IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 12.03.2020

CORAM:

THE HONOURABLE MS.JUSTICE V.M.VELUMANI

C.M.A. No. 260 of 2006

Selvamani .. Appellant/Petitioner

Vs.

1.C.S. Jayanandam
2.United India Insurance Co. Ltd.,
rep. By its Branch Manager,
235, Gandhi Market Road,
Arni. .. Respondents/Respondents

Prayer: This Civil Miscellaneous Appeal is filed under Section 173 of the Motor Vehicles Act, 1988, against the Judgment and Decree dated 06.12.2004 made in M.C.O.P. No. 194 of 2002 on the file of the Sub Court, (Motor Accident Claims Tribunal), Arni.

For Appellant : Mr. P. Satheesh Kumar

For Respondents: Mr. J. Michael Visuvasam (For R2)
R1-Exparte

J U D G M E N T

This Civil Miscellaneous Appeal has been filed challenging the portion of the award exonerating the 2nd respondent-Insurance Company from its liability as well as for enhancement of the compensation granted by the award dated 06.12.2004 made in M.C.O.P. No. 194 of 2002 on the file of the Sub Court, (Motor Accident Claims Tribunal), Arni.

2.The appellant is the claimant in M.C.O.P. No. 194 of 2002 on the file of the Sub Court, (Motor Accident Claims Tribunal), Arni. He filed the above said claim petition, claiming a sum of Rs.1,50,000/- as compensation for the injuries sustained by him in the accident that took place on 17.08.2001.

3.According to the appellant, on the date of accident, viz., 17.08.2001 at about 11.30 p.m., while he was driving the Goods Lorry bearing Registration No. TN-23A-2340, belonging to the 1st respondent, after unloading the cement bags, towards Vellore, near Sathumadurai Village E.B. Sub Station, two vehicles coming in the opposite direction were attempting to overtake each other with glaring head lights. The appellant, unable to see the road, in order to avoid collusion, swerved the Goods Lorry to the left side of the road and dashed against the tamarind tree and caused the accident. In the accident, the appellant sustained injuries and filed the claim petition before the Tribunal claiming compensation against the respondents.

4.The 1st respondent remained ex-parte before the Tribunal.

5.The 2nd respondent-Insurance Company filed counter statement and denied various averments made by the appellant in the claim petition. According to the 2nd respondent, the accident occurred due to negligence on the part of the appellant and hence, the 2nd respondent is not liable to indemnify the 1st respondent/owner of the Lorry. There is collusion between the appellant and 1st respondent/owner. The 2nd respondent also denied the age, avocation, income, injuries sustained and treatment taken by the appellant and prayed for dismissal of the claim petition.

6.Before the Tribunal, the appellant examined himself as P.W.1 and examined one Doctor as P.W.2 and marked 5 documents as Exs.P1 to P5. The respondents examined one Jeyapal as R.W.1 and marked 2 documents as Exs.R1 & R2.

7.The Tribunal, considering the pleadings, oral and documentary evidence, held that the accident occurred due to rash and negligent driving by the appellant-driver of the Goods Lorry belonging to the first respondent and and directed the 1st respondent to pay a sum of Rs.43,466/- as compensation to the appellant and exonerated the 2nd respondent-Insurance Company.

8.Challenging the portion of the award exonerating the 2nd respondent-Insurance Company from its liability as well as for enhancement of the compensation granted by the award dated 06.12.2004 made in M.C.O.P. No. 194 of 2002, the appellant has come out with the present appeal.

9.Learned counsel appearing for the appellant contended that the Tribunal failed to appreciate the fact that only to avoid collusion with on coming Lorry, the appellant turned the Goods Lorry to the left side, which resulted in dashing against the tree. The Tribunal failed to see that there was no fault on the part of the appellant. The Tribunal having found that the appellant is entitled to compensation, erred in directing the 1st respondent alone to pay the compensation, instead of directing the 2nd respondent-Insurance Company to pay the compensation. The Tribunal failed to appreciate the oral and documentary evidence let in by the appellant in proper perspective. The Tribunal ought to have awarded entire sum of Rs.1,50,000/-, as claimed by the appellant instead of awarding only a sum of Rs.43,466/-. The Tribunal erred in reducing the disability assessed by the P.W.2 - Doctor to 25% when P.W.2 - Doctor has assessed the disability at 35%. The Tribunal erred in not awarding any amount towards loss of earning, partial loss of earning and for loss of earning power. The sum of Rs.3,000/- awarded by the Tribunal for pain and suffering is meagre. The Tribunal ought to have awarded amounts as claimed by the appellant. In any event, the Tribunal ought to have directed the 2nd respondent to pay the compensation as per the provisions of the Workmen's Compensation Act, 1923, as insurer of the vehicle. In support of his contentions, he relied on the following judgments:

(1) 2002 (3) CTC 633 (SC) [Pramodkumar Rasikbhai Jhaveri Vs. Karmasey Kunvargi Tak and others]:

> "8.......The question of contributory negligence arises when there has been some act or omission on the claimant's part, which has materially contributed to the damage caused, and is of such a nature that it may properly be described as 'negligence'. Negligence ordinarily means breach of a legal duty to care, but when used in the expression 'contributory negligence' it does not mean breach of any duty. It only means the failure by a person to use reasonable care for the safety of either himself or his property, so that he becomes blameworthy in part as an 'author of his own wrong'.
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> ....
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> 10.It has been accepted as a valid principle by various judicial authorities that where, by his negligence, if one party places another in a situation of danger, which compels that other to act quickly in order to extricate himself, it does not amount to contributory negligence if that other acts in a way, which with the benefit of hindsight, is shown not to have been the best way out of the difficulty. In Swadling v. Cooper, 1931 A.C. 1 at page 9, Lord Hailsham said:
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> > 'Mere failure to avoid the collision by taking some extraordinary precaution does not in it self constitute negligence: the plaintiff has no right to complain if in the agony of the collision the defendant fails to take some step which might have prevented a collision unless that step is one which a reasonably careful man would fairly be expected to take in the

circumstances.'"

(2) Judgment of this Court dated 06.11.2014 made in C.M.A. No. 2825 of 2005 [National Insurance Co. Ltd., Vs. Manjula and others]:

> "5. From the above, it is clear, left with no other option, out of necessity and to avert the accident, the deceased tried to take the vehicle on the left side of the road. This Court, in similar circumstances, in New India Assurance Co. Ltd. v. Manimaran & Anr. reported in 2008 (2) TN MAC 137 has held that in order to avert accident with lorry coming from opposite direction negligently and rashly, the victim turned his vehicle to the left side of road and vehicle dashed against a tree and the accident is not due to any negligence of the victim and that victim is only a driver and he could be termed as third party as per policy is concerned and get compensation against the insured as well as the insurer. Para 17 of the said judgment is extracted as follows -
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> > 17. The case law relied on by the learned counsel for the petitioner would be relevant for deciding the liability to pay compensation, had the Insurance Company obtained the leave of the Court under Section 170 of the Act. The Insurance Company is statutorily prohibited from taking up the defence, otherwise provided under Section 149(2) of the Motor Vehicles Act. Pleadings and evidence disclose that the petitioner is not the owner of the vehicle and the second respondent in this Appeal is the owner of the vehicle. Therefore, the first respondent/claimant is a third party in so far as the policy is concerned and he can seek for a just and reasonable compensation against the insured as well as the Insurer."

(3) 2008 (2) TN MAC 137 [New India Assurance Co. Ltd., Vs. Manimaran and another]:

> "10.It is well settled that FIR is not an encyclopedia and merely based on FIR, negligence cannot be fastened. FIR in accident cases is often lodged in a haste manner and the same cannot be substituted for evidence to be let in by the parties before the Tribunal. It is the duty of the

Tribunal to assess the evidence both oral and documentary to render a finding on negligence. It is the case of the claimant that in order to avert an accident, he was constrained to turn the vehicle on the left side of the road, which resulted in the accident and it was not due to any negligence. The said statement is corroborated by P.W.2.

11..... the Insurance Company cannot have a wider defence on merits than what is available to it by way of statutory defence. It is true that the claimants themselves had joined first respondent-Insurance Company in the claim petition, but that was done with a view to thrust the statutory liability on the Insurance Company on account of the contract of the Insurance. That was not an order of the Court itself permitting the Insurance Company which was impleaded to avail of a larger defence on merits on being satisfied on the aforesaid two conditions mentioned in Section 170.......

....

17.The case law relied on by the learned counsel for the petitioner would be relevant for deciding the liability to pay Compensation, had the Insurance Company obtained the leave of the Court under Section 170 of the Act. The Insurance Company is statutorily prohibited from taking up the defence, otherwise provided under Section 149 (2) of the Motor Vehicles Act. Pleadings and evidence disclose that the petitioner is not the owner of the vehicle and the second respondent in this Appeal is the owner of the vehicle. Therefore, the first respondent/claimant is a third party in so far as the policy is concerned and he can seek for a just and reasonable Compensation against the insured as well as the insurer."

10.Per contra, the learned counsel appearing for the 2^{nd} respondent-Insurance Company contended that the appellant has filed claim petition under Section 166 of the Motor Vehicles Act, 1988 and appellant has to prove the negligence on the part of the 1^{st} respondent to claim the compensation from the respondents. In the present case, the appellant himself has stated that he dashed against the tamarind tree and due to that, the accident has occurred. The Tribunal has held that the appellant was responsible for the accident and therefore, the 2^{nd} respondent is not liable to pay compensation on behalf of the 1^{st} respondent, the insured, as the 2^{nd} respondent is liable to indemnify the 1st respondent for his liability to the 3rd party and prayed for dismissal of the appeal.

11.Heard the learned counsel appearing for the appellant as well as the 2nd respondent and perused the materials available on record.

12.It is the contention of the appellant that he was employed by the 1st respondent as Driver and while he was driving the Goods Lorry belonging to the 1st respondent in the course of employment, the accident has occurred. According to the learned counsel appearing for the appellant, the appellant swerved the Goods Lorry in order to avoid hitting by the on coming Lorry with bright headlight and dashed on the tamarind tree and caused the accident. The accident occurred only due to the negligence of the on coming Lorry. The learned counsel appearing for the appellant relied on the judgment of this Court dated 06.11.2014 made in C.M.A. No. 2825 of 2005 and contended that when the accident is due to negligence on the part of the other vehicle and claimant has dashed on the tree, claimant is entitled to claim compensation and therefore, the 2nd respondent is liable to pay compensation. The said judgment will not apply to the facts of the present case. As the appellant has filed claim petition under Section 166 of the Motor Vehicles Act, 1988, he has to prove the negligence on the part of the 1st respondent or when the negligence is on the part of the on coming vehicle, he ought to have impleaded the Driver, owner and insurer of the on coming vehicle. The Tribunal considering the oral and documentary evidence, held that the appellant is responsible for the accident. The reasoning of the Tribunal is valid. At the same time, the Tribunal has directed the 1st respondent alone to pay the compensation as the 1st respondent is employer of the appellant. The said finding is erroneous as the Tribunal has failed to consider the scope of insurance policy issued by the 2nd respondent to the 1st respondent. The Tribunal failed to consider that policy of insurance is a policy of contract between the insurer and insured and as per the contract, the 2nd respondent is liable to pay compensation on behalf of the insured employer to his employees involved in the accident. The scope of the insurance policy was considered by two Division Benches of this Court and it has been held as follows:

In the judgment of the Division Bench of this Court reported in 2015 (2) TNMAC 362 (DB) [M. Anbalagan vs. K.M. Asalm Basha], it has been held as follows:

> "6. Relying upon two decisions of the Supreme Court one in Oriental Insurance Company Limited vs. Dyamavva and others, reported in 2013 (1) TN MAC 161(SC) and another in Ramachandra vs. Regional Manager (2013(2) TN MAC 304 (SC)), it is contended by Mr.M.Swamikannu, the learned counsel

for the appellant that the choice of the forum cannot actually deprive the victim of compensation. Therefore, the learned counsel contended that if a person is entitled to claim compensation in terms of the Employees' Compensation Act, 1923, he cannot be deprived of compensation under the Motor Vehicles Act, 1988.

7. We have carefully considered the above submissions. But we are unable to sustain the said argument in total.

8. It is true that the victim is entitled to choose any one of the two fora, depending upon the benefits that he may get before either of them. But in so far as the claim under the Motor Vehicles Act, 1988 is concerned, the claimant should establish that he was entitled to approach the Court under Section 166 and that he was not himself a tort-feasor. This question played a vital role in distinguishing the claim made under the Motor Vehicles Act from the claim made under the Employees' Compensation Act, 1923.

9. However, as rightly contended by the learned counsel for the second respondent, this Court is empowered to award compensation as payable under the Employees' Compensation Act, 1923. In Oriental Insurance Company Vs. Kaliya Pillai and another, reported in 2003-1-L.W.113, a Division Bench of this Court held that the aggrieved or interested person can make a claim for compensation either under the Workmen's Compensation Act or under the Motor Vehicles Act. The only bar is that the claim cannot be made under both the Acts.

10. The Division Bench pointed out that the insurer's liability is to be determined not only with reference to the provisions of the Motor Vehicles Act, but also with reference to the contract of insurance. Therefore, the Division Bench held that the compensation as payable under the Workmen's Compensation Act, could at least be awarded.

11. A similar view was taken by yet another Division Bench of this Court in the Oriental Insurance Co., Ltd., vs. Krishnan and others, reported in 2003-2-L.W.73. Therefore, even if the appellant is not entitled to make a claim, as a third party, under Section 166 of the Motor Vehicles Act, he can at least make a claim under the Employees' Compensation Act, 1923.

12. Coming to the quantum of compensation that should be awarded, at least under the Employees Compensation Act, 1923, it is seen from the pleadings and the evidence on record that the appellant was aged 38 years on the date of the accident. Therefore, the relevant factor under Schedule-IV to the Employees' Compensation Act, 1923, is 189.56.”

13.The said judgment is squarely applicable to the facts of the present case. On an earlier occasion, another Division Bench of this Court in the judgment reported in 2002 (4) CTC 469 in the Oriental Insurance Co. Ltd. vs. Kaliya Pillai and 2 others, has held as follows:

“7. As per Section 3 of the Workmen's Compensation Act, undoubtedly the employer is liable to pay compensation in respect of personal injury or death caused to a workman by accident arising out of and in the course of his employment in accordance with the provisions of Chapter II. Section 4 provides how the amount of compensation is to be determined. As per sub-section (1) of Section 4A, compensation under section 4 shall be paid as soon as it falls due. It is not disputed that for arriving at a just compensation in case of permanent disablement and death the factors that are provided under Schedule IV of the Workmen's Compensation Act have to be taken note of. Though the claimants have produced salary certificate-Ex.P-4, the owner of the tractor who issued the said certificate though he is a party (first respondent in O.P.No.171/98) has not chosen to examine himself to substantiate the contents of Ex.P-4. However, in the light of Ex.P-6 Driving licence to drive tractor and trailer and considering the fact that the deceased died while driving the tractor, it would be proper to hold that he would have earned Rs.2000/- per month as a driver of a tractor. By applying the formula prescribed under Schedule IV, we fix the compensation of Rs.2,16,000/-. The procedure and method adopted above has not been disputed.”

14.As per the contract of insurance, the insurer is liable to pay the compensation to the employee of insured, as per the provisions of the Workmen's Compensation Act. In both the judgments, the Division Bench of this Court granted compensation under Workmen's Compensation Act, 1923, even though it was held that the claimants therein were not entitled to compensation under the provisions of Motor Vehicles Act. The compensations were awarded by this Court in the appeals itself instead of directing the claimants therein to approach the authority under Workmen Compensation Act. In view of the above two judgments, the 2nd respondent as insurer of the vehicle belonging to the 1st respondent is liable to pay the compensation to the appellant who is the employee of 1st respondent. The portion of the award holding that the 1st respondent alone is liable to pay compensation is set aside and the 2nd respondent is directed to pay the compensation to the appellant.

15.In the above two judgments, the Division Bench of this Court has granted compensation as per the provisions of the Workmen's Compensation Act, 1923, in the claim petition filed under Sections 166 and 167 of the Motor Vehicles Act, 1988. The ratio in the above two judgments is squarely applicable to the facts of the present case. The appellant is entitled to compensation as per the provisions of the Workmen's Compensation Act, 1923. Hence, the amounts awarded by the Tribunal under different heads are set aside.

16.The calculation of compensation payable to the employee or the legal heirs of the deceased employee is as per Section 4 of the Workmen's Compensation Act, 1923. As per Section 4(1) of the said Act, the salary could be taken into account for calculating compensation and in case of permanent total disability resulting from the injury, 60% of salary received by him is to be taken for calculation. In the present case, the appellant had stated in the claim petition that he was working as a Driver under the 1st respondent and was earning a sum of Rs.6,000/- per month. The 1st respondent remained exparte before the Tribunal and there is no contra evidence let in to disprove the income earned by the appellant. At the same time, the appellant failed to produce any material to prove his income. In such circumstances, it is for this Court to fix the notional income of the appellant. The accident is of the year 2001. The appellant was working as a Driver and as per the Minimum Wages Act, a sum of Rs.3,013.50/- per month is fixed as notional income of the appellant. The factor to be applied for calculation of the compensation is mentioned in explanation 1 to proviso to Section 4(1) of the Workmen's Compensation Act, 1923.

As per the said explanation 1, the relevant factor means the factor mentioned in the second column of Schedule IV against the entry in the 1st column with regard to the age of the injured claimant. The appellant has mentioned his age in the claim petition as 30 years. As per the IV Schedule of the Employees Compensation Act, 1923, for 30 years, the factor is 207.98. In the accident, the appellant suffered grievous injuries and P.W.2 – Doctor assessed the percentage of disability as 35%. The Tribunal rightly reduced the percentage of disability to 25% on the ground that P.W.2 – Doctor is not the Doctor who treated the appellant. Hence, applying the factor mentioned in IV Schedule and taking into consideration 60% of the amount fixed by this Court, the amount awarded by the Tribunal towards disability is modified to Rs.94,012.15/- (Rs.3013.50/- x 60% x 207.98 x 25%), rounding off to Rs.94,013/-. The amounts awarded by the Tribunal towards medical expenses is just and reasonable and the same is hereby confirmed.

17.The compensation is being granted under Workmen Compensation Act and therefore, the appellant is not entitled to any compensation under other conventional heads. Thus, the compensation awarded by the Tribunal is modified as follows:

S. No	Description	Amount awarded by the Tribunal (Rs.)	Amount awarded by this Court (Rs.)	Award confirmed or enhanced or granted
1.	Pain and suffering and extra nourishment	5,000/-	-	Set aside
2.	Grievous injuries	11,000/-	-	Set aside
3.	Disability	25,000/-	94,013/-	Enhanced
4.	Loss of income	2,000/-	-	Set aside
5.	Medical expenses	466/-	466/-	Confirmed
	Total	43,466/-	94,479/-	Enhanced by Rs.51,013/-

18.In the result, this Civil Miscellaneous Appeal is allowed and the compensation awarded by the Tribunal is enhanced from Rs.43,466/- to Rs.94,479/- together with interest at the rate of 12% per annum from the date of petition till the date of deposit.The second respondent-Insurance Company is directed to deposit the award amount now determined by this Court, along with interest and costs, within a period of six weeks from the date of receipt of a copy of this judgment. On such deposit, the appellant is permitted to withdraw the award amount along with interest and costs, after adjusting the amount, if any, already withdrawn, by filling necessary applications before the Tribunal. The appellant is directed to pay the court fee, if any, on the enhanced amount of Rs.51,013/-. The 1st respondent is permitted to withdraw the amount, if any lying in the deposit to the credit of M.C.O.P. No. 194 of 2002 on the file of the Sub Court, (Motor Accident Claims Tribunal), Arni, if the amount has already been deposited by him. No costs.

Sd/-
Assistant Registrar(Audit)

//True Copy//

Sub Assistant Registrar

gsa

To

1.The Subordinate Judge,
(Motor Accident Claims Tribunal),
Arni.

2.The Section Officer,
VR Section,
High Court, Madras.

+1cc to Mr.P.Satheesh, Advocate, S.R.No.22035
+1cc to Mr.J.Michael Visuvasam, Advocate, S.R.No.22239

C.M.A. No. 260 of 2006

CA(CO)
CB(01/09/2021)