

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 14.08.2018
Delivered on : 29.01.2019

CORAM:

THE HONOURABLE MR.JUSTICE M.V.MURALIDARAN

Civil Miscellaneous Appeal No.808 of 2015
and
M.P.No.1 of 2015

M/s.National Insurance Co. Ltd.,
2nd Floor, Thanthai Periyar Market Complex,
Opposite Old Bus Stand,
No.1, Govindasamy Pillai Street,
P.B.No.15, Salem-636 001.

.... Appellant/2nd Respondent

Vs

1.Illayaraja 1st Respondent/Petitioner

2.S.Jayakumar2nd Respondent/1st Respondent

3.K.Kumar 3rd Respondent/3rd Respondent

4.The New India Assurance Co. Ltd.,
No.40, Lakshmi Complex,
Opposite Vani Vilas Hospital,
K.R. Road, Fort,
Bangalore.4th Respondent/4th Respondent

Prayer: Civil Miscellaneous Appeal filed under Section 173 of Motor Vehicles Act, 1988 against the order dated 28.9.2012 passed in M.C.O.P.No.532 of 2010 on the file of the Motor Accident Claims Tribunal (Additional District Judge), Dharmapuri.

For Appellant : Mr.J.Chandran
For Respondents : Mr.S.Sathiaselvan
for respondent No.1
Respondents 2 & 4 : No appearance

JUDGMENT

This Civil Miscellaneous Appeal has been filed by the appellant insurance company against the award dated 28.9.2012 passed in M.C.O.P.No.532 of 2010 on the file of the Motor

Accident Claims Tribunal (Additional District Judge), Dharmapuri.

2. Brief facts are that on 13.8.2008, the first respondent was driving 407 tempo van bearing registration No.KA-14 7397 along with cleaner. In the tempo the first respondent transported the house hold articles from Bangalore to Chinnaperamanur at Dharmapuri. After unloading the house hold articles at Dharmapuri, they were returning to Bangalore. While they proceeded on 14.8.2008 at 6.15 A.M. at Rayakottai-Bangalore road, near Sajjaipatti road, a lorry bearing registration No.TN-33 F 2385, belonging to the second respondent and insured with the appellant, driven by its driver in a rash and negligent manner dashed against the tempo. Due to the impact, the first respondent and the cleaner sustained grievous injuries. After the accident, they were admitted in Government Hospital, Hosur, where from the first respondent was shifted to St. John Medical College Hospital, Bangalore and had taken treatment as inpatient from 14.8.2008 to 1.9.2008. At the time of accident, the first respondent was aged 28 years and was earning Rs.7,000/- per month by working as tempo driver. Regarding the accident, a criminal case in Crime No.223 of 2008 was registered by Rayakottai Police Station. Stating that the accident was happened due to rash and negligent driving of the driver of the lorry, the first respondent has filed claim petition claiming compensation of Rs.10,00,000/- by impleading the owner and the insurer of the tempo van as respondents 3 and 4.

3. Resisting the claim petition, the appellant has filed counter stating that the accident occurred due to the rash and negligent driving of the first respondent. It is stated that the driver of the lorry bearing registration No.TN-33 F 2385 driven the same in cautious and proper manner and it is the first respondent himself dashed against the lorry. Therefore, the driver of the lorry was not negligent. In fact, the criminal case in Crime No.223 of 2008 was registered against the first respondent and charge sheet was also filed against him. Since there is no negligent on the part of the driver of the lorry, the owner of the lorry and its insurer are not liable to pay the compensation as claimed by the first respondent.

4. The fourth respondent filed counter stating that the first respondent had driven the vehicle in a rash and negligent manner and dashed against the lorry. Since the first respondent alone responsible for the accident, he is not entitled for compensation and prayed for dismissal of the petition.

5. Before the Tribunal, the first respondent examined himself as P.W.1 and Dr.S.Krishnakumar was examined as P.W.2. Exs.P1 to P16 were marked. On the side of the contesting respondents, two witnesses were examined and Ex.R1 was marked.

6. The Tribunal held that the accident occurred due to the negligence of the the driver of the lorry and the first respondent and fixed contributory negligence. Finding that the first respondent sustained 50% disability, the Tribunal calculated the loss of income at Rs.5,10,000/-. Adding conventional damages, the Tribunal awarded compensation of Rs.6,64,599/-. Since the first respondent is in contributory negligence, the Tribunal awarded Rs.3,32,299/- to the first respondent. Challenging the award, the appellant insurance company has filed the present appeal.

7. I heard Mr.J.Chandran, learned counsel for the appellant and Mr.Sathiaseelan, learned counsel for the first respondent and perused the entire materials available on record.

8. Assailing the award, the learned counsel for the appellant submitted that the Tribunal went wrong in not following the decisions of this Court as well as the Hon'ble Supreme Court and the reasoning given by the Tribunal in awarding Rs.3,32,299/- is against the pleadings, facts and the evidence.

9. The learned counsel submitted that the Tribunal ought not to have fixed 50% contributory negligence on the driver of the lorry and consequently, the liability of paying compensation to the extent of 50% by the appellant. Since the first respondent driven the tempo without valid permit, owner of the tempo alone is liable to pay the compensation and not the appellant even to the extent of 50% and prayed for setting aside the 50% liability fastened against the appellant. The learned counsel further submitted that the first respondent has no valid permit to drive the tempo in the State of Tamil Nadu. In support, the learned counsel relied upon the decision of the Hon'ble Supreme Court in M.S.Middle High School v. HDFC Ergo General Insurance Co. Ltd. and others, reported in 2017 (2) TN MAC 763 (SC).

10. On the other hand, the learned counsel for the first respondent submitted that the first respondent drove the tempo along with cleaner and both of them have sustained injuries in the accident and were admitted in the hospital. He would submit the criminal case in Crime No.223 of 2008 was allegedly registered based on the alleged complaint given by the cleaner accusing the first respondent for causing the accident. In fact, consequent to the filing of charge sheet in C.C.No.5 of 2010 on the file of the Special Judicial Magistrate, Denkanikottai, the said case ended in acquittal. Since in the accident, the first respondent sustained injuries, he had filed the claim petition. The learned counsel further submitted that

driving the vehicle without valid permit or in violation of permit conditions cannot be a reason to vitiate the compensation awarded by the Tribunal.

11. The learned counsel next submitted that the first respondent is entitled more compensation than awarded by the Tribunal without filing separate appeal and/or cross objection and it is obligatory on the part of the Appellate Court to consider the same and to award enhanced compensation by modifying the award not fixing the contributory negligence on the part of the first respondent. In support, the learned counsel placed reliance upon the following decisions:

- (i) Kamala Mangalal Vayani and others, reported in (2010) 12 SCC 488.
- (ii) Jitendra Khimshankar Trivedi and others v. Kasam Daud Kumbhar and others, reported in (2015) 4 SCC 237.
- (iii) The Oriental Insurance Co. Ltd. v. Smt. K9iran and others, reported in 2017 SCC OnLine Bom 7723.

12. I have considered the submissions made by the learned counsel appearing on either side and also perused the materials available on record.

13. According to the first respondent, on 13.8.2008, he was driving the tempo bearing registration No.KA-14 7396 along with cleaner by name Mathialagan with house hold articles and after unloading the house hold articles at Dharmapuri, they were returning to Bangalore. While they proceeded on 14.8.2008 at 6.15 A.M. at Rayakottai, a lorry bearing registration No.TN-33 F 2385 belonging to the second respondent and insured with the appellant driven by its driver in a rash and negligent manner dashed against the tempo. As a result of which, the first respondent and the cleaner sustained grievous injuries. Thus, the first respondent stated that the accident was happened due to the rash and negligent driving of the driver of the lorry.

14. Ex.P1 is the FIR, registered against the first respondent based on the complaint given by the cleaner travelled in the tempo. The Tribunal considered Ex.P1-FIR, which is the earliest version given by the cleaner in which it has been stated that the first respondent driven the tempo in a rash and negligent manner and dashed against the lorry.

15. According to the first respondent, in the criminal case registered against him in C.C.No.5 of 2010, the cleaner deposed that while they were proceeding in the tempo, a lorry came from the opposite direction and dashed against the tempo and due to the accident, he and the driver (first respondent) sustained

multiple grievous injuries. However, he denied lodging of complaint by him. Finally, C.C.No.5 of 2010 was ended in acquittal.

16. It is pertinent to note that while dealing with the said aspect, the Tribunal held as under:

"10. So, in this circumstances although in the FIR mentioned that, the petitioner driven the vehicle in rash and negligent manner and dashed against the lorry. It will amount to only the previous statement of cleaner. However, the above statement by the cleaner has retracted in his evidence before the criminal court. Further, the above complaint given by the cleaner and it has not been used against this petitioner to contradicting him. Further, although the 2nd and 4th respondents were contended that, the petitioner's negligent and accident happened due to his fault. However, they have not come forward to examined the driver of the lorry or the cleaner of the petitioner's van. So the respondent has not proved that the petitioner alone was negligence. At the same time, this Tribunal consider the Ex.A1 FIR, it is earliest version of the cleaner. In the FIR, the cleaner made allegation against the petitioner. That the petitioner driven the van in a rash and negligent manner and dashed against the lorry. Normally a cleaner can not be given complaint against his driver in normal circumstances. Further the cleaner already known the particulars of lorry. If it so nothing prevented the cleaner to made complaint against the lorry driver."

17. Since the complainant is the cleaner of the tempo, who travelled along with the first respondent, his earlier version assumes much importance qua his complaint. The appellant has not produced any evidence to show that the accident was solely occurred due to the negligence of the driver of the tempo i.e., the first respondent. Therefore, in the facts and circumstances of the case and also based on the evidence available on record, the Tribunal held that both the first respondent and the driver of the lorry were negligent for the accident and are in contributory negligence. Since the said finding of the Tribunal is based on oral and documentary evidence, this Court does not want to take a different view. Therefore, the contributory negligence fixed equally on the first respondent and the driver of the lorry is confirmed.

18. The next contention of the appellant is that the owner of the tempo has no valid permit to drive the same in the State

of Tamil Nadu at the time of accident and the permit is valid only in the State of Karnataka.

19. On the other hand, the learned counsel for the first respondent submitted that the consequence of driving the tempo without valid permit or in violation of permit conditions cannot be a reason to vitiate the compensation awarded by the Tribunal.

20. In Kamala Mangalal Vayani and others, supra, the Hon'ble Supreme Court held:

"6. As noticed above, the owner-cum-driver had remained ex parte. Once it was established that the vehicle was comprehensively insured with the insurer to cover the passenger risk, the burden to prove that it was not liable in spite of such a policy, shifted to the insurer. The claimants are not expected to prove that the vehicle had a valid permit, nor prove that the owner of the vehicle did not commit breach of any of the terms of the policy. It is for the insurer who denies its liability under the policy, to establish that in spite of the comprehensive insurance policy issued by it, it is not liable on account of the requirements of the policy not being fulfilled.

.....

8. The High Court committed an error in expecting the claimants to prove that the vehicle possessed a valid permit. We are of the view that there was no justification for the High Court to interfere with the judgment and awards of the Tribunal in the absence of relevant evidence.

.....

10. We make it clear that this judgment will not come in the way of the insurer proceeding against the owner and recovering the amount paid by it to the claimants, in the event of the insurer being able to establish, in any suit it may choose to file against the owner, that there was violation or breach of the conditions of the insurance policy or that the vehicle was not covered by a permit on the date of the accident."

21. Before the Tribunal, the Administrative Officer of the fourth respondent was examined as R.W.2, who deposed that at the time of accident, the owner of the tempo has no valid permit to drive the tempo in the State of Tamil Nadu. He had also produced Ex.R1-permit granted to the owner of the tempo.

22. As held by the Hon'ble Apex Court in Kamala Mangalal Vayani and others, supra, the claimants are not expected to prove that the vehicle had a valid permit, nor prove that the owner of the vehicle did not commit breach of any of the terms of the policy. In the present case, though the victim is the driver of the tempo and he must know the permit granted to the owner of the tempo, as rightly held by the Tribunal, the above contention is not necessary to the present case since it is held that the first respondent is also contributed to the negligence.

23. As far as the quantum of compensation awarded by the Tribunal is concerned, in the accident, the first respondent sustained fracture of left frontal bone with contusion; fracture of left humerus; shaft of femur left; lacerated wound over forehead 10x5x1cm and tenderness, swelling (L) patella. Exs.P2 and P3 are the wound certificates. Ex.P8 is the discharge summary issued by St. John Hospital, Bangalore, where from it is seen that the petitioner sustained (i) left arm humerus fracture on both bone fore arm left and (ii) lacerated wound over forehead - the frontal bone fracture with contusion. For that, the following treatment was given to the first respondent:

- (1) Shaft of femur left - ORIF C IL nailing
- (2) Shaft of humerus left - ORIF C plate osteosyntlais
- (3) Inferior pole of patella left - screwing
- (4) Bilateral fracture of frontal bone

24. P.W.2-Doctor examined the first respondent after the accident and issued Ex.P13-disability certificate assessing the disability at 60%. In his evidence, P.W.2 deposed that the first respondent sustained fracture on both bone of fore arm on his left hand and due to the fracture sustained, the first respondent finds difficulty in holding articles and also he was not in a position to do his normal avocation.

25. Since the first respondent sustained fracture on his left hand and also other injuries in the accident and he was not able to work as before, the learned counsel for the first respondent prayed for enhancement of the compensation. By relying upon the decisions of the Hon'ble Supreme Court in Jitendra Khimshankar Trivedi and others v. Kasam Daud Kumbhar and others, supra, and the Oriental Insurance Co. Ltd. v. Smt.Kiran and others, supra, the learned counsel for the first respondent submitted that even though the first respondent has not filed any appeal and/or cross-appeal seeking enhancement, as it is obligatory on the part of this Court to award just and reasonable compensation and it is appropriate to increase the compensation by the Court.

26. In Jitendra Khimshankar Trivedi and others v. Kasam Daud Kumbhar and others, supra, the Hon'ble Supreme Court held:

"12. The Tribunal has awarded Rs.2,24,000 as against the same, the claimants have not filed any appeal. As against the award passed by the Tribunal when the claimants have not filed any appeal, the question arises whether the income of the deceased could be increased and compensation could be enhanced. In terms of Section 168 of the Motor Vehicles Act, the courts/the Tribunals are to pass awards determining the amount of compensation as to be fair and reasonable and accepted by the legal standards. The power of the courts in awarding reasonable compensation was emphasised by this Court in Nagappa v. Gurudayal Singh, (2003) 2 SCC 274, Oriental Insurance Co. Ltd. v. Mohd. Nasir, (2009) 6 SCC 280 and Ningamma v. United India Insurance Co. Ltd., (2009) 13 SCC 710. As against the award passed by the Tribunal even though the claimants have not filed any appeal, as it is obligatory on the part of the courts/the Tribunals to award just and reasonable compensation, it is appropriate to increase the compensation."

27. Relying upon the decision of the Hon'ble Supreme Court in Jitendra Khimshankar Trivedi and others, supra, in Oriental Insurance Co. Ltd. v. Smt.Kiran and others, supra, the Bombay High Court held as under:

"8. It is clear from the above judgment that even in an appeal by the non-claimant, the claimant can indeed seek enhancement in quantum of compensation even without filing any cross-objection and it is obligatory for the appellate court to consider the same and award him the compensation which, in its opinion, is just and fair.

9. This being the law settled by Hon'ble Supreme Court, I do not think that there is any scope left out to consider the argument canvassed by learned counsel for the appellant. The argument of learned counsel for the appellant is, therefore, rejected. Accordingly, I find that the oral claim raised on behalf of the claimants seeking enhancement of compensation in the present appeal is tenable before this Court."

The aforesaid decisions of the Hon'ble Supreme Court and the Bombay High Court will squarely applicable to the case on hand.

28. Following the aforesaid two decisions, let us consider the present case. The first respondent was doing driving work at the time of accident. The fracture sustained by the first

respondent on his left hand definitely will impair him, while he driving the vehicle. The Tribunal also held so, however, it had taken the disability at 50%. P.W.2-Doctor assessed the disability at 60%. Normally, 5 to 10% would vary from Doctor to Doctor. Therefore, in the present case, the Tribunal was right in taking the disability at 50%.

29. In the claim petition, the first respondent stated that at the time of accident, he was earning Rs.7,000/- per month. In his evidence, P.W.1 deposed that he was earning Rs.10,000/- per month. In the absence of proof, the Tribunal has fixed the monthly income of the first respondent at Rs.5,000/- notionally, which in my view is very low.

30. The first respondent was 28 years of age at the time of accident and was working as a driver with a valid licence for driving heavy motor vehicles. Since the post of a driver is a skilled job, he would have earned minimum Rs.8,000/- per month. Therefore, in the present case, it would be appropriate to take the monthly income of the deceased at Rs.8,000/- per month.

31. The first respondent was doing the driver work and while driving the tempo, he had sustained fracture on his left hand. If a driver sustaining fracture on his left hand, it would be very difficult for him to perform his driver duty and there is every possibility of assumption that the first respondent was not able to perform his driver work as before and accordingly, the earning capacity of the first respondent was seriously affected. Therefore, the Tribunal was right in adopting the multiplier method.

32. As stated supra, at the time of accident, the first respondent was aged 28 years. For the age group 25 - 30, the multiplier to be adopted is "17". Adopting multiplier "17", the loss of income is calculated at Rs.16,32,000/-. Since this Court had taken the disability at 50%, the gross loss of income to the first respondent is calculated as Rs.16,32,000 x 50% = Rs.8,16,000/-.

33. As far as conventional damages are concerned, the Tribunal awarded Rs.10,000/- for pain and suffering; Rs.5,000/- for transport charges; another Rs.5,000/- for extra-nourishment and Rs.1,34,599/- for medical expenses. Since amounts awarded under the aforesaid heads are quite reasonable, the same are maintained. Thus, the total compensation is calculated at Rs.9,70,599/-. Since this Court held that both the first respondent and the driver of the lorry were negligent for the accident, the first respondent is entitled for 50% of Rs.9,70,599/- i.e., Rs.4,85,299/-, rounded off to Rs.4,85,500/-.

34. In the result, the Civil Miscellaneous Appeal is dismissed. No costs. However, the award dated 28.9.2012 passed in M.C.O.P.No.532 of 2010 on the file of the Motor Accident Claims Tribunal (Additional District Judge), Dharmapuri is modified, thereby directing the appellant to pay Rs.4,85,500/- to the first respondent with interest at the rate of 7.5% per annum from the date of claim petition till the date of deposit within a period of eight weeks from the date of receipt of a copy of this judgment. On such deposit, the first respondent is permitted to withdraw the same on filing application before the Tribunal. The first respondent is directed to pay the requisite amount of court fee within a period of one month from the date of this judgment. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (CS-IV)

//True Copy//

Sub Assistant Registrar

vs

To

1.The Motor Accident Claims Tribunal,
Additional District Judge,
Dharmapuri.

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

+1cc to Mr.S.Sathiaseelan, Advocate, S.R.No. 8067

+1cc to Mr.T.Chandran, Advocate, S.R.No. 7486

C.M.A.No.808 of 2015 and
M.P.No.1 of 2015

MR(CO)
GN(12/06/2019)

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