

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 19.06.2019

CORAM:

THE HONOURABLE MRS.JUSTICE S. RAMATHILAGAM

C.M.A.No.1500 of 2015
and M.P. 1 of 2015

The Branch Manager,
National Insurance Company Ltd.,
58, Rajaji Street, Kangayam,
Erode District. ...Appellant/ Respondent

Vs.

1.Thiruvengkataraj
2.M. Subramaniam
3.S.Dhanalakshmi ...Respondents/ Respondents

Prayer: This Civil Miscellaneous Appeal is filed under Section 173 of Motor Vehicles Act, 1988, against the judgment and decree dated 31.10.2012, passed in M.C. OP. No. 1071 of 2009 on the file on Motor Accidents Tribunal/II Addl.District & Sessions Judge, Tiruppur.

For Appellant : M/s. G.Udaya Sankar
For Respondents : Mr.MA.P. Thangavel- R1
RR2 & RR3 - Exparte

J U D G M E N T

This Civil Miscellaneous Appeal has been filed by the appellant/Insurance Company challenging the award dated 31.10.2012, passed in M.C. OP. No. 1071 of 2009 on the file on Motor Accidents Tribunal/II Addl.District & Sessions Judge, Tiruppur.

2. The appellant/Insurance Company is 3rd respondent in M.C.O.P.No. 1071 of 2009 on the file of the Motor Accident Claims Tribunal /II Addl.District & Sessions Judge, Tiruppur. The 1st respondent filed the said claim petition claiming a sum of Rs.10,00,000/- for the injuries sustained by him in the accident that took place on 20.07.2009. The Tribunal, considering the pleading, oral and documentary evidence, held that the accident occurred due to rash and negligent driving

by the driver of the Cheverlet Tavera Car bearing Reg.No.TN-07-AF-3934 1st respondent's driver and fixed the 80% liability on the Insurance Company being the insurer of the said vehicle and directed to pay a sum of RS.5,73,120/- as compensation to the claimant. Against the said award and liability, the Insurance Company has come out with the present appeal to set aside the same.

Brief facts of the case:

3. On 20.07.2009, while the petitioner who was doing business of selling dry coconuts for preparing coconut oil returning home by his Hero Honda Splender bearing Reg.No. TN41-S-7841, at about 8.00pm when the petitioner riding his bike keeping southern end from East to West direction at Coimbatore to Trichy National High Ways Road in front of Rajasai Fine Linen Private Limited, a Cheverlet Tavera Car bearing Reg.No.TN07-AF-3934 came from west to east direction in a rash and negligent manner, dashed against the petitioner and he fell down and sustained grievous injuries in his head, right knee & right foot. For the injuries sustained by him, he claimed a sum of Rs.10,00,00/- as compensation under various heads.

3.1. The Insurance company in their counter statement denied the rash and negligent driving on the part of the car and mode of the accident as stated by the claimant was also denied. The other aspects regarding possession of valid driving licence by the claimant was also denied. The sum claimed under various heads are denied as excessive and without proof. Non joinder of rider and owner of the two wheeler was also contended by the insurance company. The Insurance company has also filed additional counter raising contention that the alleged accident had occurred due to rash and negligent riding by the petitioner who had under influence of alcohol in an inebriated state losing control and balance over himself as well as his vehicle invited the accident himself. Hence, prayed to fix contributory negligence on the part of the petitioner.

3.2. The tribunal after analysing the documents and pleadings, fixed the contributory negligence on the part of the petitioner at 20% and 80% on the part of the Insurance company and awarded a sum of Rs.7,16,400/- as total compensation, in which Rs.5,73,120/- to be paid by the Insurance Company.

4. Heard both sides and perused the documents available on record.

5. On perusal of the additional counter statement filed by the appellant/insurance company, it is seen that the claimant was under influence of alcohol at the time of the accident and therefore, he himself invited the accident, but the said aspect was not proved before the tribunal. On perusal of the determination by the tribunal, it is observed that on the side of the respondent, witness namely Krishnasamy was examined as RW1, through him Exhibit-R2 -rough sketch was marked. He deposed that the claimant who was under the influence of alcohol, caused the accident and the accident register, discharge summary were also placed before the tribunal and the evidence in this aspect was deposed by another witness RW3 namely Selvaraj, who witnessed the accident. He deposed that he saw the claimant fell down from his two wheeler after dashing against a car and at that time, the claimant was under influence of alcohol and he sent him to the hospital by ambulance. But, to prove the fact that the injured claimant was under influence of alcohol, no supportive documents viz., medical report, doctor's evidence and drunken certificate were filed on the side of the appellant/insurance company. It is also seen that no FIR has been registered under Section 4(1) (J) of TamilNadu Alcohol Abolition Act or under Section 185 of MV Act. Therefore in the absence of the any proof, the said argument cannot be taken for consideration. But, however the tribunal observed the said fact and fixed the liability at 20% on the claimant and at 80% on the respondent.

6. The appellant herein vehemently argued that when the tribunal has given finding that the claimant was under the influence of alcohol, the entire liability ought to have been placed on the claimant and not on the insurance company. The appellant has also brought to the notice of this Court that in the Wound Certificate it has been specifically stated that the claimant while riding two wheeler dashed against the car and the rough sketch also placed by the appellant to observe place of the accident and it is observed that the place of the accident is on the northern side of the east to west road and the evidence was also to the effect that the accident occurred when the two wheeler was proceeding from east to west and the car was proceeding west to east direction.

7. However, the evidence on the side of the respondent by marking statement reveal the fact that the injured was under the influence of alcohol, hence it is argued by the appellant that when there is observation by the tribunal that the claimant was under influence of alcohol at the time of the accident, entire liability has to be fixed on the claimant and the insurance company cannot has to be exonerated from its liability.

8. While discussing the quantum, it is vehemently argued by the appellant that the disability sustained by the claimant is only a partial permanent disability and hence the disability fixed by the tribunal at 42% is very much on the higher side.

9. Countering the said arguments, the learned counsel for the respondent/claimant submitted that the claimant had undergone three surgeries because of the said accident and the said aspect was very much proved before the tribunal by way of exhibits P8 to P11. The learned further submitted that in spite of the treatment given, his original health has not been restored, hence the disability taken by the tribunal at 42% is very meagre and the same has to be taken as per Ex.P10. The learned counsel for the 1st respondent/claimants has referred a case law reported in 2013(2) TNMAC 574 (SC) in the case of *Dulcina Fernandes & Others Vs. Joaquim Xavier Cruz & Another*, dated. 08.10.2013. The relevant portion is extracted below;

"... CW-2, who was at the relevant time working as the Head Constable of Main Eurtorim, Police Station, had deposed that a criminal case was registered against the first respondent in connection with the accident and that after investigation he was chargesheeted and sent up for trial. Though it is submitted at the Bar that the first respondent was acquitted in the said case what cannot be overlooked is the fact that upon investigation of the case registered against the first respondent, *prime facie*, materials showing negligence were found to put him on trial. From the evidence of CW-2 it also transpired that the deceased was not medically examined to ascertain whether he had consumed alcohol and was, therefore, driving the scooter under the influence of liquor. In fact, according to CW-2, he had reached the spot within 15 minutes of the incident. In his cross-examination CW-2 had specifically denied that the scooter driven by the deceased had dashed the pick-up van which was stationary i.e. parked on the road. The statements made by CW-2 in the course of his deposition has considerable significance to the issues arising in the case, namely, whether the deceased was driving the scooter under the influence of alcohol and whether there was any negligence on his part leading to the accident. The said aspects of the evidence of CW-2 do not appear to have been taken note of or to have received any

consideration of the learned Tribunal. At the same time it is possible to take the view that the evidence of CW-2, properly read and considered, can lead to a conclusion contrary to what has been arrived at by the learned Tribunal, namely, that the accident had occurred on account of the negligence of the deceased. The High Court having failed to notice the above lacunae in the award of the learned Tribunal and correct the same, we are satisfied that the present is a fit case for our interference. We accordingly set aside the findings of the learned Tribunal as affirmed by the High Court in respect of issues 1 and 4 and hold that the accident had occurred due to the rash and negligent driving of the pick-up van by the first respondent. "

10. Though the learned counsel for the appellant contended that the claimant sustained only partial permanent disability, it does not require multiplier to calculate loss of income, this Court, in view of the Wound Certificate and the evidence of doctor and the treatment taken by the claimant for the injuries, is of the view that loss of income arrived by the tribunal by adopting the multiplier is reasonable. Likewise the sum awarded under the head 'Pain and Suffering' and 'Medical expenses' is also found reasonable and does not require any modification.

11. Though the appellants fails to produce any certificate which is vital to substantiate their claim that the claimant was under influence of alcohol at the time of the accident, this Court by relying on the evidence of RW1 and RW3 who deposed that the injured/claimant was under the influence of alcohol at the time of the accident, inclined to modify the liability fixed by the tribunal. Accordingly, the liability fixed by the tribunal is modified to the effect 35% on the claimant and 65% on the appellant/Insurance company .

12. In the result, The Civil Miscellaneous Appeal is partly allowed. No costs. Consequently, connected miscellaneous petition is closed.

13. The appellant/Insurance company is directed to deposit a sum of Rs. 4,65,660/- (65% of the total compensation) along with interest and costs before the Tribunal, within a period of four weeks from the date of receipt of a copy of this order, after deducting the amount already deposited, if any. The interest awarded by the Tribunal at the rate of 7.5% per annum. On such deposit being

made, the Tribunal shall transfer the amount to the claimant's bank account through RTGS within a period of two weeks thereon.

Sd/-
Assistant Registrar(CS)

//True Copy//

Sub Assistant Registrar

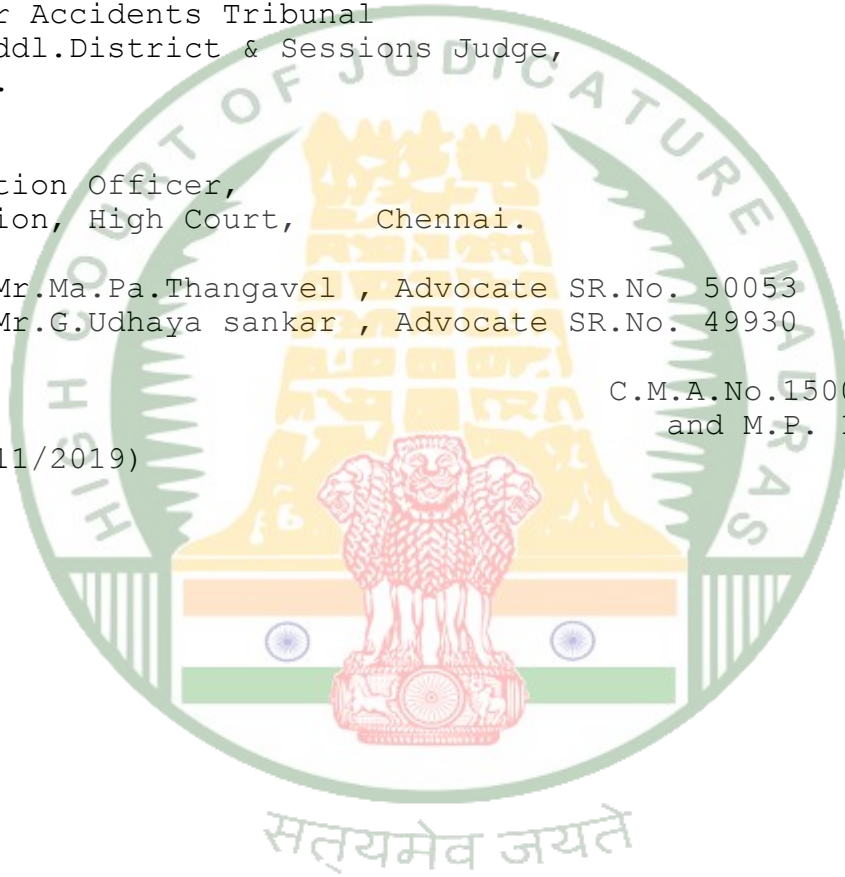
ak
To
The Motor Accidents Tribunal
The II Addl.District & Sessions Judge,
Tiruppur.

Copy to
The Section Officer,
VR Section, High Court, Chennai.

+lcc to Mr.Ma.Pa.Thangavel , Advocate SR.No. 50053
+lcc to Mr.G.Udhaya sankar , Advocate SR.No. 49930

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A.SK(19/11/2019)



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