

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 23.03.2020

CORAM:

THE HONOURABLE MS.JUSTICE V.M.VELUMANI

C.M.A.No.3183 of 2012

and

M.P.No.1 of 2012

The Divisional Manager

New India Assurance Company Ltd.

No.1, Office CSI building, Vellore.

... Appellant/2nd Respondent

Vs.

1.Govindan

2.Karuppayi

3.Alamelu

4.Poomalli

5.Mageswari

6.Rajeswari

... Respondents 1 to 6/Claimants 1 to 6

7.Thyagarajan

..7th Respondent/1st Respondent

Prayer: This Civil Miscellaneous Appeal is filed under Section 173 of Motor Vehicles Act, 1988, against the judgment and decree dated 29.11.2010 made in M.C.O.P.No.544 of 2004 on the file of Motor Accident Claims Tribunal, Chief Judicial Magistrate's Court, Tiruvannamalai.

For Appellant : Mr.K.Vinod

for Mrs.Elveera Ravindran

For R1 to R6 : Mr.F.Terry Chellaraja

for Ms.M.Malar

J U D G M E N T

This Civil Miscellaneous Appeal has been filed by the appellant/Insurance Company against the award dated 29.11.2010 made in M.C.O.P.No.544 of 2004 on the file of Motor Accident Claims Tribunal, Chief Judicial Magistrate's Court, Tiruvannamalai.

2.The appellant is 2nd respondent/Insurance Company in M.C.O.P.No.544 of 2004 on the file of Motor Accident Claims Tribunal, Chief Judicial Magistrate's Court, Tiruvannamalai. The

respondents 1 to 6 filed the said claim petition claiming a sum of Rs.10,00,000/- as compensation for the death of one Rajendiran, who died in the accident that took place on 10.08.2001.

3. According to the respondents 1 to 6, the deceased Rajendiran was the lorry driver. On the date of accident i.e., on 10.08.2001 at about 8.30 a.m., the deceased loaded tyres from MRF tyre company near Arakkonam. While the deceased was driving the lorry on Sholingur to Walajapet road crossing Putheri village, a bull crossed the road and in order to avoid hitting the bull, the deceased applied sudden brake and dashed on the tamarind tree by the side of the road. Due to the accident, the deceased Rajendiran died on the spot. Therefore, the respondents 1 to 6 filed the above claim petition claiming compensation against the 7th respondent and the appellant/Insurance Company.

4. The 7th respondent, owner of the lorry, remained exparte before the Tribunal.

5. The appellant/Insurance Company filed counter statement denying the averments made in the claim petition and stated that the accident has occurred only due to negligence on the part of the deceased. Therefore, the respondents 1 to 6 cannot claim compensation against the appellant/Insurance Company. The respondents 1 to 6 have to prove that the deceased possessed valid driving license at the time of accident. The respondents 3 to 6, who are the sisters of the deceased, are living with their husbands and they are not dependants of the deceased.

6. The appellant/Insurance Company filed additional counter statement stating that after receiving investigation report, they found that the deceased himself drove the lorry and dashed on the tamarind tree. The deceased was not a third party and he was the driver of the lorry at the time of accident. If the respondents 1 to 6 seek any remedy, they can claim compensation under no fault liability or under Workmen's Compensation Act and they cannot claim any compensation under third party claim. The lorry was not sent for inspection by the Motor Vehicle Inspector to find out that the accident has occurred due to any mechanical defect. The Police has not properly investigated the case and hence, it creates doubt about the genuineness of the accident. In any event, the compensation claimed by the respondents 1 to 6 is excessive and prayed for dismissal of the claim petition.

7. Before the Tribunal, the 1st respondent, father of the deceased, examined himself as P.W.1 and one Azhagesan, cleaner of the lorry, was examined as P.W.2 and marked four documents as Exs.P1 to P4. On the side of the appellant/Insurance Company, one Sampath, Assistant of the Insurance Company, was examined as R.W.1 and no documentary evidence was let in.

8.The Tribunal considering the pleadings, oral and documentary evidence, held that the accident has occurred, due to sudden crossing of the bull, the deceased, driver of the lorry belonging to the 7th respondent, suddenly applied brake, dashed on the tamarind tree and directed the appellant/Insurance Company being insurer of the said lorry to pay a sum of Rs.7,20,000/- as compensation to the respondents 1 to 6.

9.Against the said award dated 29.11.2010 made in M.C.O.P.No.544 of 2004, granting compensation to the respondents 1 to 6, the appellant/Insurance Company has come out with the present appeal.

10.The learned counsel appearing for the appellant/Insurance Company contended that the Tribunal erred in fastening liability on the appellant holding that the deceased in order to avoid hitting the bull, turned to the left side, dashed on the tamarind tree and caused the accident. The Tribunal failed to see that in the claim petition filed under Section 166 of the Motor Vehicles Act, the respondents 1 to 6 have to prove the negligence on the part of the opposite party to claim compensation. In the present case, the deceased was the tort-feasor and the Tribunal erred in holding that the accident occurred, when the bull suddenly crossed the road. The Tribunal failed to see that there was no third party involved in the accident and the appellant is not liable to pay any compensation, when there is no liability on the part of the appellant/Insurance Company. In any event, the amounts awarded by the Tribunal under different heads are excessive and prayed for setting aside the award of the Tribunal.

11.Per contra, the learned counsel appearing for the respondents 1 to 6 contended that the deceased was working as a driver under 7th respondent and the accident has occurred, while the deceased was driving the lorry in the course of his employment. The lorry belonging to the 7th respondent was insured with the appellant/Insurance Company and hence, the appellant is liable to pay compensation. The accident has occurred, when the deceased turned the lorry to the left side of the road in order to avoid hitting the bull and the Tribunal has rightly held that the appellant as insurer of the said vehicle is liable to pay compensation to the respondents 1 to 6. The Tribunal considered that the deceased was earning a sum of Rs.4,500/- per month by working as a driver and awarded compensation under different heads, which are not excessive and prayed for dismissal of the appeal.

12.Heard the learned counsel appearing for the appellant/Insurance Company as well as the learned counsel appearing for the respondents 1 to 6 and perused the entire materials available on record.

13. It is the contention of the respondents 1 to 6 that the deceased was working as a driver under 7th respondent at the time of accident and the accident has occurred in the course of his employment, while the deceased was driving the lorry belonging to the 7th respondent insured with the appellant. The 1st respondent, father of the deceased, examined himself as P.W.1 and deposed to that effect. The appellant/Insurance Company failed to let in any contra evidence to disprove the evidence of P.W.1. According to the respondents 1 to 6, the accident has occurred only due to negligence on the part of the deceased, as he dashed on the tamarind tree on the road side. No third party was injured and the respondents 1 to 6 failed to prove the negligence on the part of the 7th respondent or any other third party. According to the appellant, the respondents 1 to 6 are not entitled to any compensation from the appellant, as the deceased himself was the tort-feasor. The said contention has considerable force. When the claim petition was filed under Section 166 of the Motor Vehicles Act, it is for the claimant to prove the negligence on the part of the opposite party to get the compensation. In view of the same, the award of the Tribunal granting compensation to the respondents 1 to 6 is set aside.

14. The appellant/Insurance Company did not dispute that the insurance policy issued by them was in force at the time of accident. The insurance policy was in contract between the appellant/Insurance Company and the 7th respondent, owner of the lorry. The appellant has not disputed that the deceased was working as driver under the 7th respondent and the accident has occurred in the course of his employment, while the deceased was driving the lorry belonging to the 7th respondent. The appellant in the additional counter statement has stated that the respondents 1 to 6 are entitled to compensation only under no fault liability or under Workmen's Compensation Act. Therefore, the appellant being insurer of the said lorry, is liable to pay compensation to the respondents 1 to 6 as per the Workmen's Compensation Act. The issue whether the claimants being injured persons or legal heirs of the deceased are entitled to get compensation under Workmen's Compensation Act, even if they are not entitled to get compensation under Motor Vehicles Act, was considered by the Division Bench of this Court reported in 2002 (4) CTC 469 in the Oriental Insurance Co. Ltd. vs. Kaliya Pillai and 2 others, wherein it has been 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."

15. Again this issue was considered by another Division Bench of this Court and referring with approval to the earlier judgment of Division Bench of this Court referred to above, held in the judgment reported in 2015 (2) TNMAC 362 (DB) [M. Anbalagan vs. K.M. Asalm Basha], wherein 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."

16. The above two judgments of the Division Bench of this Court are squarely applicable to the facts of the present case. 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 compensation was awarded by the Division Bench of this Court in the appeal instead of directing the claimants to approach the authority under Workmen's Compensation Act. In view of the above two judgments, the appellant as insurer of the vehicle belonging to the 7th respondent is directed to pay the compensation.

17. 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 respondents 1 to 6 are entitled to compensation as per the provisions of the Workmen's Compensation Act, 1923.

18. As far as quantum of compensation is concerned, the legal heirs of the employee is entitled to compensation as per Section 4 of the Workmen's Compensation Act. As per Section 4(i) (a) of the Employees Compensation Act, 1923, where death results from the injury, an amount equal to fifty percent of the monthly wages of the deceased workman multiplied by the relevant factor. The relevant factor applicable according to the age of the deceased is mentioned in Schedule IV of the Employee's Compensation Act, 1923. The respondents 1 to 6 claimed that the deceased was aged 33 years at the time of accident. To substantiate the said claim, they have marked the driving license as Ex.P3. In Ex.P3, the date of birth of the deceased was mentioned as 20.06.1968. The date of accident is 10.08.2001. In view of the same, the deceased was aged 33 years at the time of accident. The relevant factor for 33 years is 201.66. According to the respondents 1 to 6, the deceased was working as driver of the lorry and was earning a sum of Rs.9,000/- per month. As per Section 4(i)(a) of the Employee's Compensation Act, 1923, the income of the victim is fixed as Rs.4,000/- per month, which is the maximum amount fixed in the said Act. Thus, a sum of Rs.4,03,320/- ($\text{Rs.4,000/-} \times 201.66 \times 50/100$) is awarded towards loss of dependency. As the compensation is awarded under Workmen's Compensation Act, the respondents 1 to 6 are not entitled to compensation under other conventional heads except funeral expenses. In view of the same, a sum of Rs.60,000/- awarded by the Tribunal towards loss of love and affection is set aside. A sum of Rs.12,000/- awarded by the Tribunal towards funeral expenses is excessive and the same is hereby reduced to Rs.5,000/-. Thus, the compensation awarded by the Tribunal is modified as follows:

Sl. No	Description	Amount awarded by the Tribunal (Rs.)	Amount awarded by this Court (Rs.)	Award confirmed or enhanced or granted or reduced
1.	Loss of dependency	6,48,000	4,03,320	Reduced
2.	Loss of love and affection to the respondents 1 to 6	60,000	-	Set aside
3.	Funeral expenses	12,000	5,000	Reduced
	Total	7,20,000	4,08,320	Reduced by Rs.3,11,680 /-

19. In the result, this Civil Miscellaneous Appeal is partly allowed and the compensation awarded by the Tribunal is reduced from Rs.7,20,000/- to Rs.4,08,320/- together with interest at the rate of 12% per annum after thirty days from the date of accident i.e., 10.09.2001 to till the date of deposit. It is made clear that the respondents 1 to 6 are not entitled to any interest for the default period as prescribed in column No.2 of the decree in M.C.O.P.No.544 of 2004 i.e., from 09.11.2005 to 31.10.2008. The appellant/Insurance Company is directed to deposit the award amount now determined by this Court, along with interest and costs, less the amount if any already deposited, within a period of six weeks from the date of receipt of a copy of this judgment. On such deposit, the respondents 1 to 6 are permitted to withdraw their respective share of the award amount, as per the apportionment made by the Tribunal, along with proportionate interest and costs, after adjusting the amount, if any, already withdrawn. The appellant/Insurance Company is permitted to withdraw the excess amount lying in the deposit to the credit of M.C.O.P. No.544 of 2004 on the file of the Chief Judicial Magistrate's Court, Tiruvannamalai, if the entire amount has already been deposited by them. No costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-

Assistant Registrar

//True Copy//

Sub Assistant Registrar

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To

1.The Chief Judicial Magistrate
Motor Accidents Claims Tribunal
Tiruvannamalai.

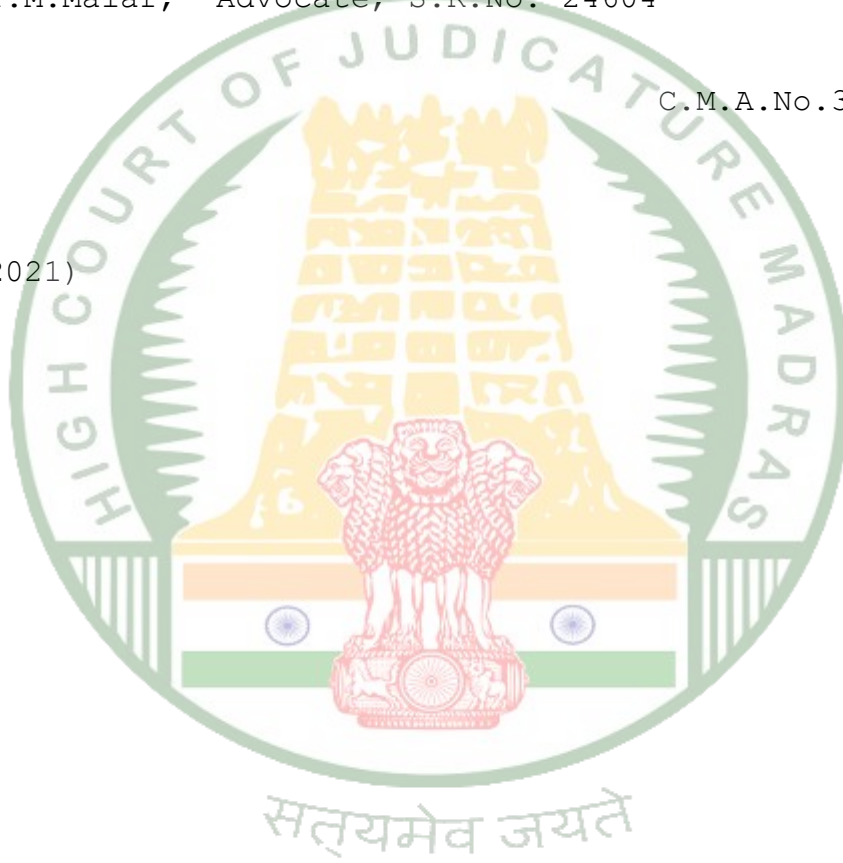
2.The Section Officer
V.R.Section
High Court, Chennai.

+lcc to Mrs.Elveera Ravindran, Advocate, S.R.No. 24595

+lcc to Mr.M.Malar, Advocate, S.R.No. 24604

C.M.A.No.3183 of 2012

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