

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 05.10.2020

CORAM:

THE HONOURABLE MS.JUSTICE V.M.VELUMANI

C.M.A. No.3267 of 2010
and M.P. No. 1 of 2010

M/s. ICICI Lombard General,
Insurance Co. Ltd.,
No.140, Nungambakkam High Road,
'Chottabi Centre' III Floor,
Nungambakkam, Chennai 600 034 ... Appellant/3rd Respondent

Vs.

1.V.Gopalakrishnan ...1st Respondent/Claimant
2.S.Jayasankar ...2nd Respondent/1st Respondent
3.K.Gopal ...3rd Respondent/2nd Respondent
(R2 & R3 were set exparte before the Tribunal)

Prayer: This Civil Miscellaneous Appeal is filed under Section 173 of Motor Vehicles Act, 1988, against the award dated 11.05.2010, made in M.C.O.P. No.9 of 2010, on the file of the Chief Judicial Magistrate, (Motor Accident Claims Tribunal), Erode.

For Appellant : Mrs. R. Sree Vidya

RR 1 to 3 : Not Ready in Notice

J U D G M E N T

The matter is heard through "Video Conferencing".

This Civil Miscellaneous Appeal has been filed against the award dated 11.05.2010, made in M.C.O.P. No.9 of 2010, on the file of the Chief Judicial Magistrate, (Motor Accident Claims Tribunal), Erode.

2.The appellant is the 3rd respondent in M.C.O.P. No.9 of 2010, on the file of the Chief Judicial Magistrate, (Motor Accident Claims Tribunal), Erode. The 1st respondent/claimant filed the said claim petition, claiming a sum of Rs.4,00,000/- as compensation for the injuries sustained by him in the accident that took place on 26.07.2006.

3. According to the 1st respondent, he was employed by the 3rd respondent and he travelled in the vehicle driven by the 2nd respondent as a Cleaner. The accident occurred due to rash and negligent driving by the 2nd respondent. In the accident, he sustained grievous and multiple injuries. Hence, he filed claim petition claiming compensation against the appellant as insurer of the vehicle belonging to the 3rd respondent and respondents 2 and 3 as Driver and Owner of the offending vehicle respectively.

4. The respondents 2 and 3 remained exparte before the Tribunal.

5. The appellant-Insurance Company filed counter statement and contended that the 1st respondent is not an employee of the 3rd respondent and he travelled in the vehicle as an unauthorized passenger. The 3rd respondent has not paid any additional premium for Loadman and prayed for dismissal of the claim petition.

6. Before the Tribunal, the 1st respondent examined himself as P.W.1 and examined Dr. Duraisamy as P.W.2 and marked 10 documents as Exs. P1 to P10. The appellant examined Jayaprabha, their Official as R.W.1 and marked 3 documents as Exs. R1 to R3.

7. The Tribunal considering the pleadings, oral and documentary evidence and the arguments on both sides, held that the accident has occurred only due to rash and negligent driving by the 2nd respondent, the 1st respondent as employee of the 3rd respondent can claim compensation either under the Motor Vehicles Act or under the Workmen Compensation Act, further held that the respondents 2 and 3 and appellant are jointly and severally liable to pay compensation and awarded a sum of Rs. 2,67,800/- as compensation to the 1st respondent for the injuries sustained by him in the accident.

8. Against the said award dated 11.05.2010, made in M.C.O.P. No.9 of 2010, the appellant-Insurance Company has come out with the present appeal.

9. Learned counsel appearing for the appellant-Insurance Company contended that the Tribunal failed to see that the 3rd respondent did not pay additional premium for the Loadman. The 3rd respondent failed to produce original Insurance Policy and Tribunal ought to have drawn adverse inference against the 3rd respondent. The Tribunal failed to consider the letter written by the 3rd respondent. The Tribunal having held that the 1st respondent sustained injuries in the course of employment, ought to have awarded compensation only as per Schedule I of the

Workmen Compensation Act and prayed for setting aside the award of the Tribunal and allowing the appeal.

10. Though the appeal is of the year 2010, no notice was served on the respondents.

11. Heard learned counsel appearing for the appellant-Insurance Company and perused the materials available on record.

12. It is the case of the 1st respondent that he travelled in the Minidor Van as Cleaner, employed by the 3rd respondent. The said contention was denied by the appellant in the counter statement. The 1st respondent as P.W.1 deposed as per the averments in the claim petition. The appellant examined one Jayaprabha and marked 3 documents as Exs.R1 to R3 with regard to policy and conditions of the policy. There is nothing on record to show that the appellant let in any evidence to prove his contention that the 1st respondent is not an employee of the 3rd respondent and he travelled as unauthorized passenger.

13. On the other hand, from the award of the Tribunal and grounds raised in the appeal, it is seen that the appellant is contending that the 1st respondent can claim compensation only under the Workmen Compensation Act and not under the Motor Vehicles Act. From this contention, it is clear that the appellant admits that the 1st respondent is an employee of the 3rd respondent and he suffered injuries in the course of his employment. As per the provisions of the Motor Vehicles Act, an injured person can claim compensation either under the Motor Vehicles Act or under the Workmen Compensation Act, but not under both the Acts. The issue whether an employee of the owner of the vehicle or in case of death, the legal heirs of the deceased/employee can maintain the claim under the Motor Vehicles Act or only course available in such situation is to approach the authority under Workmen Compensation Act, came up for consideration before the Division Bench of this Court. This Court considering the provisions of Motor Vehicles Act and contract of injured held that a claim petition under Motor Vehicles Act as well as Workmen Compensation Act is maintainable. The claimants must choose either one of the legal forums and they cannot maintain the same application under both the Acts. The Division Bench of this Court, further held that even if the claimants are not entitled to compensation under the provisions of Motor Vehicles Act, they are entitled to compensation covered under the insurance policy, which is the contract between the owner of the vehicle and insurer.

14. In paragraph 6 of the judgment reported in 2002 (4) CTC 469 in the Oriental Insurance Co.Ltd. vs. Kaliya Pillai and 2 others, it is held as follows:

"?However, the insurer's liability is to be determined not only with reference to the provisions under the Motor Vehicles Act, but also with reference to the contract of insurance which would extend to the liability of the insured under the Workmen's Compensation Act. There is a specific finding by the Tribunal that the deceased tractor driver died in the course of his employment. Further, it is not disputed that there was a valid insurance on the date of the accident, and accordingly the insurer was liable to the extend of liability under the Workmen's Compensation Act. In other words, we hold that even though the insurance company was not liable under the provisions of the Motor Vehicles Act, it would be proper to assess the compensation under the Workmen's Compensation Act and award the same in favour of the claimants. On this ground, instead of directing the respondents/claimants to go before the Commissioner for Workmen's Compensation Act, in order to shorten the litigation and also in the interest of justice, we decided to dispose of the appeal by determining the appropriate compensation in favour of the claimants.?"

15.This judgment was followed by another Division Bench of this Court in the judgment reported in 2015 (2) TNMAC 362 (DB) in M.Anbalagan vs. K.M.Asalm Basha, wherein in paragraphs 6 to 12 it is 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.?"

16. In the two judgments rendered by the two Division Bench of this Court, it has been held that the claimant need not be driven to the necessity of approaching the authority under the Workmen Compensation Act and compensation can be awarded in the claim petition filed under the Motor Vehicles Act. The ratio in the above two judgments is squarely applicable to the facts of the present case. The Tribunal considering the evidence of P.W.2- Doctor, awarded compensation which is not excessive and it is only a just compensation.

17. For the above reason, this Civil Miscellaneous Appeal is dismissed and the amount awarded by the Tribunal at Rs.2,67,800/- along with interest and costs is confirmed. The respondents 2 and 3 and the appellant are jointly and severally directed to deposit the award amount along with interest and costs, within a period of six weeks from the date of receipt of a copy of this judgment, to the credit of M.C.O.P. No.9 of 2010. On such deposit, the 1st respondent is permitted to withdraw the award amount, along with interest and costs, after adjusting the amount, if any already withdrawn, by filing necessary applications before the Tribunal. Consequently, connected Miscellaneous Petition is closed. No costs.

Sd/-
Assistant Registrar(CS-VIII)

//True copy//

Sub Assistant Registrar

gsa

To

1. The Chief Judicial Magistrate,
(Motor Accident Claims Tribunal),
Erode.

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

C.M.A. No.3267 of 2010
and M.P. No. 1 of 2010

VBA (CO)
GMY (17/04/2021)