

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 04.09.2018

CORAM:

THE HONOURABLE MR.JUSTICE K.K.SASIDHARAN
and
THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN

C.M.A. No.2693 of 2016
and
C.M.P.Nos.19358 & 19359 of 2016

The National Insurance Company Limited,
No.751, Anna Salai,
3rd Floor, Chennai- 2.

... Appellant/2nd Respondent

-vs-

1.S.Ganesh1st Respondent/Claimant
2.K.Subramaniam 2nd Respondent/1st Respondent

Civil Miscellaneous Appeal filed under Section 173 of Motor Vehicles Act, 1988 against the judgment and decree passed in MCOP.No.485 of 2013, dated 29.01.2016, on the file of the Motor Accidents Claims Tribunal, Chennai, II Court of Small Causes, Chennai.

For Appellant : Mrs.N.B.Surekha

For Respondents: Mr.A.A.Venkatesan for R1
R2 - No appearance

J U D G M E N T
सत्यमेव जयते

[Judgment of the Court was delivered by R.SUBRAMANIAN,J.]

The Insurance Company which suffered an award for a sum of Rs.20,00,000/-, for the injuries suffered by the claimant in the motor accident that occurred on 31.08.2012 at about 17.45 hours at Chillakur Village, Naidupet Taluk, Nellore District is the appellant. The appellant Insurance Company had also taken out an application in CMP.No.19359 of 2016 for reception of additional evidence.

2. The case of the claimant before the Tribunal was that on 31.08.2012, while he was travelling as a passenger in the Auto-

Rickshaw bearing registration No.AP-03-UB-TR 2501 from Naidupet to Thirupathi, the driver of the auto drove the vehicle in a rash and negligent manner endangering public safety, lost control and dashed against the electric post. The Auto capsized causing grievous injuries to the claimant. The injuries suffered resulted in amputation of the right leg above knee. Contending that the claimant had suffered permanent disability and lost earning power, the claimant sought for a compensation of Rs.25,00,000/-.

3. The Insurance Company resisted the claim petition contending that there was no negligence on the part of the Auto driver. It was also contended that the auto-rickshaw in question had only a temporary registration and had no permit to carry passengers. Therefore, according to the Insurance Company there was a violation of the policy condition and hence the Insurance Company is not liable. The Insurance Company also denied the nature of injuries and the quantum of loss claimed by the injured claimant.

4. The Tribunal on a consideration of the oral and documentary evidence placed on record, particularly the fact that a criminal case in crime No.51 of 2012 was registered against the auto driver as evidenced by Ex.P1, FIR and the charge sheet Ex.P15, concluded that the accident occurred due to the rash and negligent driving of the auto driver. The Tribunal took into account the fact that the alleged violation of policy condition cannot be put against the claimant who is a third party, held that the Insurance Company is liable to pay the compensation.

5. On the quantum, the Tribunal relied upon the evidence of PW2, the Doctor to conclude that the disability suffered by the claimant would be 30%. Considering the fact that the claimant was driver by profession, the Tribunal concluded that because of the amputation, he will be prevented from discharging his duty as a driver in future. The Tribunal fixed the functional disability at 70%. The monthly income was taken at Rs.9,000/- adding 30% towards future prospects, the Tribunal arrived at the monthly income of Rs.11,700/- for the purposes of calculating the loss of future earning capacity. The Tribunal adopted a multiplier of '14' and arrived at the future loss of earning capacity at Rs.13,75,920/- ($11,700 \times 12 \times 14 \times 70\%$), the Tribunal awarded a sum of Rs.75,000/- towards transportation, Rs.65,000/- towards medical expenses, Rs.1,00,000/- towards future medical expenses, Rs.40,000/- towards attender charges. Rs.90,000/- towards permanent disability (30×3000), Rs.13,75,920/- towards loss of future earning capacity,

Rs.54,000/- towards loss of earning during the period of treatment, Rs.1,00,000/- towards pain and suffering and trauma, Rs.1,00,000/- towards loss of amenities. In all, the Tribunal, arrived at the compensation of Rs.19,99,920/- and the same was rounded off to Rs.20,00,000/-. Aggrieved by the said award, the Insurance Company has come forward with the appeal.

6. We have heard Mrs.N.B.Surekha, learned counsel appearing for the appellant, Insurance Company and Mr.A.A.Venkatesan, learned counsel appearing for the 1st respondent/ claimant. Though the 2nd respondent is served, he has not chosen to appear either in person or through counsel duly instructed.

7. CMP.No.19359 of 2016 has been filed by the Insurance Company under Order 41 Rule 27 of the Code of Civil Procedure seeking to produce the temporary registration certificate, Insurance Policy and the fitness certificate of the auto-rickshaw bearing registration No.AP-03-UB-TR 2501 to establish the fact that the auto-rickshaw had only a temporary registration and it had no permit to carry passengers.

8. In the affidavit filed in support of the said application, it is stated that since the accident occurred at Andhra Pradesh, the Insurance Company could not produce the documents immediately. Though a defence was taken before the Tribunal regarding the violation of policy condition, the Tribunal had rejected the said defence solely on the ground that the Insurance Company has not produced the documents.

9. Mrs.N.B.Surekha, learned counsel would submit that the non-production of the documents before the Tribunal is neither willful nor wanton, it is due to the procedural delay involved in getting the documents from the RTO at Nellore, the same could not be produced before the Tribunal. The owner of the auto-rickshaw remained exparte before the Tribunal as well as before us.

10. We have considered the averment in the affidavit filed in support of the application. We are satisfied that the Insurance Company has made out a case for reception of additional evidence. The reception of additional evidence by itself in our considered opinion would not prejudice the case of the claimant/ injured. We also find that these documents will be relevant and will aid the disposal of the appeal. Hence, CMP.No.19359 of 2016 is allowed. The documents filed along with

the said application viz., temporary registration certificate of the vehicle, the policy of the insurance and the fitness certificate of the auto are received in evidence and marked as Ex.R2 to Ex.R4.

11. Arguing on the merits of the appeal, Mrs.N.B.Surekha, learned counsel appearing for the appellant Insurance Company would contend that the documents that are now being produced would show that there was a violation of policy condition and therefore the Insurance Company cannot be held liable to pay the compensation. She would further contend that the compensation awarded by the Tribunal is on the higher side, she would however not dispute the loss of future earning capacity arrived at by the Tribunal. She would contend that a sum of Rs.75,000/- awarded towards transportation, extra nourishment and miscellaneous expenditure is excessive. She would also claim that the award of Rs.65,000/- towards medical expenses in the absence of any evidence and the award of Rs.1,00,000/- towards future medical expenses are highly excessive.

12. Mr.A.A.Venkatesan, learned counsel appearing for the claimant/ 1st respondent would submit that even assuming that the compensation awarded on particular heads is on the higher side, the overall compensation is just and reasonable.

13. We have considered the rival submissions. From the documents received as additional evidence, it is seen that the vehicle in question had only a temporary registration on the date of the accident i.e., 31.08.2012. The vehicle was actually registered only on 22.11.2012 and permit to carry passengers was issued only on 23.11.2012. The Insurance policy that was issued at the time when the vehicle had only a temporary registration is only for the purposes of enabling registration of the vehicle. The fact that the auto-rickshaw which did not have a permit to carry passengers had carried passengers on the date of the accident would show that there was a violation of the policy conditions. But, the violation of policy conditions by the Insured cannot be a ground to deny compensation to the third party claimant. At the best, the Insurance Company can have an order for pay and recovery. We therefore conclude that the Insurance Company will have to pay the compensation and it will be at liberty to recover the same from the owner of the auto-rickshaw, if it is so advised, without taking any separate proceedings.

14. Mrs.N.B.Surekha, learned counsel appearing for the appellant Insurance Company would make a faint attempt to challenge the finding of negligence arrived at by the Tribunal. From the evidence on record, it is clear that the Insurance Company had not chosen to let in any evidence regarding the negligence by examining the insured or the driver. We do not think that we should entertain any challenge to the finding of the negligence arrived at by the Tribunal. We therefore confirm the finding of the Tribunal that the accident occurred due to the rash and negligent driving of the driver of the auto-rickshaw.

15. On the quantum, as already stated, the loss of future earning capacity has been arrived at by the Tribunal by taking the monthly income of Rs.9,000/-. The claimant had produced his driving license which shows that he was licensed to drive commercial vehicles. The accident had occurred on 31.08.2012, we are therefore of the opinion that the quantum of income adopted by the Tribunal is just and reasonable. The Tribunal has adopted 30% towards future prospects. The same also cannot be faulted with, in view of the decision of the larger Bench of the Hon'ble Supreme Court in National Insurance Co. Ltd Vs. Pranay Sethi and others reported in 2018 (1) LW 331. We therefore see no reason to interfere with the quantum of loss of earning capacity arrived at by the Tribunal.

16. The Tribunal has granted a sum of Rs.40,000/- towards attender charges, Rs.90,000/- towards permanent disability at Rs.3,000/- per percentage, Rs.54,000/- towards loss of earning during the period of treatment and Rs.1,00,000/- towards pain and suffering. Admittedly, the injured claimant had taken treatment as an in-patient in the hospital and has undergone four surgeries. It is also found from the records that he had suffered an amputation of his right leg. Therefore, he should have definitely incurred certain expenditures towards having an attender. Therefore a sum of Rs.40,000/- granted towards attender charges cannot be said to be excessive. The quantum of disability arrived at by the Tribunal at 30% is reasonable and the Tribunal was right in granting Rs.90,000/- towards permanent disability. The Tribunal has granted loss of earning during the period of treatment at Rs.54,000/- on the basis that the claimant would have been immobilized for a period of six months. We do not find any reason to interfere with the said finding of the Tribunal.

17. A sum of Rs.1,00,000/- has been awarded towards pain and suffering. The claimant is aged about 45 years at the time of the accident and he has suffered an amputation of the right leg, therefore, the quantum of compensation awarded towards pain and suffering is also justified. The Tribunal has awarded a sum of Rs.75,000/- towards transportation, extra nourishment and other miscellaneous expenditure, this in our opinion is excessive. We find that a sum of Rs.25,000/- would be just and reasonable on the above heads. The Tribunal has granted a sum of Rs.65,000/- towards medical expenses. We find absolutely no evidence to support the said conclusion of the Tribunal. In fact the claimant had taken treatment only at Government Hospital and therefore, the medical expenses is fixed at Rs.20,000/-. The Tribunal has granted a sum of Rs.1,00,000/- towards future medical expenses for which also there is no documentary evidence. Of course from the very nature of the injury and the disability caused it would require a certain amount to be granted towards future medical expenses which we fix at Rs.50,000/-. The Tribunal has granted a sum of Rs.1,00,000/- towards loss of amenities. We find the same to be on the higher side, once compensation has been awarded on the heads of loss of future earning capacity, the loss of earning as well as pain and suffering, the award of Rs.1,00,000/- on the ground of loss of amenities cannot be sustained, therefore the same is reduced to Rs.50,000/-. Thus, the total compensation is arrived at Rs.18,04,920/-.

18. In fine, the appeal is partly allowed. The award of the Tribunal is modified awarding a sum of Rs.18,04,920/- with 7.5% interest from the date of petition till date of payment. The Insurance Company is directed to deposit the amount awarded less the amount if any already deposited within a period of six (6) weeks from the date of receipt of a copy of the judgment. On such deposit, the claimant is permitted to withdraw the entire compensation along with interest and proportionate costs. There will however be no order as to costs in this appeal. Consequently, the connected Miscellaneous Petition in CMP.No.19358 of 2016 is closed.

Sd/-

Assistant Registrar(CS VII)

//True Copy//

Sub Assistant Registrar

Exhibits marked on the side of the Appellant:-

Ex.R2 : Temporary registration certificate of the vehicle.

Ex.R3 : The policy of the insurance.

Ex.R4 : The fitness certificate of the auto.

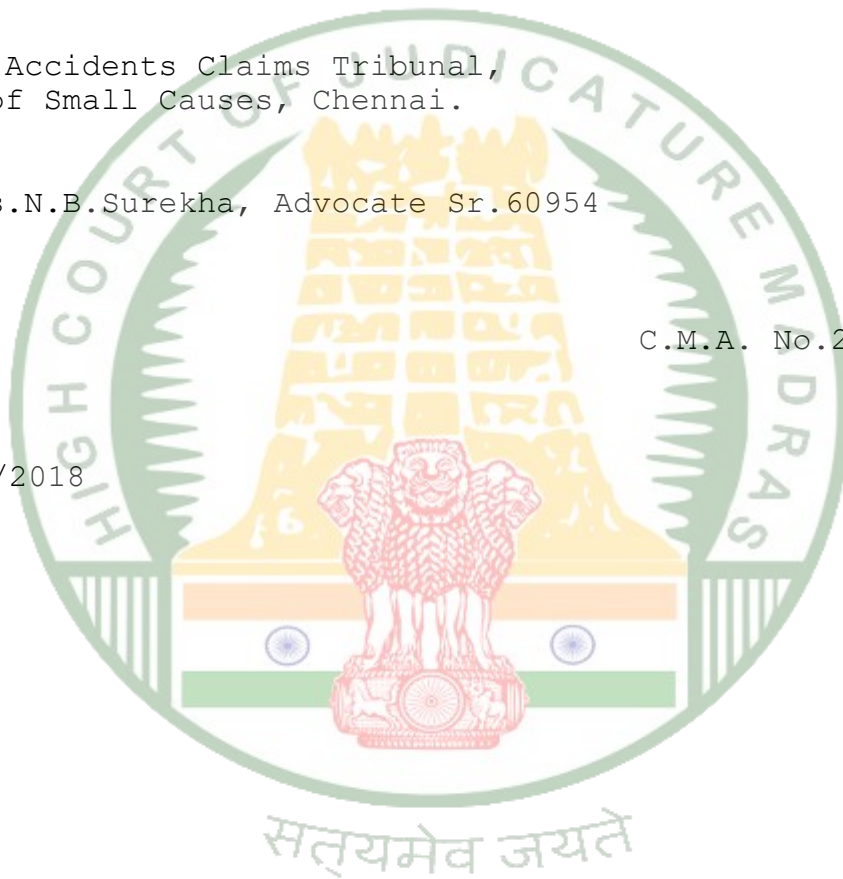
To

The Motor Accidents Claims Tribunal,
II Court of Small Causes, Chennai.

+1cc to Ms.N.B.Surekha, Advocate Sr.60954

C.M.A. No.2693 of 2016

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