

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Orders Reserved on 07.08.2019	Orders Pronounced on 06.09.2019
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CORAM:

THE HON'BLE MRS JUSTICE S. RAMATHILAGAM
Civil Miscellaneous Appeal No.1843 of 2018

1. A.Anandhi
2. Minor Santhosh
3. Minor Ganesh ..Minors rep by their
mother and next friend
Smt.Anandhi
4. Kullamma
5. Subramani .. Appellants/Petitioner

..vs..

1. M/s.Saleth Mary Cattle Feeds and Poultry
represented by its Authorized Signatory
Redhills, Chennai-52.
2. Bajaj Allianz General Insurance Co. Ltd.,
Divisional Office, Prince Towers,
College Road, Nungambakkam
Chennai.
3. Asha Rajesh Agarwal
4. ICICI Lombard General Insurance Co. Ltd.,
Divisional Office, Chottabai Centre
No.148, 3rd Floor, Nungambakkam High Road
Chennai.

... Respondents/Respondents

Civil Miscellaneous Appeal filed under Section 173 of the
Motor Vehicles Act, 1988, against the judgment and decree, dated
09.09.2004 made in MCOP No.778 of 2008 on the file of the Motor
Accident Claims Tribunal, Principal District Court, Vellore.

For Appellants : Mr.P.R.Thiruneelakandan
For Respondent-1 : Mr.P.V.Sanjeev
For Respondent-2 : Mr.J.Michael Visuvasam
Respondent-4 : No appearance

J U D G M E N T

Civil Miscellaneous Appeal has been filed by the claimants, aggrieved against the judgment dated 09.09.2004 made by the Tribunal in MCOP No.778 of 2008.

2. The brief facts leading to the claim application is that on 06.11.2008 at about 4.30 hours, when the deceased was travelling in the mini-lorry bearing Registration No.TN-20-AW-3317 owned by the first respondent and the deceased was accompanying a poultry feed load from the factory to Sholingur, the driver of the said mini-lorry while he was nearing the Bridge on NH-205 road at Kudur, he dashed the same behind another lorry bearing Registration No.CG-04-J-7212 and as a direct result, the deceased sustained fatal injuries and died on the spot. The claimants contended that the first respondent is the owner of the mini-lorry and the second respondent is the insurer of the mini-lorry, third respondent is the owner of the lorry and the fourth respondent is the insurer. The claimants contended that all the respondents are jointly, severally and vicariously liable to pay compensation and they made a claim of Rs.25 lakhs under various heads as loss of life, loss of love and affection, loss of earning, loss of estate and other related heads.

3. The second respondent, owner of the mini-lorry denied the mode of accident as well as denied the valid driving licence held by the driver Subramani. Further, the second respondent also contended that the deceased was covered under ESI Act and Section 53 of the ESI Act says the bar against receiving or recovering of compensation or damages under any other law and therefore, the second respondent contended that he is not liable to pay compensation to the petitioners and sought for dismissal of the claim application.

4. The fourth respondent also denied the mode of accident alleged by the claimants and contended that the alleged accident occurred only due to the driver of the mini-lorry and the First Information Report was registered against the driver of the mini-lorry and as such, only the first and second respondents are liable to pay the compensation.

5. The Tribunal, after analysing the evidence and documents placed before the same by both, has given a finding that the accident occurred during the course of employment and the wife of deceased also gave a petition to get compensation from ESI and in that aspect, the petitioner side evidence and also the respondent side evidence were all observed by the Tribunal, especially the evidence of RW.1, who has stated that a

petition was given to them and if the employer submits relevant papers, then ESI will give compensation to the deceased family and hence, the Tribunal discussed the provisions under Section 61 of the ESI Act by verifying the fact that the deceased suffered injuries during the course of employment and the claim application under Section 166 of the Motor Vehicles Act is not maintainable and the petitioners are at liberty to approach the ESI Corporation for the relief under ESI Act. Hence, the said claim application was dismissed. Aggrieved against the said order, the claimants have preferred this appeal.

6. In the grounds of appeal, the appellants contended that when the Tribunal has given a finding that the deceased Arul died on the road accident due to the rash and negligent driving on the part of the first respondent/driver, the Tribunal ought to have awarded compensation under the Motor Vehicles Act. The Tribunal also has given a finding that the deceased was a worker and the lorry bearing registration No.TN-20-AW.3317 involved in the accident belongs to the first respondent and the accident occurred in the National Highways, therefore the order of the Tribunal in rejecting the claim application is illegal.

7. The appellant also relied on a decision reported in AIR 1992 Madras 223 (Mangalam and others ..vs.. Express Newspaper Limited) by stating that the purpose of the ESI Act is to safeguard the employer from funding more than one claim in relation to the same accident, whereas the Tribunal without considering the object, rejected the claim of the appellants/claimants. Further, the grievance of the appellants is that they have not received any compensation under ESI Act and therefore, they are entitled to maintain the claim under Section 166 of the Motor Vehicles Act and there is no bar under Sections 53 and 61 of the ESI Act. Further contentions made by the appellants is that the liability in a road accident is governed by Motor Vehicles Act, whereas the liability and the responsibility of the employer and employee is governed under the ESI Act and the only bar created under the ESI Act Sections 53 and 61 is that the workman should not receive more than one compensation under the aforesaid enactment. Hence, the appellants sought for setting aside the order of the Tribunal and remanded the case to decide the quantum of compensation and the liability on merits.

8. Heard both sides and perused the materials available on record.

9. On hearing both sides and on perusal of the records, it is observed that as per the claimants, the accident occurred on 06.11.2008 at about 4.30 hours, while the deceased was travelling in the mini-lorry owned by the first respondent and

the driver of the said mini-lorry dashed behind another lorry bearing registration No.TN-20-AW-3317. Hence, the accident occurred due to the rash and negligent driving of the drivers of both the vehicles. The second respondent denied the liability and throws it on the third respondent. The third respondent denied the liability and throws it on the first respondent. First Information Report is registered against the driver of the mini-lorry, in which the deceased was travelling.

10. On the side of the claimants, three witnesses were examined and Exs.P1 to P15 were marked and on the side of the respondents, RW.1 to RW.4 witnesses examined and Exs.R1 to R7 were marked.

11. PW.2 is the eye-witness, who deposed before the Tribunal that the accident occurred due to the rash and negligent act of the first respondent driver and in support, First Information Report was also filed by him and for the First Information Report, a complaint is given by one Jeyapaul, against the driver of the lorry bearing registration No.TN-20-AW-3317. The second respondent contended before the Tribunal that the deceased, who was working as a Supervisor in the Agricultural and Poultry Firm, travelling in the mini-lorry, which belongs to the first respondent company and the deceased was a worker in the first respondent company and he was also accompanying the poultry feed load from the factory to Sholingur and these facts are reflected in the First Information Report (Ex.P1). Ex.P4 is also the document-death report of the deceased, which stated that the deceased was Supervisor in S.M. Feeds and Ex.P7, which is a document, i.e., the bill of "Suguna Chicken". It says that there is one Poultry Firm, by name "Suguna Poultry" and Ex.P14 is the "Attendance Register", which shows that the deceased Arul was a worker in the first respondent firm. PW.3, who is also the Branch Manager of the first respondent firm confirmed the same and the accident occurred on 06.11.2008 while he was on duty was admitted by PW.3. The driver of the said lorry was also employed under the first respondent company. So, the observation made by the Tribunal is that the accident occurred during the course of employment and the wife of the deceased also gave application to the ESI and the same was admitted by both PW.1 and RW.1 and the provision under Section 53 of the ESI Act came under picture when both the petitioner as well as respondent confirmed the fact that the deceased died due to the accident while he was under employment and he is also working under first respondent and the vehicle also belongs to first respondent. The petitioners can claim compensation only from ESI and not entitled for any claim before the Tribunal. Based on the above said rival contentions that the deceased was an employee under first respondent and he met with the accident while he was under

employment and there is also a petition pending before the ESI Court for consideration and observing all these facts, a direction was given by the Tribunal by stating that "Therefore, I observed that ESI Corporation will consider the claim of the petitioner in accordance with law without raising any objection to the delay, since the petitioners were prosecuting the claim before a wrong forum and hence, the claim application is not entertained before the Tribunal and dismissed the same." The appellants, who are very much aggrieved by the said order, have contended that Section 53 has no bar the claim under Section 166 of the Motor Vehicles Act against the stranger, tort-feaser, but bars the claim against the employer under any other law. The claim of the appellants is that bar under Section 53 of the ESI Act is vacated and the matter is remitted back to the Tribunal for fresh disposal. The above said decision is arrived in the case relied on by the appellants in CDJ 2009 Kerala High Court 126 (Kuriakose ..vs.. Santhosh Kumar). The appellant also relied upon another case in CDJ 2010 Kerala High Court 307 (Shridevi & Others ..vs.. S.Sarojini & Another), in which it says provision under Section 53 would come to compensation of the claim only against the employer of the deceased. In the said case, the petition was filed by the dependents of the deceased on the ground that the deceased is an employee covered under ESI Act, they sought for compensation under ESI Act and not under Motor Vehicles Act. Here, in this case, the accident occurred in the course and out of employment and petitioners have not made any claim against the employer in the petition and the claim is against the offending lorry and the insurer of the lorry. Further, in the said case, the provisions under Section 53 of the ESI Act would not come in the way since the claim application has been made against the insurer of the offending vehicle on the ground that the deceased is the third party.

12. The other case reported by the appellants/claimants is Rajasthan High Court "Oriental Insurance Company Limited ..vs.. Mohan Kanwar and others" (2007 ACJ 420). In the said case, the Hon'ble High Court has clearly pointed out the principle behind the provisions of Section 53 of the ESI Act that the employer be not vexed twice in relation to the same accident. The facts of the case in other decision of Madras High Court in P.Saraswathi Mohan, 1982 ACJ (Supp.) 249 (Madras) are not given and it is not borne out if the claim was sought to be maintained against the employer or not. However, the said decision only refers to the ration in Mangalam's case 1982 ACJ (Supp) 203 (Madras) and not beyond.

13. On the other hand, first respondent relied upon the case reported in 1997 (7) SCC 638, in which Section 53 and 61 and 2(8) under Section 53 were discussed and object of Section 53 is stated that "to save the employer from funding more than

one claim in relation to the same extent". In the said case, the claim of the respondent for damages was barred under Section 53 of the ESI Act, the trial Court was right in dismissing the application under Order 33 Rule 1 CPC.

14. 2009 (13) SCC 361 (National Insurance Company Limited ..vs.. Hamida Khatoon and others) speaks about applicability of bar under Section 53.

15. In 1996 (4) SC 255 (A.Trehan ..vs.. Associated Electrical Agencies and another), reference made regarding the case "(Mangalamma ..vs.. Express Newspaper Limited)". The relevant paragraph is extracted hereunder:-

"15. The Madras High Court in Mangalamma ..vs.. Express Newspaper Limited (AIR 1982 Mad 223 : 1982 (1) MLJ 149), the Karnataka High Court in K.S.Vasantha ..vs.. Karnataka SRTC (1982 (60) FJR 118 (Kant) and Annapurna ..vs.. G.M., Karnataka SRTC (1984 Lab IC 1355: 1984 ACJ 238) have considered the effect of the bar created by Section 53 of the ESI Act with respect to the claim for compensation made under the Motor Vehicles Act for injuries received because of an accident arising out of and in the course of employment. In our opinion, the view taken by those High Courts with respect to the object of Section 53 of the ESI Act and the nature and the effect of the bar created by it appears to be correct."

16. On the side of the respondents, judgments were relied upon regarding bar under Section 53.

17. Here, in the instant case, the claimants have clearly deposed that they have preferred a claim before the first respondent and the first respondent also admitted the fact that it is pending. Hence, the finding of the Tribunal is that since the claim is made before the concerned authority and it is for the claimants to avail the relief before the said authority and the finding is also in that way. But when the appellants/claimants are sought for clarification regarding the direction given by the Tribunal and also the status of the claim made before the ESI, the appellants have not furnished any details regarding the claim made before the ESI. The finding of the Tribunal is that "Therefore, it is crystal factor that the accident was occurred during the course of employment. On the basis of that, the wife of the deceased gave a petition to get compensation from ESI and the same was accepted by PW.1. Not only PW.1, but also RW.1, who is Branch Manager of ESI

Corporation, Vellore, accepted that a petition was given to them and also stated that if the employer submit relevant documents, then ESI will compensate to the deceased family." So, in this aspect, the appellant/claimants have not furnished any details regarding the claim made before the ESI, when it is the clear evidence of RW.1, who has stated that if the employer has submitted relevant documents, then the ESI will give compensation to the deceased family. Based on the said evidence, which reveal the status of the claim application made by the appellants/ claimants, the observation of the Tribunal is that the direction is given that the ESI Corporation to consider the claim of the petitioners/claimants in accordance with law. This order was passed on 09.09.2014. But the appellants have not furnished any details regarding the status of the said claim made before the ESI and also the order passed in the year 2014. Hence, in the absence of any further details regarding pendency, the Civil Miscellaneous Appeal is not maintainable.

18. So, it is for the appellants/claimants to furnish the details whether they have furnished the documents required by the ESI for the grant of compensation, since RW.1 has assured that if the relevant papers are submitted, it will be considered. Hence, in the absence of any details regarding the disposal of the claim before the ESI, the appeal filed by the appellants does not require any consideration and the Civil Miscellaneous Appeal is dismissed. The order and decreetal order, dated 09.09.2004 made in MCOP No.778 of 2008 on the file of the Motor Accident Claims Tribunal, Principal District Court, Vellore, are hereby confirmed. No costs.

-s/d-
Assistant Registrar

True Copy

सत्यमेव जयते Sub-Assistant Registrar

Mra

To

1. Motor Accident Claims Tribunal, Principal District Court,
Vellore.

2. The Section Officer, V.R.Section, Madras High Court,
Chennai 104

+1 cc to Mr.Michael Visuvasam Advocate sr77248

+1 cc to Mr.Sanjeev Advocate sr77030

Pre-delivery Order in
C.M.A.No.1843 of 2018

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