



C.M.A.(MD)No.301 of 2020

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 26.07.2023

Pronounced on : 18.08.2023

CORAM:

THE HON'BLE MR.JUSTICE **K.MURALI SHANKAR**

C.M.A.(MD)No.301 of 2020

and

C.M.P.(MD)No.3902 of 2020

The Branch Manager,
National Insurance Company Ltd.,
Manojiyappa Street,
Thanjavur Town,
Thanjavur District.

... Appellant/
2nd Respondent

Vs.

1. Muralidharan

... 1st Respondent/
1st Appellant

2. Ramamoorthy

... 2nd Respondent/
1st Respondent

Prayer : This Civil Miscellaneous Appeal filed under Section 173 of the Motor Vehicles Act, to set aside the decree and judgment dated 06.12.2018 made in M.C.O.P.No.94 of 2016 on the file of III Additional District Judge, Thanjavur at Pattukottai.



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For Appellant : Mr.A.Ilango
For R1 : Mr.S.Deenadhayan
For R2 : No appearance

JUDGMENT

The Civil Miscellaneous Appeal is directed against the award passed in M.C.O.P.No.94 of 2016 dated 26.03.2019 on the file of the Motor Accident Claims Tribunal/III Additional District Court, Thanjavur at Pattukottai.

2. The appellant/insurer, who was made liable to pay compensation of Rs.9,59,900/- (Rupees Nine Lakhs Fifty Nine Thousand and Nine Hundred only) with interest at 7.5% per annum to the first respondent/claimant for the disability suffered by him, consequent to an accident occurred on 18.06.2014, challenged the liability mulcted on it by adopting the doctrine of pay and recovery and also the quantum of compensation awarded at, by the Tribunal.



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3. The case of the first respondent/claimant is that on 18.06.2014 at about 05.30 p.m., the first respondent/claimant borrowed a TVS motorcycle and proceeded towards Pattukottai with one Dharmadurai as pillion rider, that when the first respondent/claimant was proceeding near No.16 Vaikkal, Enathi Village and he attempted to overtake a parked lorry and at that time, a two wheeler bearing Registration No.TN-49-AS-6431, which came in the opposite direction in a rash and negligent manner, had dashed against the two wheeler driven by the first respondent/claimant and as a result of which, the first respondent/claimant and the pillion rider had sustained serious injuries all over their body, that the first respondent/claimant was immediately taken to Government Hospital, Pattukottai through 108 Ambulance and that the accident was occurred only due to the rash and negligent driving of the second respondent/first respondent's rider.

4. It is the further case of the first respondent/claimant that after first aid treatment, he was referred to Thanjavur Medical College Hospital, but the first respondent/claimant was admitted in a private hospital, namely, Elangovan Hospital on 18.06.2014 and was discharged on 26.06.2014,



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that the first respondent/claimant had bone injuries, that the first respondent/claimant was working as a car driver and was earning more than Rs.10,000/- (Rupees Ten Thousand only) per month and that due to the disability suffered, he is not in a position to drive the vehicle.

5. The defence of the appellant/insurer is that FIR has been registered only against the first respondent/claimant, who was driving TVS XL Super two wheeler and charge sheet was also laid against him and the case is pending in S.T.C.No.82 of 2015 on the file of the Judicial Magistrate Court, Orathanadu, that the accident arose out of collision of two motor vehicles, that the motor vehicle driven by the first respondent/claimant was not having RC book and insurance coverage, that the first respondent/claimant was also not having valid and effective driving licence on the date of accident, that the accident was occurred only due to the rash and negligent driving of the first respondent/claimant, that the first respondent/claimant has not suffered any disability due to the accident and that the claim of compensation is excessive.

6. During enquiry, the first respondent/claimant has examined himself as P.W.1 and Doctor M.Chellappan as P.W.2 and exhibited 12



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documents as Ex.P.1 to Ex.P.12. The second respondent/first respondent had remained exparte. The appellant/insurer has adduced neither oral nor documentary evidence.

7. The learned trial Judge, upon considering the evidence, both oral and documentary and on hearing the arguments of both the sides, has passed the impugned award dated 26.03.2019 holding that the second respondent/first respondent's driver was responsible for the accident and directed the appellant/insurer to pay a compensation of Rs.9,59,900/- (Rupees Nine Lakhs Fifty Nine Thousand and Nine Hundred only) with interest at 7.5% per annum and costs. Aggrieved by the impugned award, the insurer has come forward with the present appeal.

8. The learned counsel appearing for the appellant/insurer would submit that the Tribunal has failed to consider the fact that the first respondent/claimant himself was the tortfeasor against whom the police has registered the case and laid the charge sheet and as such, he cannot claim compensation for his own negligence, that the accident was occurred when the first respondent/claimant was attempting to overtake a



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parked lorry and went to the wrong side of the road i.e., to his right side and the insured vehicle coming from the opposite direction keeping its left dashed against the first respondent/claimant, that the first respondent/claimant has also contributed to the accident, that the trial Court has erred in applying the multiplier method for the bone injuries, that the first respondent/claimant has not shown that he suffered functional disability and that therefore, the impugned award is liable to be interfered with.

9. The learned counsel appearing for the first respondent/claimant would submit that the appellant/insurer has not adduced any evidence to prove that the first respondent/claimant has also contributed to the accident, that the Tribunal, considering the evidence adduced by the first respondent/claimant, has rightly come to a decision that the accident was occurred only due to the rash and negligent driving of the second respondent/first respondent's driver and that since the first respondent/claimant has sustained bone injuries in tibia and fibula on his right leg, the Tribunal has rightly applied the multiplier formula and granted compensation.



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10. Admittedly, FIR was lodged against the first respondent/claimant and after investigation, the jurisdictional police has laid the charge sheet against the first respondent/claimant and the same was taken on file in S.T.C.No.82 of 2015 and is pending on the file of the Judicial Magistrate Court, Orathanadu.

11. The learned counsel appearing for the appellant/insurer would submit that subsequent to the filing of the claim petition, the first respondent/claimant was convicted for the offences under Sections 279 and 337 IPC and fine was levied on him and that the first respondent/claimant has paid the fine. The first respondent/claimant has not disputed the above factum.

12. No doubt, as already pointed out, the appellant/insurer has not adduced any evidence. Though the appellant/insurer has taken a stand that the accident was occurred only due to the rash and negligent driving of the first respondent/claimant and his driver is not at fault, they have not chosen to examine their rider of the two wheeler nor any other witnesses to show that the first respondent/claimant alone was responsible for the accident.



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13. It is not in dispute that the first respondent/claimant along with the pillion rider had proceeded from West to East near No.16 Vaikkal, Enathi Village and that the vehicle of the second respondent/first respondent has come in the opposite direction i.e., from East to West. Even according to the first respondent/claimant, when he attempted to overtake a parked lorry, the accident was occurred. As rightly contended by the learned counsel appearing for the appellant/insurer, the first respondent/claimant, while overtaking a parked lorry, has proceeded to the right side of the road, but the second respondent/first respondent's rider has come on the right side i.e., on his left side of the road. As rightly contended by the learned counsel appearing for the appellant/insurer, the first respondent/claimant, who had attempted to overtake a parked lorry, should have taken care to see as to whether any other vehicle was coming in the opposite direction.

14. Considering the mode of accident and the admission of the first respondent/claimant that he attempted to overtake a parked lorry and went to the right side of the road, this Court has no hesitation to hold that the first respondent/claimant has also contributed to the accident. Considering



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the entire facts and circumstances and also taking note of the fact that the appellant/insurer has not adduced any evidence to prove their defence that the first respondent/claimant alone was at fault, this Court fixes the contributory negligence at 25% on the first respondent/claimant. Since the second respondent/first respondent's driver was not possessing valid driving licence at the time of accident, the Tribunal has rightly applied the doctrine of pay and recovery.

15. Now turning to the quantum of compensation, it is the specific contention of the appellant/insurer that since the first respondent/claimant has not suffered any functional disability, the Tribunal should have applied percentage method, not the multiplier formula.

16. It is evident from Ex.P.2-Accident Register extract that the first respondent/claimant has sustained a lacerated wound of size 2 x 2 x 1cm in the right forehead and a diffuse swelling in the right lower leg of size 5 x 3 x 2cm. It is evident from Ex.P.3-Discharge Summary that the first respondent/claimant was admitted on 18.06.2014 and surgery was done on 19.06.2014 and was discharged on 26.06.2014. It is further evident that IMIL Nailing was done on right leg.



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17. P.W.2-medical officer would say that surgery was performed for the fractures of tibia and fibula on right leg, that there was malunion of fibula bone and that he has fixed the disability at 40%. Admittedly, P.W.2-medical officer has not treated the first respondent/claimant, but on perusing the medical records has issued the Disability Certificate. Even P.W.2-medical officer in his chief examination affidavit has specifically stated that the first respondent/claimant has only suffered partial permanent disability.

18. The learned counsel appearing for the appellant/insurer would submit that the application of multiplier formula is not automatic in all the injury cases and relied on the decision of the Hon'ble Supreme Court in ***Raj Kumar Vs. Ajay Kumar and another*** reported in ***2011 (1) SCC 343***,

“9. Therefore, the Tribunal has to first decide whether there is any permanent disability and if so the extent of such permanent disability. This means that the tribunal should consider and decide with reference to the evidence: (i) whether the disablement is permanent or temporary; (ii) if the disablement is permanent, whether it is permanent total disablement or permanent partial



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disablement, (iii) if the disablement percentage is expressed with reference to any specific limb, then the effect of such disablement of the limb on the functioning of the entire body, that is the permanent disability suffered by the person. If the Tribunal concludes that there is no permanent disability then there is no question of proceeding further and determining the loss of future earning capacity. But if the Tribunal concludes that there is permanent disability then it will proceed to ascertain its extent. After the Tribunal ascertains the actual extent of permanent disability of the claimant based on the medical evidence, it has to determine whether such permanent disability has affected or will affect his earning capacity.

....

13. We may now summarise the principles discussed above :

(i) All injuries (or permanent disabilities arising from injuries), do not result in loss of earning capacity.

(ii) The percentage of permanent disability with reference to the whole body of a person, cannot be assumed to be the percentage of loss of earning capacity. To put it differently, the percentage of loss of earning capacity is not the same as the percentage of permanent disability (except in a few cases, where the Tribunal on the basis of evidence,



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concludes that percentage of loss of earning capacity is the same as percentage of permanent disability).

(iii) The doctor who treated an injured-claimant or who examined him subsequently to assess the extent of his permanent disability can give evidence only in regard the extent of permanent disability. The loss of earning capacity is something that will have to be assessed by the Tribunal with reference to the evidence in entirety.

(iv) The same permanent disability may result in different percentages of loss of earning capacity in different persons, depending upon the nature of profession, occupation or job, age, education and other factors.”

19. Considering the above, it is very much clear that in all cases of injury or permanent disablement, the ascertainment of future loss of income or loss of earning capacity is not automatic, that the Tribunal is duty bound to take into consideration the various factors such as nature of extent of disablement, avocation of the injured and the impact of the disability on the avocation and that the multiplier method cannot be applied mechanically.



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20. As rightly contended by the learned counsel appearing for the appellant/insurer, the first respondent/claimant has not shown that he suffered any permanent disability and consequent functional disability. Though the first respondent/claimant has alleged that he was working as a car driver, he neither pleaded nor proved that he was not in a position to drive the car subsequent to the accident. In the absence of any evidence to show that the first respondent/claimant has suffered functional disability, the decision of the Tribunal in applying the multiplier method is not proper and is not in accordance with law.

21. Considering the nature of the injuries and the consequent disability, this Court is of the view that the first respondent/claimant is entitled to get Rs.5,000/- (Rupees Five Thousand only) per percentage and the disability compensation comes to Rs.2,00,000/- (Rs.5,000 x 40).

22. The Tribunal has awarded Rs.5,000/- (Rupees Five Thousand only) for transport expenses, Rs.5,000/- (Rupees Five Thousand only) for extra nourishment, Rs.40,000/- (Rupees Forty Thousand only) for pain and suffering and Rs.2,700/- (Rupees Two Thousand and Seven Hundred only) for attendant charges. Considering the bone injuries suffered, period of



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treatment and the consequent disability sustained and other attending circumstances, this Court is of the view that some more amount is to be awarded towards transport expenses, extra nourishment, pain and suffering and attendant charges and accordingly, the compensation awarded by the Tribunal is modified as follows:-

S. No.	Description	Amount awarded by Tribunal (Rs.)	Amount awarded by this Court (Rs.)	Award confirmed or enhanced or granted or reduced
1.	Disability	9,07,200	2,00,000	Reduced
2.	Transport expenses	5,000	20,000	Enhanced
3.	Extra nourishment	5,000	25,000	Enhanced
4.	Pain and suffering	40,000	75,000	Enhanced
5.	Attendant charges	2,700	10,000	Enhanced
	Total	9,59,900	3,30,000	Reduced by Rs.6,29,900/-

23. In view of the decision of this Court that the first respondent/claimant has also contributed to the accident, the first respondent/claimant is entitled to get 75% of the compensation amount i.e., Rs.2,47,500/- (Rupees Two Lakhs Forty Seven Thousand and Five Hundred only). Considering the other facts and circumstances of the case, this Court further decides that the parties are to be directed to bear their own costs.



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24. In the result, this Civil Miscellaneous Appeal is partly allowed and the appellant/insurer is directed to pay compensation of **Rs.2,47,500/- (Rupees Two Lakhs Forty Seven Thousand and Five Hundred only)** together with interest at 7.5% per annum and costs to the credit of M.C.O.P.No.94 of 2016 on the file of the Motor Accident Claims Tribunal/ III Additional District Court, Thanjavur at Pattukottai, after deducting the amount already deposited if any, within a period of four weeks from the date of receipt of a copy of this judgment. Thereafter, the appellant/insurer is permitted to recover the same from the second respondent/first respondent as per law. On such deposit being made, the first respondent/claimant is permitted to withdraw the award amount, less the amount already withdrawn, if any, together with proportionate interest and costs, on due application before the Tribunal. If the amount was already deposited, the balance amount shall be withdrawn by the appellant/insurer. Parties are directed to bear their own costs. Consequently, connected Miscellaneous Petition is closed.

18.08.2023

NCC : Yes/No
Index : Yes/No
Internet: Yes/No
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K.MURALI SHANKAR,J.

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To:

1. The Motor Accident Claims Tribunal/
III Additional District Court,
Thanjavur at Pattukottai.
- 2.The Record Keeper,
Vernacular Section,
Madurai Bench of Madras High Court,
Madurai.

Pre-Delivery Order made in
C.M.A.(MD)No.301 of 2020
and
C.M.P.(MD)No.3902 of 2020

Dated : 18.08.2023