant in C.M.A.No.2141 of 2011
M.Murugesan .. Appellant in C.M.A.No.2142 of 2011
M.Devi .. Appellant in C.M.A.No.2143 of 2011

-vs-

1. S.Venkatachalam
2. P.Mohanasundari

3. The Reliance General Insurance
Company Ltd.,
First Floor, G.J.Arcade
141/71, T.V.Samy Road
West R.S.Puram
Coimbatore-2 .. Respondents 1 to 3 in all the C.M.A's

Memorandum of Grounds of Civil Miscellaneous Appeals under Section 173 of the Motor Vehi

For Appellants :: Mr.N.Manokaran

For Respondents :: Ms.C.Harini for
Mr.N.Vijayaraghavan for R3
No appearance for R1 & R2

JUDGMENT

These three appeals have been filed by the appellants/claimants, being the members of the same family, namely, husband, wife and minor son, challenging the common award passed in M.C.O.P.Nos.207, 209 & 206 of 2008 respectively dated 27.12.2010 by the Motor Accidents Claims Tribunal (Additional District Judge), Fast Track Court No.1, Erode restricting the compensation payable to them at 50% on the ground of contributory negligence.

2. Mr.N.Manokaran, learned counsel for the appellants, assailing the impugned common award, pointed out the following infirmities committed by the Tribunal:-

> (i)The fixing of contributory negligence on the part of the appellants/claimants at 50%, merely on the ground that four persons, namely, husband, wife and two kids travelled in the motor-cycle, without there being any evidence to show that the driver of the motor-cycle had caused the accident, is not legally sustainable.
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> (ii)The non-production of the driving licence by P.W.1 cannot be put against the claimants, when it was not even seriously disputed by the respondent-Insurance Company. Moreover, the non-production of the driving licence of P.W.1 was also not the subject matter of issue before the Tribunal. It was also contended that although the driving of motor-cycle without licence would tantamount to committing an offence, the same by itself cannot lead to a finding of negligence as regards the accident. It is one thing to say that P.W.1-M.Murugesan was not possessing the driving licence. But no finding of fact has been arrived at by the Tribunal that he was driving the motor-cycle in a rash and negligent manner. If he had not driven the motor-cycle in a rash and negligent manner, it cannot be held that he should be held guilty of contributory negligence, only because he was not having a licence.
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> (iii)The contributory negligence cannot be fixed on assumptions and presumptions, particularly, when the respondent-Insurance Company has not chosen to examine the driver of the car as a witness, when he was already convicted by the criminal Court consequent to the filing of FIR for having caused the accident, for which he was found guilty and subsequently he paid the penalty thereof. The said fact should have been considered by the Tribunal.

3. Explaining further, the learned counsel submitted that on 7.10.2007 at about 9.00 P.M., when the appellants and another family member were travelling in the motor-cycle bearing Registration No.TN-29-Z-3550 driven by P.W.1-M.Murugesan from Komarapalayam to Pallipalayam, when they came nearer to Vijai Deepas Spinning Mills opposite road, one Maruti Zen car bearing Registration No.TN-38-D-0090 came from the opposite direction in a rash and negligent manner with high speed and hit against the motor-cycle, as a result all of them fell down and sustained injuries. The accident occurred only due to the rash and negligent driving of the first respondent, because of which P.W.1-M.Murugesan sustained bone fractures on the right shoulder, right caricable, ribs fracture on right side, backside of head, left hand, right leg and forehead; P.W.2-M.Devi sustained communicated fractures involving acetupulas and both calums of acetabulan in left side, multiple fractures at pubic, rami & pubic bone on right side, fracture at L5 vertebra and dislocation of femoral bone head on left side and the minor son-Balaji also sustained bone fracture on the right shoulder. Immediately first-aid treatment was given to them at Komarapalayam Government Hospital and they were shifted to Government Hospital, Erode and admitted as in-patients. In fact, P.W.1-M.Murugesan was taking treatment in the hospital from 7.10.2007 to 29.10.2007; P.W.2-M.Devi was taking treatment from 7.10.2007 to 8.11.2007 and the minor son was taking treatment from 7.10.2007 to 15.10.2007 respectively. It was also contended that due to the fracture,

the minor son was not able to lift the weight and move his hand, as the right shoulder movement was restricted and was not able to write and continue his studies apart from mental shock and agony. Likewise, P.W.1-M.Murugesan, aged about 42 years, being the breadwinner, was neither able to walk, stand, squat, ride vehicle and do any physical work nor lift any weight. Besides his shoulder movement and chest movement got restricted. In addition thereto, due to the ribs fracture, he was not able to breathe properly. Prior to the accident, he was working as a Carpenter and getting Rs.10,000/- per month. However, after the accident, on account of the shoulder and ribs fracture, he was not able to perform his job and his earning capacity was also miserably affected. On account of the accident the entire family is facing financial difficulties. He further contended that P.W.2-M.Devi, aged about 32 years, was a tailor and was earning Rs.7,000/- per month. However, after the accident, she was not able to stand, sit, squat, walk and do any physical work, as he left hip was replaced and plate and screws were introduced. In fact, two operations were performed on her at the Government Hospital, Erode. Thereafter, she was also shifted to K.M.C.Hospital, Coimbatore and admitted as in-patient from 11.11.2007 to 28.11.2007 and five operations were performed there apart from skin grafting and bone grafting. Due to the operations, her hip movements, leg movements got restricted and her left leg got shortened. Besides, she could not fulfill the conjugal obligations and more than Rs.1,50,000/- was spent towards the medical expenses of P.W.2-M.Devi. In fact the appellants are finding it very difficult to maintain the family including the parents.

4. Adding further, the learned counsel submitted that immediately after the accident, a criminal case was also registered against the first respondent in Crime No.762 of 2007 on the file of Komarapalayam Police Station under Sections 279, 337 & 338 of IPC. Under this background, when the claimants have filed the proof affidavits and established their case before the Tribunal that in the accident that took place on 7.10.2007 at about 9.00 P.M., all the three claimants suffered multiple bone fractures, dislocation of femural bone head on left side, etc., as referred to already, rendering them completely unfit for doing their day to day work, the Tribunal, after accepting the case of the appellants that there was an accident at 9.00 P.M., on 7.10.2007 at the site in question caused by the driver of Maruti Zen car bearing Registration No.TN-38-D-0090 coming in the opposite direction in a rash and negligent manner, wrongly considering the fact that P.W.1-M.Murugesan was riding the motor-cycle bearing Registration No.TN-29-Z-3550 along with his wife and two minor children, has erroneously come to the conclusion that since P.W.1-M.Murugesan was driving the motor-cycle with four persons, they should be held guilty of contributory negligence. According to the learned counsel, this sort of assumptions and presumptions, without there being any corroborative evidence, cannot be legally accepted.

5. Again attacking the finding of the Tribunal as to the contributory negligence, he has further contended that the contributory negligence cannot be fixed on the basis of mere assumptions and presumptions, particularly the respondent-Insurance Company has not chosen to examine the driver of the offending vehicle as a witness. Secondly, it was contended that when the said driver of the offending vehicle, pursuant to the filing of the charge sheet in Crime No.762 of 2007 on the file of the Komorapalayam Police Station for the offence under Sections 279, 337 & 338 of IPC, had admitted his guilt and also paid the penalty of Rs.2,750/- before the learned Judicial Magistrate, Tiruchengode in S.T.C.No.1368 of 2008, it goes without saying that the driver of the offending vehicle had caused the accident due to his rash and negligent driving. But this important and vital

piece of document has been completely overlooked by the Tribunal. Adding further, he submitted that although the finding of the criminal Court cannot have any binding effect on the Tribunal, the fact remains that Mr.S.Venkatachalam, who is the driver of the offending vehicle, on the fateful day, had caused the accident, as a result P.W.1-M.Murugesan, P.W.2-M.Devi and their son suffered multiple injuries. Moreover, P.W.2-M.Devi had undergone operations and her leg also completely got shortened. Besides her hip movement and leg movement are also restricted and she is unable to walk, stand, squat and do any physical work. When these are the admitted facts for the cause of the accident and the person responsible for causing the accident, Mr.S.Venkatachalam has also admitted his guilt before the criminal Court for the offence under Sections 279, 337 & 338 of IPC, the Tribunal ought not to have fixed the contributory negligence against the appellants, for the simple reason that since all the four persons had travelled in the motor-cycle driven by P.W.1-M.Murugesan, they should be held guilty of contributory negligence. Taking support from a Division Bench judgment of this Court in The Oriental Insurance Company Limited rep.by its Branch Manager, Pondicherry v. K.Balasubramanian and others, 2008 (1) CTC 142, he submitted that when a similar issue came up for consideration, wherein the offending driver involved in the accident had admitted the offence and pleaded guilty and that on his admission he was convicted for the offence under Sections 279, 337 & 338 of IPC, this Court has come to the conclusion that except for the limited purpose of saying that there was a criminal prosecution which ended in conviction or acquittal, the judgment of the criminal Court should be taken as a reliable evidence, not because it is a judgment of the criminal Court, but as a document containing admission. While this being the settled legal position that when the driver of the offending vehicle has admitted his guilt before the civil Court/Motor Accidents Claims Tribunal and also paid the penalty, that shows that he was convicted for the offence under Sections 279, 337 & 338 of IPC. Therefore the proceedings issued by the criminal Court have to be treated as a reliable evidence, both oral and documentary on the side of the claimants, to prove the negligence on the part of the driver of the offending vehicle. Even in the present cases, Mr.S.Venkatachalam, the driver of the offending vehicle was prosecuted and after admitting his guilt, when he had also paid the penalty, the Tribunal has wrongly come to the conclusion that P.W.1-M.Murugesan is also partially liable, applying the principle of contributory negligence, which has no relevance to the cases on hand. The said finding of the Tribunal is liable to be set aside, he pleaded. Moreover, there was no oral or documentary evidence to deny or controvert the claim of the appellants. Hence the Tribunal ought to have drawn an adverse inference. In this context, he relied upon a judgment of this Court in New India Assurance Co.Ltd., v. C.K.Ramesh and others, 2009 (6) CTC 589. Concluding his arguments, the learned counsel for the appellants submitted that the Tribunal has again reached an erroneous conclusion on the premise that P.W.1-M.Murugesan, while riding the motor-cycle, had failed to possess the driving licence, when that is not the subject matter of issue before the Tribunal and that the non-possession of the driving licence is a contra evidence against the appellants/claimants. When the Insurance Company has failed to prove that the motor-cyclist did not possess the licence, the finding given by the Tribunal that the non-possession of the driving licence by P.W.1-M.Murugesan while driving the vehicle might show that he was not well experienced in driving the motor cycle and that he might have equally contributed to the negligence, again based on presumption, cannot be accepted.

6. Opposing the above prayer, the learned counsel for the third respondent-Insurance Company, placing heavy reliance on an unreported judgment of a Division Bench judgment of this Court in

C.M.A.No.1142 of 2008 dated 3.4.2009 (M/s National Insurance Company Limited, Chennai v. S.Chitra and others), submitted that admittedly in the cases on hand, P.W.1-M.Murugesan being the head of the entire family had driven the motor-cycle bearing Registration No.TN-29-Z-3550 on 7.10.2007 at about 9.00 P.M., carrying three persons along with him, which is not permissible under the provisions of the Motor Vehicles Act. Therefore, the Tribunal has rightly come to the conclusion that when four persons travelled in a motor-cycle, which is meant for two persons, they are liable for contributory negligence, because their action is completely contrary to the statute. Therefore the finding given by the Tribunal fixing contributory negligence on the appellants citing the reason that the four persons travelling on a motor-cycle might have contributed the negligence leading to the accident and also for the reason that the driver of the motor-cycle was not possessing the driving licence has shown that he was not familiar with the driving, are fully in order. Hence, no interference is called for, she pleaded.

7. This Court hardly finds any justification to accept the findings of the Tribunal. Indisputably, on 7.10.2007 at about 9.00 P.M., P.W.1-M.Murugesan along with his wife P.W.2-M.Devi and two children were proceeding in the motor-cycle bearing Registration No.TN-29-Z-3550 from Komarapalayam to Pallipalayam and when they came nearer to Vijai Deepass Spinning Mills opposite road, one Maruti Zen car bearing Registration No.TN-38-D-0090 came from the opposite direction and finally the accident had taken place, as a result P.W.1-M.Murugesan, his wife M.Devi and their son fell down and sustained multiple injuries and they were treated as in-patients at the Government Hospital, Erode from 7.10.2007 to 29.10.2007; 7.10.2007 to 8.11.2007 and 7.10.2007 to 15.10.2007 respectively. It is also not in dispute that P.W.1-M.Murugesan, aged 42 years, was a Carpenter and was earning a sum of Rs.10,000/- per month. After the accident, he is not able to eke his livelihood. Likewise, P.W.2-M.Devi, aged about 32 years, was a tailor and earning a sum of Rs.7,000/- per month. After the accident her left hip was completely replaced and plates and screws were introduced. Even after infusion of blood, her leg and hip movements got restricted. The minor son Balaji also sustained fractures. It was established before the Tribunal that her left leg was also shortened due to that she had lost her amenities and enjoyment and she is not able to continue her tailoring business, as a result her monthly salary of Rs.7,000/- also has been lost. In addition thereto, it was claimed that Rs.1,50,000/- has been spent towards the medical expenses. Though counter affidavits were filed by the Insurance Company before the Tribunal, they miserably failed to contest the case in a proper and legal manner. Therefore, when the Insurance Company has not come forward to throw the claim made by the appellants, it is not known how the Tribunal can come to a wrong conclusion that there was a contributory negligence on their part, more particularly, on the rider of the motor-cycle Mr.M.Murugesan. The Apex Court in Bimla Devi and others v. Satbir Singh and others, (2013) 14 SCC 345, while dealing with a similar issue that after filing of the counter affidavit, if any claim has not been contested in a proper and legal manner, that would not be sufficient to throw the claim petition so as to deny the claimants of their just compensation. In this context, it is relevant to extract the relevant paragraphs of the said judgment as follows:-

> 9. No doubt, it is true that the claim case has not been contested in a proper and legal manner, but that should not be sufficient to throw the claim petition, so as to deny the claimants of their just compensation. It is always desirable, rather a necessity in law, that the matter, as far as possible, be decided on merits and in

> accordance with law. According to us, that has not been done, may be on account of several mistakes committed by the appellants.
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> 10. In claim cases, it is difficult to get witnesses, much less eyewitnesses, thus extremely strict proof of facts in accordance with provisions of the Evidence Act may not be adhered to religiously. Some amount of flexibility has to be given to those cases, but it may not be construed that a complete go-by is to be given to the Evidence Act.

8. Moving to the second finding given by the Tribunal that only for the reason that P.W.1-M.Murugesan was driving the motor-cycle along with his wife and two children, it might have led to the accident, therefore, he should be fastened with 50% contributory negligence, is also not justifiable. The mere reason that Mr.M.Murugesan was driving the motor-cycle along with his wife and minor children, cannot automatically lead to a conclusion that he has contributed to the negligence, without there being any contra evidence adduced by the Insurance Company. Again the finding of the Tribunal that since Mr.M.Murugesan, while driving the motor-cycle, was not in possession of a driving licence, he might have contributed to the negligence, is also far from acceptance. In this regard, the judgment of the Apex Court in Sudhir Kumar Rana v. Surinder Singh and others, (2008) 12 SCC 436 may be usefully referred to, wherein the Apex Court held as follows:-

> 9. If a person drives a vehicle without a licence, he commits an offence. The same, by itself, in our opinion, may not lead to a finding of negligence as regards the accident. It has been held by the courts below that it was the driver of the mini truck who was driving rashly and negligently. It is one thing to say that the appellant was not possessing any licence but no finding of fact has been arrived at that he was driving the two-wheeler rashly and negligently. If he was not driving rashly and negligently which contributed to the accident, we fail to see as to how, only because he was not having a licence, he would be held to be guilty of contributory negligence.

9. Thirdly, when the driver of the offending vehicle, who has caused the accident, pursuant to the registration of the FIR by the claimants, had appeared before the criminal Court and admitted his guilt and thereupon after receiving the verdict had also paid the penalty, the same would show that the driver of the offending vehicle has not only admitted his guilt before the criminal Court, but also the claim of the appellants. The scope of admission has been rightly dealt with by a Division Bench of this Court in The Oriental Insurance Company Limited rep.by its Branch Manager, Pondicherry v. K.Balasubramanian and others, 2008 (1) CTC 142, wherein it has been held as follows:-

> 0. Copy of First Information Report, copy of the Observation Mahazar prepared by the Investigating Officer, copy of the Rough Sketch prepared by him, copy of the Report of the Motor Vehicles Inspector and the certified copy of the Judgment of the Judicial Magistrate No.II, Nagercoil in the above said case in S.T.C.No.3554 of 2001 have been produced and marked on the side of the claimants as Exs.A-1 to A-5. Exs.A-1 to A-4 clearly support the case of the claimants that it was the fifth respondent herein/first respondent in M.C.O.P., the driver of the lorry who acted in a rash and negligent manner in driving the vehicle and caused the accident in question. From Ex.A-4, it is quite clear that there was no mechanical defect in either of the vehicles involved in the accident and that

the accident was purely due to the human error. Ex.A-5, the judgment of the Judicial Magistrate No.II, Nagercoil in S.T.C.No.3554 of 2001 evidences that the fifth respondent herein/first respondent in M.C.O.P., admitted the offence and pleaded guilty and based on his admission he was convicted for the offences under Sections 279, 337 and 338, IPC. It is a well settled proposition of law that the judgments of the Criminal Courts are neither binding on the Civil Court/Motor Accident Claims Tribunal nor relevant in a Civil Case or a claim for compensation under the Motor Vehicles Act, except for the limited purpose of showing that there was a criminal prosecution which ended in conviction or acquittal. But there is an exception to the general rule. When an accused pleads guilty and is convicted based on his admission, the judgment of the Criminal Court becomes admissible and relevant in civil proceedings and proceedings before the Motor Accident Claims Tribunal, not because it is a judgment of the Criminal Court, but as a document containing an admission. Of course, admissions are not conclusive proof of the facts admitted therein. But unless and until they are proved to be incorrect or false by the person against whom the admissions are sought to be used as evidence, the same shall be the best piece of evidence. In this case, though the appellant did have the right to lead evidence to disprove the facts admitted in the Criminal Case, no evidence has been adduced on the side of the appellant in the proceedings before the Motor Accident Claims Tribunal.....

10. A close reading of the above paragraph of the judgment clearly shows that it is well settled proposition of law that the judgment of the criminal court is neither binding on the civil Court nor relevant in a civil case or a compensation under the Motor Vehicles Act, except for the purpose of showing that there was a criminal prosecution which ended in conviction or acquittal. But there is an exception to the general rule, namely, that if an accused pleads guilty and is convicted based on his admission, the judgment of the criminal Court becomes admissible and relevant in civil proceedings and proceedings before the Motor Accident Claims Tribunal, not because it is a judgment of the criminal Court, but as a document containing an admission. When this Court has held that such an admission has to be construed as the best piece of evidence, the appellants in the present cases, placing reliance on the proceedings issued by the criminal court holding the driver of the offending vehicle guilty, had proved the case that the accident had occurred only because of the driver of the offending vehicle, namely, the Maruti Zen car. But no finding whatsoever has been rendered by the Tribunal as to why the proceedings issued by the criminal Court should not be relied to hold that the driver of the offending vehicle is the cause for the accident. When the Tribunal has committed serious infirmities, this Court is not able to accept the same. Therefore, the finding of the Tribunal that the claimants have contributed to the negligence, without there being any sufficient evidence on the contrary, is liable to go. Accordingly, the finding of the Tribunal that the appellants are guilty of the contributory negligence stands set aside and the civil miscellaneous appeals shall stand allowed. Needless to state that the appellants are entitled to the full compensation arrived at by the Tribunal, without the deduction of 50% on the ground of contributory negligence. The third respondent is directed to deposit the full compensation amount to the credit of the M.C.O.P.Nos.206, 207 & 209 of 2008 on the file of the Motor Accidents Claims Tribunal (Additional District Judge), Fast Track Court No.1, Erode within a period of four weeks from the date of receipt of a copy of this order. On such deposit, it is for the appellants/claimants to withdraw the same by making appropriate applications before the Tribunal. However, there shall be no order as to costs.

Index : yes/no 08.09.2016

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To
1. The Motor Accidents Claims Tribunal
Additional District Judge/Fast Track Court No.1
Erode

T.RAJA, J.

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C.M.A.Nos.2141 to 2143 of 2011

08.09.2016