

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 27.07.2020

Pronounced on: 30.07.2020

CORAM

THE HONOURABLE DR. JUSTICE G.JAYACHANDRAN

C.M.A.No.2213 of 2015

and

M.P.No.1 of 2015

M/s.National Insurance Co.Ltd.,
LRN Colony,
Sarada College Main Road,
Hasthampatty, Salem-7. ..Appellant /2nd Respondent

/versus/

1.M.Palanisamy ..1st Respondent/Claimant

2.N.A.Chinnasamy .. 2nd Respondent/1st Respondent
(2nd respondent herein set exparte
by the Court below)

Prayer: Appeal filed under Section 173 of the Motor Vehicles Act
against the Decree and Judgment dated 13.12.2013 made in
M.C.O.P.No.1772 of 2012 on the file of the Motor Accident Claims
Tribunal, (Special Subordinate Judge No.1), Salem.

For Appellant : Mr. K.Padmanabhan

For R1 : No appearance

For R2 : Exparte

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(The case has been heard through video conference)

The Insurance Company is the appellant herein. Aggrieved by
the quantum of compensation awarded by the Tribunal in the
claim petition filed by the first respondent, the present appeal
is filed.

2. The Gist of the claim petition :

On 30.08.2012, at about 19.30 hrs, the first respondent /claimant tried to board the passenger bus bearing registration number TN 30 AD 7579 at Gandhi Nagar Bus stop, Panamarathupatty - Salem Road. The driver of the bus rash and negligently took the bus without ensuring the entry of the claimant into the bus. The claimant slipped down and the rear wheel of the bus run over the right foot of the claimant. The claimant sustained crush injury leading to amputation of his 2nd toe. He was hospitalised for 20 days and advised continuous medical care and review. As a worker in the brick kiln, he was earning Rs 12,000/- per month. Due to the accident he has lost income and earning capacity. Hence sought compensation of Rs 5,00,000/- under pecuniary damages and special damages against the owner of the bus and the insurance company which has issued insurance cover. The claim break-up is as below:

Loss of earning	Rs. 72,000/-
Transport to hospital	Rs. 8,000/-
Extra Nourishment and medical expenses	Rs. 70,000/-
Shock and mental agony	Rs. 25,000/-
compensation for pain and suffering	Rs. 25,000/-
compensation for permanent disability	Rs. 2,75,000/-
loss of earning power	Rs. 25,000/-
TOTAL	Rs. 5,00,000/-

3. The Gist of the counter by Insurance Company:

The accident occurred due to the negligence and fault of the claimant. The claimant slipped down from the bus while boarding from the front steps. When he fell down to ground, the bus was not in motion. In the Accident Report, the doctor who first saw the injured has recorded that he was in inebriant state. Had the claimant taken care the accident could have been averted. The claimant sustained only simple injuries and the claim under different heads are exaggerated and baseless.

The claimant and the doctor who gave the disability certificate were examined as PW-1 and PW-2. Exhibits 1 to 9 were marked through PW-1 and Ex C-1 disability certificate and Ex C-2 X-ray were marked through PW-2. The Tribunal after considering the evidence, awarded Rs 2,79,000/- with 7.5% interest from the date of filing the petition till the date of realisation.

4. The learned counsel for the appellant impugn the award on three grounds.

a) The accident register Ex-P 3 is the contemporaneous document in which the doctor has recorded that the patient (claimant) smell alcohol. The claimant due to his inebriant state could not board the bus and had fallen down and sustained injuries. In his deposition the claimant has admitted that when he slipped down, the bus was not in motion. Since he had contributed to the accident, proportionate deduction in the award should be made.

b) The award of Rs 1,00,000/- for loss of amenities is exorbitant and without any rhyme and reasoning. After awarding a sum of Rs 50,000/- for disability no further compensation under the head loss of amenities is warranted. Referring the judgment of the Hon'ble Supreme court in Rajkumar -vs- Ajay Kumar reported in 2011 (1) SCC 343, the learned counsel would state that in the absence of claim and evidence for special damages, award of Rs one lakh under the head loss of amenities without any discussion is erroneous, more particularly after awarding Rs 20,000/- for pain and suffering and Rs 50,000/- for disability. Therefore award under this head is liable to be set aside.

c) The fixation of monthly income at the rate of Rs 6000/- and the award of Rs 60,000/- for loss of income for 10 month period, the counsel would state that, there is no evidence to prove that the claimant was earning Rs 6000/- per month. Further, the claimant was in the hospital as inpatient only for 20 days. While discharging he was advised rest only for 12 weeks. While facts being so, calculating loss of income for 10 months at the rate of Rs 6000/- per month is contrary to evidence.

5. The claimant though served with notice has not engaged counsel although he received the notice on 09/11/2019. Hence in his absence the appeal is heard and decided on its merit.

FINDING:

Ex P-1 is the First Information Report regarding the motor accident, in which the negligence is attributed to the driver of the passenger bus. The driver was prosecuted and convicted based on his guilty plea. Though finding of the criminal court it is not binding and it is not the conclusive proof for rash and negligence, the appellant / insurance company has not placed any contra evidence to fix the negligence on the part of the injured. Similarly, entries in the Accident Register ought to have been proved by examining the doctor who has made the entries. Smelling of alcohol is not by itself a presumption for negligence. In the absence of any evidence to attribute contributory negligence on the part of the injured, merely based

on the entry in the accident register, the insurance company cannot escape from its liability.

6. Regarding the compensation under the heading loss of amenities, this court finds that in the impugned award the tribunal though awarded a lump sum of Rs one lakh, it has not specifically discussed about loss of amenities except referring the opinion of the doctor PW-2 that the patient would find difficulty in walking, climbing and squatting due to the injury. This opinion is taken for consideration to fix the disability as 25%. In addition to the award of Rs 50,000/- for disability, further sum of Rs 1,00,000/- under loss of amenities is awarded by the tribunal without any specific reasoning.

7. From the records we find that PW-2, the victim in his chief examination has stated about the difficulty he face while walking after the surgery in his injured leg . Also there is evidence to show that skin grafting was done to the foot and the injury scare appears ugly. However, there is no evidence to show due to the injuries sustained in the accident, the victim suffers impairment of his mobility or stability. There is no evidence to infer any restrain of movement and if so the percentage of restrain.

8. In this regard, it is appropriate to extract the observation of the learned judge (Justice K.Kannan) in Madan Lal Papneja -vs- State of Haryana (MANU /PH/3853/2010)

" Loss of amenities of life is another admissible head that is subjective and our attempt must therefore be to provide for some amount which deprives a person the felicity of free ambulation and convenience. A human being is no machine. Amusement and entertainment add necessary spice to life. A person handicapped to walk or run or gallop at his will is a person crippled just not in body but in mind and spirit as well. A person that cannot ride on a two wheeler or drive his vehicle is fettered in his mobility and become dependent on others for his free movement. A person that is confined to bed draws sympathy from others and becomes a burden on others. Depending on the gravity of the injury and what a person cannot do or how a person becomes dependent on others or any form of deprivation of material pleasures shall become relevant. To a child that is young and to an old person, the yard stick cannot be the same. The scale has to be on a descending gradient and could range between Rs 1,00,000/- to Rs 25,000/-"

" A mal-union of a fracture or shortening of limb by a few cms or inches have but cosmetic value and some functional impairment and the compensation has to be modest and reasonable."

9. Now coming to the facts of the case, the victim has sustained crush of his right foot and amputation of his 2nd toe. the disability certificate Ex X-1 and the X-ray Ex X-2 supports the case of the claimant about the injury, skin grafting and deformity. The Doctor has also testified that the victim cannot wear ordinary footwear and he will find difficulty in walking. Therefore it cannot be said that the victim is not entitle for compensation under the head loss of amenities because he has not made any claim under this head or because the Tribunal has not given any reason for awarding compensation under the head loss of amenities or already Rs.50,000/- awarded for the disability.

10. The point which Court has to look at is whether the amount awarded under this head is appropriate or excessive. As pointed out by the Learned Judge in Madal Lal case cited supra, the deprivation and gravity has to be taken note while awarding compensation under the head loss of amenities. For the disability of 25% the claimant Rs 50,000/- is awarded. So, applying the gradation for depravity of nobility and for cosmetic value, the claimant shall be entitle for another sum of Rs 50,000/-. Award of Rs 1 lakh by the Tribunal under this head being excessive, it is reduced from 1,00,000/- to Rs 50,000/-

11. This court also find that the compensating loss of income for 10 months is contrary to the evidence. The discharge summary marked as Ex P-5 shows that the claimant was treated as inpatient from 01/09/2012 to 20/092012 (ie) 20 days. In the discharge summary it is stated that the patient should rest for 12 weeks (ie) 3 months. So, at the most the claimant would have suffered loss of income for 4 to 5 months and not more than that. Therefore the award towards loss of income for 10 months has to be reduced to 5 months. Accordingly, the award under the head loss of income is reduced to half, from 60,000/- to Rs 30,000/-.

12. As the result, the compensation awarded by the Tribunal is modified and reduced from 2,79,,000/- to Rs. 1,99,000/- as tabulated below .

Heads of compensation	Awarded by Tribunal in MCOP	Awarded in the CMA
Pain and suffering	Rs. 20,000/-	Rs. 20,000/-
Loss of Income during treatment	Rs. 60,000/- (6000 x 10 months)	Rs. 30,000/- (6000 x 5 months)
Food and extra nourishment	Rs. 5,000/-	Rs. 5,000/-
Medical expenses	Rs. 42,000/-	Rs. 42,000/-

For disability (25% x Rs 2000)	Rs. 50,000/-	Rs. 50,000/-
Transportation	Rs. 1000/-	Rs. 1000/-
Loss towards personal belongings	Rs. 1000/-	Rs. 1000/-
Loss of amenities	Rs. 1,00,000/-	Rs. 50,000/-
TOTAL	Rs. 2,79,000/-	Rs. 1,99,000/-

13. The claimant is entitle for interest at the rate of 7.5% from the date of filing the petition till the date of payment. The appellant shall deposit the money within 2 months from the date of receipt of the order copy. In case the appellant has deposited any money over and above the amount payable, the appellant is entitle for refund of the same.

14. This Civil Miscellaneous Appeal is allowed. Consequently, the connected miscellaneous petition is also closed. No costs.

Sd/-

Assistant Registrar

//True Copy//

Sub Assistant Registrar

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To

1.The Motor Accident Claims Tribunal (Special Subordinate Judge No.1), Salem.

C.M.A.No.2213 of 2015

VD(CO)
RMP (07/01/2021)

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