

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on : 30.11.2016

Judgment Pronounced on : 04.08.2017

CORAM: THE HONOURABLE MR.JUSTICE N.SESHASAYEEC.M.A.No.31 of 2008
and MP.No.1 of 2008

National Insurance Co., Ltd.,
by its Branch Manager,
N.T.C. Upstairs, Bharathi Road,
Cuddalore-1.

.. Appellant

Vs.

1. Bakkiam,
2. K.Murugesan
3. Tamil Nadu State Transport Corporation,
by its Managing Director,
Villupuram.
4. Muthusamy

.. Respondents

Prayer : Civil Miscellaneous Appeal filed under Section 173 of the Motor Vehicles Act, 1988 against the judgment and decree dated 27.08.2007, made in M.C.O.P.No.1373 of 2002 on the file of Motor Accident Claims Tribunal, Chief Judicial Magistrate, Salem.

For Appellant : Mr.N. Vijayaraghavan
For Respondents : Mr.V.Babu

J U D G M E N T

The insurer of the first respondent in M.C.O.P.No.1373 of 2002 before the Motor Accident Claims Tribunal has preferred this appeal challenging in essence the maintainability of the very Claim.

2. Lokeshwaran was an employee of the second respondent (the first respondent before the Tribunal) as his lorry driver. On 18.05.1993, when he was on the

wheels of the said lorry, due to a head on collision with a bus belonging to the State Transport Corporation, Lokeshwaran died on the spot. The claimant/first respondent is Lokeshwaran's mother and she first moved the authority under the Workmen's Compensation Act, 1923 (would be referred to as WC Act) for the death of her son, but lost the claim. Instead of preferring an appeal under Sec.30 of the said Act, the claimant moved the Motor Accidents Claims Tribunal (MACT for short) seeking compensation under Sec.166 of Motor Vehicles Act (MV Act, for short) with a claim of Rs.5.0 lakhs. This was resisted by the appellant insurance company of the lorry on the ground that inasmuch as the claimant had elected to prefer a claim under the WC Act, a second claim before MACT was not maintainable in view of the bar under Sec.167 of the Act. It produced the copy of the order passed in the Claim petition preferred under the WC Act as Ext.R-2. This document disclosed that the Tribunal under the WC Act rejected the Claim before it solely on the basis of its suspected identity of the victim who died in the accident, and dismissed the claim summarily. It did not even consider it necessary to quantify the compensation. Holding that both Lokeshwaran and the driver of the bus had contributed in equal terms to the occurrence of the accident, the MACT proceeded to deal with the objection of the insurance company and held that even though the Commissioner under the WC Act had dismissed the petition, nowhere had it held that the claimants/petitioners before it were not entitled to compensation and held that the claimant would be entitled to compensation in terms of Sec.163-A of the MV Act and awarded Rs.3,47,000/- payable with interest at 7.5% p.a. In other words the Tribunal fell back on Chapter X of the MV Act dealing with 'No fault' liability which is an exception to the operation of Sec.167. It apportioned the

liability equally between the employer of Lokeshwaran (owner of the lorry) and his insurer for one half and the State Transport Corporation for the other half.

3. The insurance company of the lorry felt aggrieved by the award passed and has preferred this appeal. The only point raised and argued with a degree of emphasis by the appellant's counsel is that the claimant/first respondent had earlier moved the Commissioner the WC Act seeking compensation against his employer in W.C.No.70/ 1994 and the same was dismissed on merits by the Commissioner, Vide his order dated 24-04-1995. However, without challenging the said award on merits, the claimant has approached the Tribunal with a fresh claim for compensation, which is positively prohibited under Sec. 167 of the Motor Vehicles Act. The learned counsel has also brought to the notice of the Court that in column 22(ii) of the Claim petition which is intended for furnishing the details of earlier claim by the claimant, she has opted to suppress the factum of her earlier unsuccessful attempt to obtain compensation in W.C. 70/1994 and has stated a mere 'No' for an answer. Since the claimant had already elected to move one of the forums constituted for remedying her cause and lost that action, it is impermissible in law for her to make a fresh claim twice over and hence the petition is not maintainable in law. To lend strength to his submissions the learned counsel relied on the authorities in **National Insurance Company Vs. Mastan & Another** [2006] 2 SCC 641 and **Oriental Insurance Company Limited Vs. Dyamavva & others** [2013] 9 SCC 406.

4. Per contra, the learned counsel for the first respondent/claimant submitted that the spirit of Section 167 of MV Act is not to deny a claimant the best option to claim compensation but only bars him from claiming compensation twice after exhausting the remedy under another. He read several passages from the authority in **Dyamavva case** relied on by the appellant and spotlighted on the aspect that even in that case the Supreme Court has not held that once a claim is made under the Workmen's Compensation Act, a second claim under Motor Vehicle Act is prohibited. On the contrary, it approved the method adopted both by the Tribunal as well as by the High Court in deducting the amount awarded under the Workmen's Compensation Act from the award determined by the MACT while arriving at the net value of the compensation payable under the MV Act. To this effect, he also placed before this Court an authority of the Karnataka High Court delivered in MFA.30950/2009 between **National Insurance Company Limited versus Vijayalakshmi and others** [2016] 5 ALL MR 17 wherein the judgment in the **Dyamvaa case** is referred to.

5. The point required to be resolved is a straightforward one liner: Whether a claim before the MACT is maintainable by a claimant who has earlier lost a claim before the Commissioner, WC Act, on the same cause of action. To take it further, does the right of election of forum still survive for the claimant within the meaning of Sec.167 of the MV Act? To narrow it down finely, what is the point up to which right of election under Sec.167 of the Act is available for a victim of an accident?

6. Sec.167 of the M.V. Act reads:

"Option regarding claims for compensation in certain cases. –Notwithstanding anything contained in the Workmen's Compensation Act, 1923 (Act 8 of 1923) where the death of, or bodily injury to, any person gives rise to a claim for compensation under this Act and also under Workmen's Compensation Act, 1923, the person entitled to compensation may without prejudice to the provisions of Chapter X claim such compensation under either of those Acts but not under both".

By employing the word 'claim' in Sec.167, the legislature seemingly has inserted a check against dual actions for the same cause. Sec.167 in essence states that a claimant can choose from any one of two independent remedial forums open to him to make his claim but not both. Where, however, a claimant elects the choice of his forum but has not received the remedy on his cause of action which he otherwise is entitled to, does his right to move the other remedial forum stand foreclosed?

7. The Workmen's Compensation Act however, provides for two different modes of addressing the same situation of compensating an employee: One at the instance of the employer under Sec.8, and the other at the instance of the employee/claimant under Sec.10 of the Act. Where the employer has taken the initiative to compensate his workman under Sec.8, then inasmuch as an employee or his legal representatives, as the case may be, has not exercised his right to elect the forum of his choice to seek compensation on his/their initiative there would not be any bar to maintain an action under M.V.Act. If on the

contrary, a claimant initiates an action successfully under Sec.10 of the WC Act then he, having elected a choice of remedial forum, forfeits his option to maintain an action under MV Act. The **Dayamvaa** case (cited supra) rests on this plane, where the employer and not the widow of the employee invoked the jurisdiction of the authority constituted under the Workmen Compensation Act and hence the Supreme Court sustained the right of the claimant to approach the MACT.

8. The legislative intent behind Sec.167 M.V. is too apparent to require any elaboration: That while an employee who loses his life or limbs in a road-accident is entitled to be compensated, he is still not entitled to be profited out of his loss. It is hence even in the **Dyamvva case (cited supra)**, while sustaining an action of a widow under M.V.Act as maintainable, the Supreme Court approved the method adopted by the Courts below in deducting the sum that the employer had deposited under Sec.8 of the Workmen Compensation Act out of the sum arrived as just compensation under M.V. Act to arrive at the net sum that may be awarded by the MACT. If this is logically stretched then it may be possible to state that what is barred under Sec.167 of the Act is not the pursuit to seek compensation under two tribunals created under two different enactments successively, but the actual receipt of compensation from both the tribunals on the same cause of action. To allow a claimant to pursue a remedy for a second time after benefiting once will be an abuse of process and this precisely is the tendency that the legislature intended to curb.

9.1 What happens if compensation is denied to a claimant such as the one

available in this case where the authority constituted under the Workmen's Compensation Act has chosen not even to quantify the compensation payable? Here is a case where a mother of a lorry driver whose legitimate expectation of securing her life from destitution with the support that her son might have provided was lost to her when that son died in a road accident. The Commissioner under the Workmen's Compensation Act had denied her compensation on the ground that the doctor who conducted autopsy on the body of the deceased had omitted to record the name of the dead in his postmortem certificate. An over excited Commissioner cried *eureka*, suspected the identity of the victim and dismissed the claim, when it was nobody's case that the victim was not an employee, nor was there a case that he did not die in a road accident in the course of his employment. Shockingly if not atrociously enough, the Workmen's Compensation Tribunal did not even feel it a duty to undertake the arithmetical effort of computing the value of loss of a life to complete its exercise.

9.2 This accident had taken place in May, 1993. It is little over twenty-four years now and this mother is not compensated yet and she still awaits her remedy. And, whatever remedy that has been provided to her by the Tribunal below may have been possibly delayed further due to the pendency of this appeal. Without analysing if the mother of the victim can be blamed for the fault of the doctor who conducted the autopsy on the body of her son and be denied compensation, or discussing the legal semantics on burden of proof, the fact remains that no compensation has been paid thus far, and the insurance

company which objects to passing of the award on a point of maintainability of the claim before this court is yet to part with its money even as it reflects an attempt to write off the life of a citizen and the support he could have given to his parent as valueless. If Sec.167 of the M.V. Act is literally understood and if the phrase '*claim such compensation under either of those Acts but not under both*' it employs is considered as a repository of the legislative intent, then this mother before this court can be branded as a defaulter in our system and can be denied compensation. But the response of our legal system and the remedial apparatus it claims to possess are not designed to deny the claims of a deserving litigant. If it is otherwise, it would be an antithesis to the Constitutional spirit, if not promise, of securing the right to life of the passive or secondary victims of an accident - the dependents of the dead and injured, whose continued existence with dignity in the context is directly linked to the financial security that the compensation awarded offers. A road accident is not a mere act of negligence simpliciter leading to a tortious liability *in personam* with a back up right in contract of insurance. Every time someone dies or goes crippled on the road consequent to the negligence of another road user, there is a violation of the human rights of the victim that simultaneously imperils and endangers the right to a decent and dignified life, a facet of guaranteed fundamental rights, of his dependents.

10. Law has multi-dimensional roles: It regulates and disciplines human affairs, brings in paradigm shift in social living, creates and extinguishes rights, attempts an equilibrium amidst co-existing conflicts, provides forum of action

for remedying rights-violation situations and offers tangible remedies. Its operation has two facets: (a) Where it requires those who it intends to focus for its application as its subjects to submit to it; and (b) where it is expected to display a reflexive reaction to address a rights-violation situation to demonstrate it. The former is what others should do to make law relevant to its existence, and the latter is what law should do to make its existence meaningful. It will therefore be a contradiction if law were to be converted into a laboratory material for intellectual analysis sans its organic objective and functional utility. A beneficial law should be understood and applied without depreciating its beneficial objective. If this is missed, the connect between the law and those who it governs is lost. After all, substantial number of 'We, the People', are illiterates, ignorant and poverty stricken, and their collective hopes and expectations from law should not be lost to them. Discipline within law should not lead to denial of justice. This is the plane from which the situation at hand will have to be considered.

11. It is now ideal to explore the contours of Sec.167 of the MV Act to understand if it actually bars a claim before the MACT where no benefit was received under the Workmen's Compensation Act?

12. In **Beepathuma and Others v. Velasari Shankaranarayana Kadambolithaya and Others** [AIR 1965 SC 241], a three Judge Bench of the Supreme Court dealt with the elements that go to constitute the prerequisite for applying the doctrine of election. The context however, was different, but not so

the principles it stated. It declared:

"17. The doctrine of election which has been applied in this case is well-settled and may be stated in the classic words of Maitland

" That he who accepts a benefit under a deed or will or other instrument must adopt the whole contents of that instrument, must conform to all its provisions and renounce all rights that are inconsistent with it."(See Maitland's lectures on Equity Lecture 18)

The same principle is stated in White and Tudor's Leading Cases in Equity Vol.1 8th Edn. At p.444 as follows :

*"Election is the obligation imposed upon a party by **Courts of equity to choose between two inconsistent or alternative rights or claims** in cases where there is clear intention of the person from whom he derives one that he should not enjoy both That he who accepts a benefit under a deed or will must adopt the whole contents of the instrument."*

18. The Indian Courts have applied this doctrine in several cases and a reference to all of them is hardly necessary. We may, however, refer to a decision of the Madras High Court in

Ramakottayya v. Viraraghavayya, ILR 52 Mad 556: (AIR 1929 Mad 502 FB) where after referring to the passage quoted by us from *White and Tudor, Coutts Trotter*, C.J. observed that the principle is often put in another form that a person cannot approbate and reprobate the same transaction and he referred to the decision of the Judicial Committee in *Rangaswami Gounden v. Nachiappa Gounden*, ILR 42 Mad 523: (AIR 1918 PC 196)..."

13. In ***M/s Transcore Vs Union of India & another*** [2008(1) SCC 125], the Supreme Court was concerned with resolving a question if the remedies available to the bank for pursuing the same cause of action under both the DRT Act and SARFASI Act are inconsistent, or whether the remedy under Sec.13 of the SARFASI Act is an added remedy, in addition to what it is already provided by the DRT Act, and whether the provisos introduced to Sec.19(1) of the DRT Act contemplated election of remedial forums, the Supreme Court had an occasion to explain the doctrine of election:

"In the light of the above discussion, we now examine the doctrine of election. There are three elements of election, namely, existence of two or more remedies; inconsistencies between such remedies and a choice of one of them. If any one of the three elements is not there, the doctrine will not apply. According to American jurisprudence, 2d, VO.25. Page 652, if in truth there is only one remedy, then the doctrine of election does

not apply. In the present case..... the NPA Act [SARFAESI Act] is an additional remedy to DRT Act. Together they constitute one remedy and, therefore, the doctrine of election does not apply. Even according to Snell's Equity [Thirty-first Edition, Page 119] the doctrine of election of remedies is applicable only when there are two or more co-existent remedies available to the litigants at the time of election which are repugnant and inconsistent. In any event, there is no repugnancy nor inconsistency between the two remedies, therefore, the doctrine of election has no application."

14. If on the basis of above principles Sec.167 of the MV Act is scanned for its true import, it would reveal that it only deals with choice of remedial forums and not the remedy per se. A remedy from the stand point of the victim of an accident is to get compensated in whatever form and on this point hardly is there any inconsistency between both the WC Act and MV Act. Both the enactments may prescribe different modes for computing compensation payable yet they both deal with the entitlement to compensation for the same cause of action. Is then a remedy under the MV Act an additional remedy to what is already available under WC Act? It is here that Sec.167 intervenes. It is therefore, more about the right of choice to the remedial forum than to the remedy itself and doctrine of election in the context of Sec.167 is restricted in its operation to remedial forums.

15. In ***National Insurance Company Vs. Masthan and another*** [(2006)2 SCC 641], the question that the Supreme Court was required to resolve was: In a claim made before the Commissioner for Workmen's Compensation, whether the insurance company is entitled to take the defenses that are open to it under Sec.149(2) of the M.V. Act. It could also be gathered from the said authority that the victim of a road accident had approached the Commissioner for Workmen Compensation seeking compensation for his injuries and the Commissioner too had determined the compensation at Rs.2,70,264. In the context of the case before it and while differentiating how the obligation of the insurer under both the enactments varied, S.B. Sinha J., observed thus:

"21..... A party to a lis, having regard to the different provisions of the two Acts, cannot enforce liabilities of the insurer under both the Acts. He has to elect one.

23. 'The doctrine of election' is a branch of 'Rule of Estoppel', in terms whereof a person may be precluded by his actions or conduct or silence when it is his duty to speak, from asserting the right which he otherwise would have had. The doctrine of election postulates that when two remedies are available for the same relief, the agreed party has the option to elect either of them but not both. Although there are certain exceptions to the same rule

27. The first respondent having chosen the forum under 1923 Act

for the purpose of obtaining compensation against his employer cannot now fall back upon the provisions of 1988 Act therefor, inasmuch as the procedure laid down under both the Acts are different save and except those which are covered by Section 143 thereof."

Concurring with the learned Judge on the Bench, P.K.Balasubramanyan, J wrote:

"33. *The exclusiveness of the jurisdiction of the Motor Accidents Claims Tribunal is taken away by Section 167 of the Motor Vehicles Act in one instance, when the claim could also fall under the Workmen's Compensation Act, 1923. That section provides that death or bodily injury arising out of a motor accident which may also give rise to a claim for compensation under the Workmen's Compensation Act, can be enforced through the authorities under that Act, the option in that behalf being with the victim or his representative. But Section 167 makes it clear that a claim could not be maintained under both the Acts.* In other words, the claimant who becomes entitled to claim compensation under both the Motor Vehicles Act, 1988 and the Workmen's Compensation Act, because of a motor vehicle accident has the choice of proceedings under either of the Acts before the forum concerned. By confining the claim to the authority or the Tribunal under either of the Acts, the legislature has

incorporated the concept of election of remedies, insofar as the claimant is concerned. In other words, he has to elect whether to make his claim under the Motor Vehicles Act, 1988 or under the Workmen's Compensation Act, 1923. The emphasis in the Section that a claim cannot be made under both the enactments, is a further reiteration of the doctrine of election incorporated in the scheme for claiming compensation. The principle "where, either of the two alternative Tribunals are open to a litigant, each having jurisdiction over the matters in dispute, and he resorts for his remedy to one of such Tribunals in preference to the other, he is precluded, as against his opponent, from any subsequent recourse to the latter" (see R.v. Evans) is fully incorporated in the scheme of Section 167 of the Motor Vehicles Act, precluding the claimant who has invoked the Workmen's Compensation Act from having resort to the provisions of the Motor Vehicles Act, except to the limited extent permitted therein. The claimant having resorted to the Workmen's Compensation Act, is controlled by the provisions of that Act subject only to the exception recognised in Section 167 of the Motor Vehicles Act.

34. On the language of Section 167 of Motor Vehicles Act, and going by the principle of election of remedies, a claimant opting to proceed under the Workmen's Compensation Act cannot take

recourse to or draw inspiration from any of the provisions of the Motor Vehicles Act, 1988 other than what is specifically saved by Section 167 of the Act. Section 167 of the Act gives a claimant even under the Workmen's Compensation Act, the right to invoke the provisions of Chapter X of the Motor Vehicles Act, 1988. Chapter X of the Motor Vehicles Act, 1988 deals with what is known as "no fault" liability in a case of an accident. Section 140 of the Motor Vehicles Act, 1988 imposes a liability on the owner of the vehicle to pay the compensation fixed therein, even if no fault is established against the driver or owner of the vehicle. Sections 141 and 142 deal with particular claims on the basis of no fault liability and Section 143 re-emphasizes what is emphasized by Section 167 of the Act that the provisions of Chapter X of the Motor Vehicles Act, 1988, would apply even if the claim is made under the Workmen's Compensation Act. Section 144 of the Act gives the provisions of Chapter X of the Motor Vehicles Act, 1988 an overriding effect.

35. Coming to the facts of the case, the claimant has not chosen to withdraw his claim under the Workmen's Compensation Act before it reached the point of judgment, with a view to approach the Motor Accidents Claims Tribunal. What he has done is to pursue his claim under the Workmen's Compensation Act till the award was passed and also to invoke

a provision of the Motor Vehicles Act, not made applicable to claims under the Workmen's Compensation Act by Section 167 of the Motor Vehicles Act. The respondent claimant is not entitled to do so. The High Court was in error in holding that he is entitled to do so."

What emerges from the above passage is that the victim in the case before the Supreme Court had already exhausted the remedy available under the Workmen's Compensation Act and hence he is denied an opportunity to seek a second remedy on the same cause of action. This case arose from Karnataka, where the interpretation of Sec.167 appears to be that the MV Act provided only an additional remedy and hence a claimant can maintain twin actions for the same cause but subject to the rider that the amount awarded by one must be deducted from the amount awarded by the other to maintain one cause one remedy doctrine. Whether the law as declared by the Supreme Court in the context of the facts involved in the **Mastan case** can be telescoped into the case at hand? It is a rudimentary principle of the *rule of stare decisis* that a judgment is a precedent for what it actually decides and consequently unless facts are identical or substantially similar, to apply the law so declared would be fatal. See: **Union of India Vs Dhanwanti Devi** [1996(6) SCC 44] Besides, judgements are not to be read like statutes. See **Bharat Petroleum Corporation Ltd., Vs N.R.Vairamani** [(2004)8 SCC 579].

16.1 In the context of this case a passage from **S. Suppiah Chettiar Vs Chinnathurai & another** [AIR 1957 Madras 216] appears apposite. The facts

are as follows: an employee who moved the Commission for Workmen Compensation with an action, withdrew his claim and instituted a suit under the Fatal Accidents Act. As in the case before this Court, the maintainability of an action before a forum of second choice after invoking the jurisdiction of forum of first choice was a defence to the action. Extracting from the judgment of Lord Alverstone CJ in **Rouse Vs Dickson** [1904-2 KB 628], the judgment reads:

"13. That being so, it seems to me that when a claim is made under the Workmen's compensation Act which cannot be enforced because the case does not come within the Act at all, the right of the workman to make any other claim is not lost..... There is nothing in the Act to lead to the extraordinary result that, where a claim is made under the Act, but withdrawn before there has been any decision upon it, all other liability on the part of the master thereby wiped out..... The intention of the Act was only to prevent the master from being liable to pay twice over" (Per Lord Alverstone C.J).

"If the workman acting under a mistake gives notice of a claim under the Workmen's Compensation Act, and then withdraws that claim, I think no effective option has been exercised." (Per Lord Wills J).

A converse case under the same section is one decided by the Court of Appeal in Bennet v L. and W. Whitehead Ltd., 1926-2 KB 380 (V). The action was instituted first, but it was discontinued by the workman who thereupon started proceedings under the Workmen's Compensation Act. The Court of Appeal by a majority (Scrutton L.J. dissenting) held that the workman is not debarred from proceeding with his

claim. The decision of the Court of Session in Scotland in *King v Edinburgh Collieries Co.*, 1924 SC 167 (VI) which held that the mere commencement of the proceedings cannot amount to a conclusive election was referred to with approval.

Atkin L.J. at page 409 stated that he can find no authority which makes one choice conclusive, **except in a case where proceedings have reached the conclusion.**

That election is a question of fact importing as it does a knowledge in the person electing, is to be found in *Burke and Unsworth v Elder Dempster Lines Ltd.*, 1939-3 All ER 339 at p.343 (W). A summary of this principle of election is found in *Willis and Barrats Workmen's Compensation Act 1944 Edn.* at pages 524 and 526.

(14) The term "instituted" under S.3(5) of the Workmen's Compensation Act has nowhere been judicially defined. But the following definitions taken from Ramanatha Aiyar's Law Lexicon of "Institute" may be usefully borne in mind:

"Institute: Set on foot; commence. "Instituted" in respect of legal proceedings means, commenced. *Blackborne v. Blackborne*, (1968) 37 LJ (P and M) 73 : 1 P and D 563 (X). To begin an action; to accuse; to appoint an heir by will. A counter claim is a 'proceeding instituted' (*Hoodbarrs v. Cathcart*, (1895) 1 QB 873 (Y).

'Institute' when applied to legal proceedings signifies the commencement of the proceedings. When we talk of 'instituting an action. We understand bringing an action. Criminal proceedings cannot be said to be 'instituted' until a

formal charge is openly made against the accused by complaint before a Magistrate”.

The word “instituted” in S.3(5) of the Workmen's Compensation Act **can therefore be taken as meaning “setting on foot an enquiry” and is more than a mere filing of a claim.** Even in the decision in AIR 1942 Mad 116 (T), the claim before the Commissioner was admitted by him. I must respectfully point out, however that the decision of Horwill J. in the above case is not based upon any discussion of the relevant English or Indian cases and seems to be a case of first impression and nothing more.

To sum up, in the language of Ruegg, the remedy under the Workmen's Compensation Act will often overlap the remedy of compensation or damages for negligence under the Fatal Accidents Act in the Civil Court. The obligation under the Workmen's Compensation Act which is more akin to that of an insurer, is independent of any negligence or breach of duty on the part of the Master and is outside the law of Torts:

See *Darlington V. Roscoe and Sons*, 1907-1 KB 219 at p.230 (Z); *Salmonds Law of Torts* p.112; *Pullock on Torts* pp.79, 84, 86; *Underhill on Torts*, p.349; *London Brick Co. V. Robinson*, 1943 AC 341 at p.344 (Z1); *Works Manager, Carriage and Wagon Shop, E.I.Rly v. Mahabir* AIR 1954 All 132 (Z2); AIR 1937 Rang 451 (N) **But two venues of claim to the injured workman against the master, does not mean that the injured workman or his dependant would be enabled to obtain a double compensation; nor will he in every case be able to prosecute his remedies alternatively.**

*Where a double remedy exists, the employer, the workman or his dependant, by the construction placed upon the Act in England and India, is put to the election which remedy he will pursue. **This remedy has generally to be exercised before the proceedings are commenced.***

(15) Bearing these principles in mind, if we examine the facts of this case, inasmuch as the dependant did nothing more than file a claim and withdrew it before the proceedings were commenced and which commencement would only be with effective taking of notice to the opposite side, there has been no such election as would debar the workman's dependant from instituting a suit in the civil Court and which as the plaint shows was under the Workmen's Compensation Act and the Fatal Accidents Act. Therefore, the petition should not have been rejected on this ground." (Emphasis supplied)

16.2 If the above passage is scrutinized carefully, the following principles can be deduced:

- The objective of electing a forum is to deny payment of double compensation.
- Election of forum will not be conclusive *except in cases where proceedings have reached their conclusion.* (Per Lord Atkin)
- Institution of a claim within the meaning of Sec. 3(5) of the Workmen's Compensation Act means something *more than a mere filing of a claim.*

The learned Single Judge however adds that the right of election is **generally exercised before the commencement of the proceedings**, but this in the context appears more of a general perception of the Court and it does not

appear to set an outer time limit for its exercise.

17. It is imperative for any vibrant system of justice administration not to plead helplessness in remedying a cause of action, but this cannot be achieved unless there is an attempt to preserve the cause of action. This underlying anxiety shall be of the Court's and it was best expressed when Lord Atkin (as extracted in ***Suppaiah Chettiar case***) insisted that right of election of forum might not be held conclusive unless the forum approached has conclusively decided the action. This statement if expatiated would mean that the right of election should be preserved till the matter is concluded by the forum of first choice. Hence, withdrawal of proceedings from the forum of first choice is held not to bar a proceeding before the forum of second choice on the same cause of action.

18. Though it may not be germane contextually, it may be stated that while in ***Suppaiah Chettiar's case*** a view was expressed that the switchover process from one forum to another might be routed through Order XXIII Rule 1 CPC, it may have to be stated that what is provided in the Code of Civil Procedure, 1908 is procedural in character and it primarily aims to discipline the litigant from flirting with his choices as to forum. But its application to proceedings either under the WC Act or the MV Act with all its inflexibility is doubtful as these legislations do not appear to accommodate CPC controlled regime of its proceedings in entirety.

19. There therefore is an indication that right of election should be available till the forum of first choice has concluded the proceedings. The next point is when can it be stated if forum of first choice has concluded the proceedings? It cannot be at the threshold level, for as indicated in the **Suppaiah Chettiar case (cited supra)** institution of proceedings under the WC Act is something more than a mere preference of a Claim. A proceeding is said to be concluded only when the forum, call it a Court or a Tribunal, that is required to decide on the rights of the litigant before it, actually decides it and needs to do no more than executing its decision where it is not obeyed or complied with. In the context of a Claim before a Tribunal under the WC Act, it implies a decision on quantification of a Claim and not just deciding preliminarily on the entitlement of a claimant to the claim. Does a summary rejection of a claim by a Tribunal on a suspected identity of the victim whose loss of life is required to be valued and quantified, without actual quantification decides anything conclusively? This Court holds that it does not.

20. Therefore, as in the case of withdrawal of a proceeding before a Tribunal under the WC Act before its conclusion, a termination of proceedings by a summary dismissal of a Claim without quantifying the compensation payable too will not destroy the right to move the MACT. The doctrine of election will operate only when the forum of first choice conclusively has quantified the compensation payable which has become final as regards the Tribunal that has passed it. Till that point the insulation against double payment for the same loss is preserved. It is here that the facts in the **Mastan case** were different from

the present case, where the Commissioner under the WC Act has actually quantified the compensation payable. Once the compensation is quantified, the right to elect should necessarily extinguish lest it would lead to speculative double claims and breeds temptations to defraud judicial process which would not be in the best public interest. These specifically are the circumstances when Sec.167 of the MV Act should be granted free space to operate.

21. It may now be added that implied in the doctrine of election is the doctrine of waiver. In a given situation, it may be a supplemental test to understand if the right of election survives. It may be explained: If one elects a forum, it can also be stated that one has waived to move the other forum. However, to constitute 'waiver', in words of S.K.Das J in **Basheshar Nath Vs Commissioner of Income Tax & another** [AIR 1959 SC 149] *"there must be an intentional relinquishment of a known right or the voluntary relinquishment or abandonment of a known existing legal right, or conduct such as warrants an inference of the relinquishment of a known right or privilege"*. In the context of the present case can it be said, that the Claimant, the mother of a lorry driver, and not adequately educated or accomplished be credited with the knowledge about the existence of at least two remedial forums for her to seek compensation in order she could be said to have waived her right to remedy before the MACT? If this knowledge has to be imputed to litigants such as the claimant in the present case by a non-purposive interpretation of the doctrine of waiver and hence of election, it will victimize the poor, illiterate and uninformed lot of this country. Will it not be an anathema to our much prided

Constitutionalism?

22. The only point that the appellant has raised is decided against it. There is no dispute now before the court as to the identity of the person dead, that death visited him in a road accident, his relationship to the claimant or the latter's entitlement to compensation. Hopefully the agony of this litigant must end now. This court only intends to convey to this litigant: "Sorry, we have kept you waiting this long to secure your right."

23. The appeal is dismissed and the award of the Tribunal below in MCOP. No.1373 of 2002 on the file of Motor Accidents Claims Tribunal, Chief Judicial Magistrate, Salem is hereby confirmed. If the compensation amount has not been deposited, the same is directed to be deposited by appellant as well as by the third respondent within four weeks from the date of receipt of a copy of this order, whereupon, the claimant is entitled to withdraw the same forthwith. Consequently, connected miscellaneous petition is closed.

सत्यमेव जयते

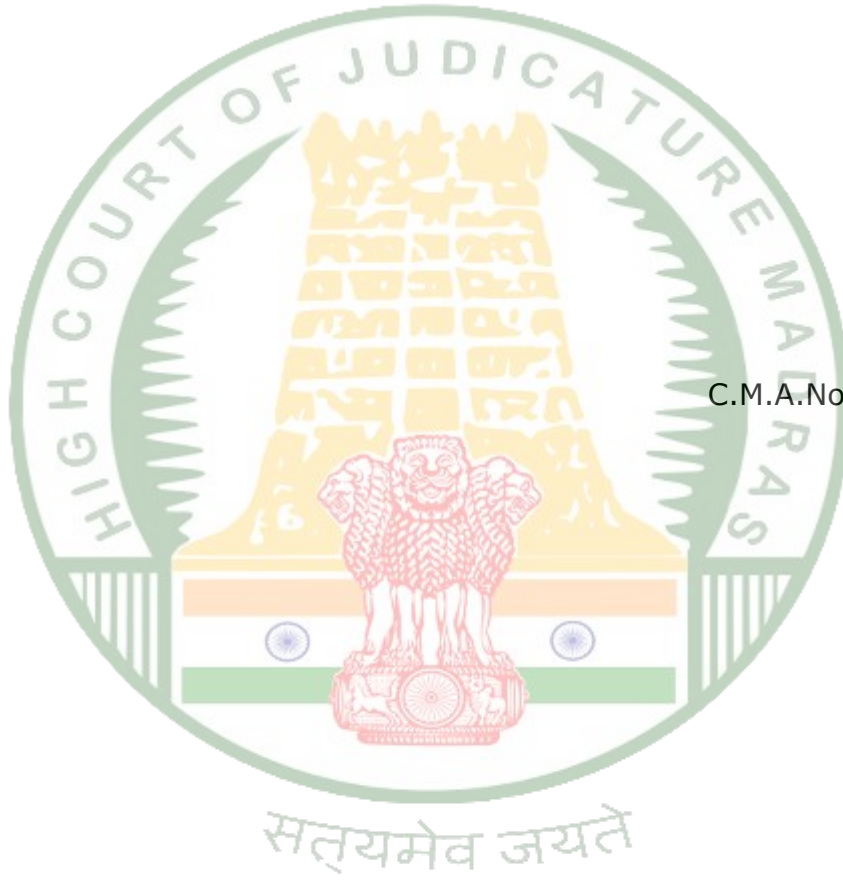
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To:

The Chief Judicial Magistrate
Motor Accidents Claims Tribunal
Salem.



C.M.A.No.31 of 2008

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