IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 11.01.2018

CORAM

THE HONOURABLE MR. JUSTICE R. SUBBIAH
AND
THE HONOURABLE MR. JUSTICE P.D. AUDIKESAVALU
C.M.A. No. 3422 of 2014

The Manager,
Bharti Axa Gen.Ins. Co. Ltd.,
Pride Quandra, No.30, II Floor,
Herobal Road, Bangalore.

..Appellant/2nd Respondent

Vs.

1. Shivakumar @ Kumar .. 1st Respondent/Claimant
2. Annaiah Reddy ..2nd Respondent/1st Respondent

(2nd respondent remained ex parte in Lower Court)

..Respondents

Prayer: Civil Miscellaneous Appeal filed under section 73 of Motor Vehicles Act as against the order and decree dated 25.06.2014 passed in M.C.O.P. No. 2192 of 2013 by the Motor Accidents Claims Tribunal (Special Sub Court) Krishnagiri.

For Appellant :: Ms.R. Rathna Thara

For Respondents :: Mr.K. Prasanna for
M/s. Mukund R.Pandiyan
for R1
R2 - ex parte

J U D G M E N T

(Judgment of the Court was delivered by R. SUBBIAH,J.)

This Civil Miscellaneous Appeal has been filed by the Insurance Company challenging the judgment and decree dated 25.06.2014 passed by the Motor Accidents Claims Tribunal (Special Sub Court), Krishnagiri, in M.C.O.P. No. 2192 of 2013 on the ground of negligence as well as quantum.

2. The 1st respondent herein is the claimant before the Tribunal.

3. The case of the 1st respondent/claimant before the Tribunal was that on 14.07.2011, at about 10.40a.m., he was riding his Bajaj Platinum Motor Cycle bearing Registration No. TN-24-V-6888 having his wife as pillion rider and proceeding to Alasanatham Road, in Hosur. Whileso proceeding, he slowed down the vehicle, opposite to Ameeriya Petrol Bunk, since he was not having signal to proceed further and at that time, a Tipper Lorry bearing Registration No. TN-30-AB-7932, belonging to the 2nd respondent and insured with the appellant, which was coming behind, driven in a rash and negligent manner and without caring for the signal, dashed against the 1st respondent's motor cycle and thus caused the accident. Due to the impact, the 1st respondent and his wife fell down and the wheel of the lorry ran over the 1st respondent's left leg below knee causing crush injury and he also sustained fracture on his right leg while his wife came under the wheels of the lorry and died on the spot. The 1st respondent/claimant was initially taken to Government Hospital, Hosur for first aid and thereafter, referred to Ashok Hospital for further management for the injuries sustained by him, namely, crush injury of left leg with loss of distal leg and foot with active bleed (vascular bleed) and fracture of 2nd and 3rd MT Right foot. Thereafter, the claim petition was filed seeking compensation to the tune of Rs.20 lakhs .

4. The claim petition was resisted by the Insurance Company by taking a stand that the accident was not caused due to the rash and negligent driving of the lorry insured with them. On the other hand, according to the Insurance Company, the accident had taken place only due to the negligence on the part of the claimant. The specific defence taken by the Insurance Company was that at the time of accident, the driver of the Tipper Lorry was driving the vehicle at a normal speed and the 1st respondent/claimant, who was going in front of the lorry, suddenly swerved his two-wheeler without noticing the signal and in the said process, the lorry hit the two-wheeler. Therefore, the Insurance Company took a stand that the entire negligence cannot be attributed to the driver of the Tipper Lorry alone and prayed for dismissal of the claim petition.

5. In order to prove the claim, the 1st respondent/claimant examined himself as P.W.1 besides examining one Dr. M. Devendran as P.W.2 and marked Exs-P1 to P8. On behalf of the Insurance Company, one of their officials was examined as R.W.1 and three documents were marked as Exs-R1 to R3. The Tribunal, on a cumulative consideration of the

materials on record, came to the conclusion that the accident had occurred only due to the rash and negligent driving of the driver of the Tipper Lorry insured with the Insurance Company and awarded a sum of Rs. 17,18,014/- as compensation to the claimant. Challenging the same, the Insurance Company has come forward with the present appeal.

6. When the matter is taken up for consideration, it is the submission of the learned counsel for the appellant Insurance Company that during the cross-examination of P.W.1, he has admitted that at the time of accident, while riding the two-wheeler, a gas cylinder was placed between him and the pillion rider and therefore, there was every possibility of the 1st respondent/claimant losing control of the two-wheeler while swerving it. According to the learned counsel, the Tribunal, by considering this piece of evidence, ought to have fixed contributory negligence on the part of the claimant and calculated the compensation amount. That apart, the learned counsel for the appellant has submitted that on account of crush injury suffered by the claimant on his left leg, his left leg was amputated below knee and as per Schedule I to the Workmen's Compensation Act, for amputation of leg below knee, the percentage of disability fixed is 50% and therefore, the percentage of disability should have been fixed at 50% instead of 70%, as has been done by the Tribunal, solely based on the evidence of P.W.2. Therefore, according to the learned counsel for the appellant, by fixing the percentage of disability at 50%, the compensation amount has to be recalculated. In this regard, reliance was also placed upon the judgment of the Honourable Apex Court rendered in Sri Kumaresh V. The Divisional Manager, National Insurance Company Limited and another reported in 2011 (2) TN MAC 10 (SC).Further, it is the submission of the learned counsel for the appellant that there is an admission on the part of the claimant, during his cross-examination by the appellant Insurance Company, that he was aged about 41 years on the date of accident and in that event, the appropriate multiplier to be adopted would be 14 whereas the Tribunal has adopted multiplier 16. Hence, on the above grounds, the learned counsel for the appellant seeks fixation of contributory negligence on the part of the claimant and reduction of the compensation amount awarded by the Tribunal.

7. Per contra, the learned counsel for the 1st respondent/claimant made his submissions supporting the award passed by the Tribunal.

8. Keeping the submissions of the learned counsel on either side, we have carefully gone through the entire materials on record.

9. Though it is contended by the learned counsel for the appellant that at the time of accident, when the 1st respondent/claimant was riding his two-wheeler, he was carrying a gas cylinder, placed between him and his wife, there is absolutely no such plea raised in the counter statement. No doubt, the 1st respondent/claimant has admitted during his cross-examination by the appellant Insurance Company that he was carrying a gas cylinder in the two-wheeler at the time of accident, but that would not by itself lead to the inference that the 1st respondent/claimant is responsible for the accident. The contributory negligence on the part of the 1st respondent/claimant has to be proved by examining independent witnesses. But, in the instant case, the Insurance Company has miserably failed to do so. They had examined only their own official, who was not an eyewitness to the occurrence. Further, we also find that there is absolutely no favourable reply elicited from P.W.1 in support of the case of the appellant Insurance Company. Under such circumstances, we are not inclined to accept the submission of the learned counsel for the appellant that there was contributory negligence on the part of the 1st respondent/claimant in causing the accident.

10. Insofar as the quantum of compensation is concerned, the Doctor, who was examined as P.W.2, has deposed that on account of the accident, the claimant's left leg below knee was amputated and even the Insurance Company is not disputing this fact. Their contention is that since for amputation below knee, the percentage of disability fixed under Schedule I to Workmen's Compensation Act is 50%, the Tribunal ought to have fixed the percentage of disability at 50% whereas solely relying upon the evidence of P.W.2, it had fixed the disability at 70%, thereby resulting in awarding an exorbitant amount as compensation. But, the 1st respondent/claimant is a tailor by profession and the nature of injuries sustained by him will definitely have a bearing in carrying on his avocation for the rest of his life. Under such circumstances, we feel that it would be appropriate to fix the percentage of disability at 60% to arrive at a just and reasonable compensation. At the same time, as contended by the learned counsel for the appellant, there was clear admission by P.W.1 in his evidence that he was aged about 41 years at the time of accident and the appropriate multiplier that should have been adopted by the Tribunal is 14. Therefore, multiplier 16 adopted by the Tribunal is set aside and instead, we adopt multiplier 14 to calculate the " Loss of Earning Capacity". Now, taking the monthly income of the claimant, as fixed by the Tribunal, at Rs.6500/- per month, the percentage of disability at 60% and adopting multiplier 14, "Loss of Earning Capacity" is calculated as hereunder:

Loss of Earning Capacity	::	Rs.6500 x 12 x 14 x 60/100
	::	Rs.6,55,200/-

Except this modification, the amounts awarded by the Tribunal, under the other heads, remain intact. The net compensation now payable to the 1st respondent/claimant with break-up details are as follows:

Loss of Earning Capacity	::	Rs. 6,55,200/-
Pain and Suffering	::	Rs. 1,50,000/-
Future Treatment/Artificial Limb	::	Rs. 2,00,000/-
Medical Expenses	::	Rs. 1,94,414/-
Loss of Marriage Prospects/ Amenities/Enjoyment of Life	::	Rs. 1,50,000/-
Extra Nutrition and Transport To hospital	::	Rs. 50,000/-
Attender Charges	::	Rs. 1,00,000/-
Total	::	Rs.14,99,614/-

Hence, the award of the Tribunal to the tune of Rs.17,18,014/- is reduced to Rs.14,99,614/-. The rate of interest awarded by the Tribunal at 6% per annum remains unaltered. Hence, the Civil Miscellaneous Appeal is partly allowed. No costs.

11. It is submitted that the entire amount, as awarded by the Tribunal, along with interest and costs, has been deposited by the appellant Insurance Company. The claimant is permitted to withdraw the amount, as per the modified award passed by this Court and the Tribunal is directed to refund the excess amount lying in deposit to the appellant. No costs.

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

nv

To
The Special Sub Judge,
The MACT (Spl. Sub Court),
Krishnagiri.

+1cc to Ms.R.Rathna Thara, Advocate, S.R.No.3049
+1cc to M/s. Mukund R. Pandiyan, Advocate, S.R.No.3265

C.M.A. No. 3422 of 2014

KGK(CO)
CS/26/02/18