IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 21.12.2020

CORAM:

THE HONOURABLE MS.JUSTICE V.M.VELUMANI

C.M.A. No.256 of 2013
and
M.P. No. 1 of 2013

New India Assurance Co. Ltd.,
A.P.V. Mansions, 1st Floor,
110, Gandhi Market Road,
Arani. .. Appellant/Respondent II

Vs.

1.Dayalan
2.Subbiah .. Respondents/Petitioner/Respondent I

Prayer: This Civil Miscellaneous Appeal is filed under Section 173 of Motor Vehicles Act, 1988, against the judgment and decree dated 03.08.2004, made in M.C.O.P. No.213 of 1997, on the file of the Motor Accident Claims Tribunal, Arani.

For Appellant : Mr. K. Mohan

J U D G M E N T

The matter is heard through "Video Conferencing".

This Civil Miscellaneous Appeal has been filed by the appellant-Insurance Company against the judgment and decree dated 03.08.2004, made in M.C.O.P. No.213 of 1997, on the file of the Motor Accident Claims Tribunal, Arani.

2.The appellant is the 2nd respondent in M.C.O.P. No.213 of 1997, on the file of the Motor Accident Claims Tribunal, Arani. The 1st respondent/claimant filed the said claim petition, claiming a sum of Rs.2,00,000/- as compensation for the injuries sustained by him in the accident that took place on 27.05.1994.

3.According to the 1st respondent, on the date of accident, when he was driving a Car bearing Registration No. TSD-4460 belonging to the 2nd respondent from Arni to Kovilampatti, near Andhichiyurani Vilaku Village, in order to avert hitting the Cyclist coming in opposite direction without following traffic rules, 1st respondent applied brake and turned the Car to left side. In the impact, the Car hit against the tree on the left side of the road and accident occurred. In the accident, the 1st respondent suffered multiple and grievous injuries. For the injuries suffered by him, the 1st respondent claimed compensation against the 2nd respondent and appellant, as owner and insurer of the offending vehicle.

4.The 2nd respondent remained exparte before the Tribunal.

5.The appellant-Insurance Company filed counter statement and denied all the averments made by the 1st respondent in the claim petition. According to the appellant, the 2nd respondent has not intimated the alleged accident to the appellant by producing policy particulars and vehicular documents viz., Fitness Certificate, Registration Certificate and Driving License. The 1st respondent has to prove that the Car belonging to the 2nd respondent was insured with the appellant at the time of accident and 1st respondent possessed valid driving license to ply the vehicle on road. The 1st respondent also has to prove his age, avocation and income, injuries suffered and disability sustained, to claim compensation. In any event, the total compensation claimed by the 1st respondent is excessive and prayed for dismissal of the claim petition.

6.Before the Tribunal, the 1st respondent examined himself as P.W.1, examined Doctor as P.W.2 and marked 5 documents as Exs.P1 to P5. The appellant examined their Official as R.W.1, but did not let in any documentary evidence.

7.The Tribunal considering the pleadings, oral and documentary evidence, held that the accident did not occur due to negligent driving of Car by the 1st respondent and directed the appellant as insurer of the said vehicle to pay a sum of Rs.43,000/- as compensation to the 1st respondent.

8.Challenging the liability fixed on them and questioning the quantum of compensation granted by the Tribunal in the award dated 03.08.2004, made in M.C.O.P. No.213 of 1997, the appellant - Insurance Company has come out with the present appeal.

9.The learned counsel appearing for the appellant/Insurance Company contended that the accident has occurred due to rash and negligent driving by the 1st respondent. F.I.R. was registered only against the 1st respondent. The Tribunal failed to consider the fact whether the owner of the vehicle is vicariously liable and responsible for the accident. The Tribunal also failed to see that the 1st respondent has not established that the accident occurred due to wrongful act or default or negligence on the part of the owner of the vehicle or any other person. The 1st respondent has not proved that due to negligence of the third party, the accident has occurred and hence, the claim petition filed under Section 163-A of the Motor Vehicles Act is not maintainable. The Tribunal has committed a serious error in holding that the appellant/Insurance Company has not discharged its burden of proving that the driver was not having driving license to drive the vehicle involved in the accident, when the driver himself was the claimant, who was examined as P.W.1. The Tribunal erroneously held that the Insurance Company is liable to pay compensation and awarded higher compensation without application of mind. The learned counsel further contended that the 1st respondent is an employee of the 2nd respondent and is entitled to compensation only under the Workmen's Compensation Act. He has to approach the authority under Workmen's Compensation Act and not the Motor Accident Claims Tribunal and prayed for setting aside the award of the Tribunal.

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

11.From the materials on record, it is seen that it is the contention of the 1st respondent that when a cyclist came in the opposite direction without following the rules, the 1st respondent, to avoid the accident, turned the car to the left side by applying brake and unfortunately, the car hit against the tamarind tree, which is on the left side of the road. The 1st respondent sustained grievous injuries in the accident and filed claim petition under Section 163-A of the Motor Vehicles Act, claiming compensation for the injuries. The 1st respondent examined himself as P.W.1, deposed to that effect and marked F.I.R. as Ex.P1. On the other hand, it is the contention of the learned counsel appearing for the appellant that the accident has occurred only due to rash and negligent driving by the 1st respondent, he is the tort-feasor and therefore, the claim petition filed under Section 163-A of the Motor Vehicles Act is not maintainable. From the materials on record, it is seen that no other vehicle except the vehicle driven by the 1st respondent was involved in the accident. The 1st respondent has not proved that a cyclist came from opposite direction and in order to avoid hitting, he turned his vehicle and hit the road side tree. F.I.R. is registered only against the 1st respondent.

12.It is the contention of the appellant that 1st respondent did not possess driving license at the time of accident and accident has occurred only due to negligence on the part of the 1st respondent. To substantiate the said contention, the appellant examined their official as R.W.1. R.W.1 in his evidence admitted that he is not an eye-witness. The appellant has not examined any official from the concerned R.T.O. to prove that the 1st respondent did not possess driving license at the time of accident. The Tribunal considering the oral and documentary evidence, held that the accident did not occur due to negligence on the part of the 1st respondent and the appellant failed to prove that the 1st respondent did not possess driving license at the time of accident.

13.From the facts narrated above, it is clear that the accident occurred only due to rash and negligent driving by the 1st respondent. In view of such finding, this Court is of the view that the claim petition filed under Section 163-A of the Act is not maintainable as the 1st respondent himself is the tort-feasor. But it is seen from the materials on record that while the 1st respondent was driving the vehicle, the accident occurred. The 1st respondent has also contended that the accident occurred during and in the course of employment. The 2nd respondent, owner of the vehicle did not deny the same. It is not the case of the appellant that the 1st respondent is not an employee of the 2nd respondent. On the other hand, it is the case of the appellant that the 1st respondent has to approach the authority under Workmen's Compensation Act. In view of the above materials, the 1st respondent is entitled to compensation only under Workmen's Compensation Act.

14.The issue whether an employee of the owner of the vehicle sustained injuries 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's Compensation Act, came up for consideration before the Division Bench of this Court. This Court considering the provisions of the Motor Vehicles Act and contract of insurance, held that a claim petition filed both under Motor Vehicles Act as well as Workmen's Compensation Act are maintainable. The claimants must choose either one of the legal forums and they cannot maintain the 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. In paragraph-6 of the judgment reported in 2002 (4) CTC 469 [Oriental Insurance Co.Ltd. vs. Kaliya Pillai and two others], it is held as follows:

> "6.........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) [M.Anbalagan vs. K.M.Asalm Basha], wherein in paragraph Nos. 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 above two judgments, the Division Bench of this Court has granted compensation as per the provisions of Workmen's Compensation Act in the claim petition filed under Sections 166 and 167 of the Motor Vehicles Act, instead of driving the claimants to approach the authority under Workmen's Compensation Act.

17.The Tribunal considering the nature of injuries and evidence of P.W.2/Doctor, awarded a total sum of Rs.43,000/- as compensation to the 1st respondent together with interest. The said amount is lesser than the amount specified in the Workmen's

Compensation Act. In view of the same, the award of the Tribunal is not interfered with.

18.In the result, this Civil Miscellaneous Appeal is dismissed and the amount awarded by the Tribunal at Rs.43,000/- together with interest at the rate of 9% per annum from the date of petition till the date of deposit is confirmed. The appellant-Insurance Company is directed to deposit the award amount, along with interest and costs, less the amount already deposited, 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.213 of 1997. 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-V)

//True Copy//

Sub Assistant Registrar

kj/gsa

To

1.The Motor Accident Claims Tribunal,
Arani.

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

+1cc to Mr.S.Jayasankar, Advocate, S.R.No. 42209

C.M.A. No.256 of 2013

AK(CO)
GN(16/04/2021)