IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 02.02.2018

CORAM:

THE HONOURABLE MR.JUSTICE S.BASKARAN

C.M.A.No.2327 of 2017

K.Kesavan ...Appellant/Petitioner

vs

1.M.Dinakaran
2.M.R.S.Rajesh
3.The Manager
ICICI Lombard Motor Ins.Co.Ltd.,
Opp to Lakshmi Theatre
Officers Lane,
Vellore ..Respondents/Respondents

Civil Miscellaneous Appeal filed against the judgment and decree dated 08.01.2015 made in M.C.O.P.No.41 of 2012 on the file of Motor Accident Claims Tribunal, at Aarani, Thiruvannamalai District.

For appellant : : Mr.T.G.Balachandran
For Respondents : :
for R3 : : Ms.R.Sreevidhya

J U D G M E N T

This Civil Miscellaneous Appeal is filed by the claimant, challenging the judgment and decree dated 08.01.2015 made in M.C.O.P.No.41 of 2012 on the file of Motor Accident Claims Tribunal, at Aarani, Thiruvannamalai District.

2. For the sake of convenience, the parties are referred to as per their litigative status before the Tribunal. The case of the petitioner is that on 16.01.2012, at about 2.15 p.m., while the petitioner was grazing the goats near Vandavasi-Aarani Main Road at Nambedu Village, a two wheeler bearing Reg.No.TN 22-BL-1076, owned by the 1st respondent came at high speed and in a rash and negligent manner and dashed against the petitioner, who was standing on the road side, resulting in the petitioner sustaining grievous injuries over his body. The petitioner contends that the accident occurred only due to rash and negligent driving of the 1st respondent driver. The petitioner further states that by working as Tea Master and also by grazing goats, he was earning Rs.10,000/- per month. Since he suffered

head injury in the accident, he is unable to use his right hand and right leg and he is not in a position to do any work. The petitioner was not able to walk on his own and as such, he is said to have suffering from permanent disability. Hence, the petitioner seeks compensation of Rs.10,00,000/- as compensation from the respondents 2 and 3.

3. On the other hand, opposing the petition, the 3rd respondent/Insurance Company contends that it is not correct to say that the accident occurred only due to the mistake on the part of the 1st respondent viz., the rider of the motor cycle. According to the 3rd respondent, the accident occurred due to contributory negligence on the part of the petitioner. It is further stated that the compensation claimed is excessive. They also denied the age, avocation and income of the injured petitioner. Hence, the 3rd respondent sought for dismissal of the Petition.

4. Before the Tribunal, the petitioner examined himself as P.W.1 and the medical expert P.W.2 and produced documents Ex.P.1 to P.8 to prove his claim. On the side of the 3rd respondent/Insurance Company, R.W.1 was examined and documents Ex.R.1 to R.8 was marked. The Tribunal, on the basis of oral and documentary evidence available before it, found that the 1st respondent/driver alone is responsible for the accident and as the owner of the vehicle, the 2nd respondent is liable to pay compensation and as the rider of the vehicle was not having any valid driving license, the 3rd respondent Insurer is not liable to pay any compensation and on that basis, awarded a sum of Rs.4,03,350/- to the petitioner and dismissed the petition against the 3rd respondent/Insurance Company. Aggrieved over the said finding, the petitioner/claimant has come forward with the present appeal.

5. The contention of the petitioner/appellant is that the Tribunal erred in dismissing the petition against the 3rd respondent/Insurance Company on the ground of violation of policy conditions. The petitioner contends that the Tribunal ought to have directed the 3rd respondent/Insurance Company to pay the award amount at first instance and then to recover the same from the owner of the vehicle/2nd respondent. The Tribunal failed to consider the medical evidence properly and it should have fixed the disability at 70% based on P.W.2 doctor evidence. The amount awarded by the Tribunal under various heads is very trivial and the same needs enhancement. Hence the petitioner seeks to entertain the appeal and to enhance the compensation with a direction to the 3rd respondent/Insurance Company to pay the award amount and thereafter, to recover the same from the 2nd respondent/owner of the vehicle.

6. Per contra, the learned counsel appearing for the 3rd respondent/Insurance Company contends that the Tribunal, after taking into consideration the nature of injury and the disability suffered by the petitioner, has awarded compensation of Rs.4,03,350/- and the same is just and proper and as such the quantum of compensation needs no interference. Further, the learned counsel contended that the petitioner has failed to produce any substantial evidence to show that the insurance policy was in force at the time of accident and in view of violation of Policy conditions, the 3rd respondent is not liable to pay the award amount and as such, the finding of the Tribunal in respect of liability issue is perfectly in order. The learned counsel thus sought to dismiss the appeal.

7. The appellant/injured petitioner who deposed as P.W.1 stated that on 16.01.2012, at about 2.15 p.m., while he was grazing goats and standing by the side of Vandavasi to Aarani Main Road, a vehicle belonging to the 2nd respondent came at high speed in a rash and negligent manner and dashed against him. According to the petitioner, after taking treatment at Vandavasi G.H., he was sent to Government Hospital, Chennai. He was unconscious for 20 days and took treatment for a period of 2 months. The Peramanallur Police registered the case as evidenced by Ex.P.1-FIR. Thus the petitioner contends that the accident occurred only due to the rash and negligent act of the driver/1st respondent, which vehicle was owned by the 2nd respondent.

8. On the other hand, the person who deposed as R.W.1 stated that the Police laid charge sheet against 1st respondent and produced a copy of final report laid by the police as Ex.R.3. R.W.1 also produced the insurance policy for the vehicle as Ex.R.1 and his Investigation Report as Ex.R.2. The notice issued by the 3rd respondent to the owner of the vehicle and the returned cover is produced as Ex.R.4 and Ex.R.5. Likewise, the notice sent to the 1st respondent by the 3rd respondent counsel is produced as Ex.R.6 and the postal receipt for the same is Ex.R.7.

9. It is evident from the oral evidence of P.W.1, P.W.2, Ex.P.1-copy of FIR and Ex.R.3-final report that the accident occurred only due to the negligence of the rider of the two wheeler belonging to the 2nd respondent. Admittedly, the two wheeler involved in the accident and owned by the 2nd respondent is insured with the 3rd respondent. R.W.1 categorically admitted the fact that the vehicle was insured with the 3rd respondent. The same is reflected in the investigation report-Ex.R.2 filed by the 3rd respondent. The factum of existence of insurance policy is also substantiated by Ex.R.8-M.V.Report. R.W.1 also admitted in his evidence that the offending vehicle was insured

with them. Therefore, it is clear that the vehicle owned by the 2nd respondent was covered under insurance policy of the insurer/3rd respondent. However, the Tribunal, while passing the award, has concluded that as the rider failed to produce the driving licence, the same amounts to violation of policy condition and hence, the 3rd respondent/Insurance Company is not liable to pay compensation. The said finding is challenged by the appellant/injured petitioner.

10. It is apparent from R.W.1 evidence that the rider of the offending vehicle failed to produce his driving licence. In such circumstances, since no proof is available to show that the rider of the two wheeler possessed valid driving licence, permitting such person to ride such vehicle will amount to clear violation of the Policy Condition. In such circumstances, the learned counsel for the 3rd respondent/Insurance Company contended that they are not liable to pay compensation. However, as rightly pointed out by the appellant/petitioner/claimant, following the various Ruling of this Court as well as Apex Court, the Insurance Company cannot avoid payment of the award amount as the Insurance Policy was in force at the time of the accident except if there is only violation of Policy condition, but they are only entitled to recover the award amount from the owner of the vehicle after satisfying the award. The said contention of the learned counsel for the appellant/petitioner is to be accepted.

11. In the light of the various Rulings of this Court particularly 2004 ACJ 1 = 2004(1) TN MAC 104(SC) (National Insurance Co. Ltd., - Swaran Singh and others), the finding of the Tribunal that the 3rd respondent-Insurance Company is not liable to pay the amount and the petition against them is not maintainable is set aside. As the insurer of the offending vehicle, the 3rd respondent is liable to pay the compensation and they are entitled to recover the same from the owner of the vehicle, since he has committed violation of policy condition.

12. The appellant/petitioner has stated that by working as Tea Master and also by grazing goats, he was earning Rs.10,000/- per month. However, the petitioner has not produced any material proof regarding avocation and income. In such circumstances, notional income of the petitioner can be fixed at Rs.6500/- instead of Rs.5000/- fixed by the Tribunal. As per the evidence of the petitioner as well as P.W.2 doctor, it is apparent that the petitioner suffered the following injuries:-

"1)Fracture f (L) parietal bone, compound and communited.

2) Fragment removed leaving a large gap.

3) Right upper limb and right lower limb paralized and could not be revived.

4) Spastic joint & ® shoulder and elbow and wrist have flexion deformity

5) Right hand movement totally absent.
6) Multiple injuries all over the body.
7) The petitioner has sustained Hemiplegia-paralysis of one side of the body. He cannot stand and walk without a stick and also without an attender."

The medical expert who deposed as P.W.2 stated that he assessed disability of the petitioner at 70% and issued Ex.P.7 disability certificate. The petitioner also produced X ray taken as Ex.P.8. The Tribunal after considering the evidence of P.W.1 and P.W.2 and other documents, produced by them, concluded that the permanent disability suffered by the petitioner can be fixed at 50% instead of 70% fixed by the Medical expert. The said finding, is in my considered opinion, is just and proper. Since the petitioner would have had an attender, necessarily an amount has to be given under the head "attender charges". The learned counsel for the appellant/petitioner also pointed out that in the present condition of the petitioner, he cannot do the job of tea master and go for grazing and as such there is total loss of earning power. The petitioner contends that the disability assessed at 70% by the doctor is correct and the same has to be adopted instead of 50% adopted by the Tribunal. The claim of the petitioner for compensation towards future loss of income is justifiable. Accordingly, this court, considering the percentage of disability sustained by the petitioner and also considering the consequential loss of earning power in future, is inclined to make addition of 25% on the notional monthly income of the petitioner. Accordingly, while fixing Rs.6500/- as salary of the petitioner per month, the following calculation is to be made for arriving the future loss of earning power:-
Rs.6500 + 25% addition = Rs.8125/-.
8125 x 12 x 13 x 50% disability = Rs.6,33,750/-.
Thus, a sum of Rs.6,33,750/- is awarded under the head "future loss of earning power".

13. Considering the nature of injury suffered by the appellant/petitioner and the period of treatment undergone and also considering the permanent disability sustained by the petitioner, it would be appropriate to award Rs.50,000/- towards "loss of amenities". Further, this court is also inclined to modify the compensation granted by the Tribunal under various heads. Accordingly, the compensation awarded by the Tribunal stands modified as follows:

| Sl. No. | Head | Amount granted by the Tribunal | Amount awarded by this Court |
|---|---|---|---|
| 1 | Loss of income due to permanent disability | Rs. 3,90,000 | Rs. 6,33,750/= |
| 2 | Pain and suffering | Rs. 10,000/- | Rs. 10,000/= |

| Sl. No. | Head | Amount granted by the Tribunal | Amount awarded by this Court |
|---|---|---|---|
| 4 | Transport Expenses | Rs. 2,000/- | Rs. 10,000/= |
| 5 | Damage to clothing | Rs. 1,000/- | --- |
| 7 | Attender charges | --- | Rs. 10,000/= |
| 8 | Loss amenities | --- | Rs. 50,000/= |
| 9 | Medical expenses | Rs. 350/- | Rs. 350/= |
| | Total | Rs. 4,03,350/- | Rs. 7,14,100/= |

14. In the result, the Civil Miscellaneous Appeal is Partly Allowed with costs as follows:-

(i) The award of the Tribunal is enhanced to Rs.7,14,100/- from Rs.4,03,350/-

(ii) The award amount will carry interest at the rate of 7.5% per annum from the date of claim petition till the date of deposit. In view of the order of this court dated 25.07.2017 in C.M.P.No.6145 of 2016 in C.M.A.No.SR.25038 of 2016, interest is waived off, for the default period.

(iii) In view of the above modified award amount, the 3rd respondent/Insurance Company is directed to deposit the award amount with proportionate interest and costs, less the amount, if any, already deposited, within a period of six weeks from the date of receipt of a copy of this order, with liberty to recover the same from the owner of the vehicle.

(iv) On such deposit, the appellant/claimant is permitted to withdraw the amount awarded as above by filing proper application before the Tribunal, less the amount if any already withdrawn, with accrued interest. The Tribunal shall pass appropriate directions for the disbursal of the amount as stated supra on the filing of such application.

s/d-
Assistant Registrar(CS VI)

True Copy

Sub-Assistant Registrar

nvsri

To
1.The Motor Accidents Claims Tribunal,
at Aarani, Thiruvannamalai District.

2.The Section Officer,
V.R.Section, High Court, Madras.

+1 CC to Mrs. Sreevidhya, Advocate sr 8343.
+1 CC to Mr.T.G. Balachandran, advocate sr 7807.

C.M.A.No.2327 of 2017

PVS(CO)
SP(25/04/2018)