IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 05.08.2020
PRONOUNCED ON : 18.08.2020

CORAM

THE HON'BLE DR.JUSTICE G.JAYACHANDRAN

Civil Miscellaneous Appeal Nos.2700 of 2016 and 9 of 2017

K.Nagaraj @ Nagarajan
..Appellant in CMA No.2700 of 2016
1st Respondent in CMA No.9/2017 Claimant

vs

1.P.Selladurai Nadar ..1st Respondent in CMA.2700/2016
2nd Respondent in CMA.9/2017/
1st Respondent

2. Reliance General Insurance Co. Ltd.,
Reliance House,
Haddows Road,
Nungambakkam,
Chennai 600 034. ..2nd Appellant in CMA.2700 of 2016/
Appellant in CMA No.9 of 2017/
2nd Respondent

Prayer in CMA No.2700 of 2016 & CMA.9 of 2017:- This Civil Miscellaneous Appeals has been filed under Section 173 of the Motor Vehicles Act, 1988 against the judgment and decree dated 21.04.2016 made in MACT O.P.No.4643 of 2013 on the file of the II Judge, Motor Accidents Claims Tribunal, (Court of Small Causes), Chennai.

For Appellant in CMA.2700/16 & 1st Respondent in CMA.9 of 2017: Mr.K.Suriyanarayanan for Mr.M.Swamikannu

For R.1 in CMA.2700/2016 & R2 in CMA.9/2017 :No appearance

For Appellant in CMA.9/2017 & 2nd Respondent in CMA.2700/2016: Mr.S.Arun Kumar

COMMON JUDGMENT

These two appeals are against the award passed in MCOP.No.4643 of 2013 by the Motor Accident Claims Tribunal, (II Small Causes Court, Chennai) dated 21/04/2016. The compensation of Rs.4,69,000/- as against the claim of Rs.24,00,000/- is challenged by the claimant in C.M.A.No.2700 of 2016 alleging that the award amount is not adequate. Contrarily, alleging the claimant being the tortfeasor, he is not entitled for any compensation and even if any compensation to be paid, since, the offending vehicle Driver had no driving license and batch endorsement to drive goods vehicle, it is the responsibility of offending vehicle owner to pay and not the Insuance Company,. Further, the compensation awarded by the Tribunal is excessive and disproportionate to the injuries sustained by the claimant. Hence , the Insurance Company had preferred an appeal in C.M.A.No. 9 of 2017.

2.Claimant version:

On 23rd February 2013, at about 12:30 hours, the claimant was riding the motorcycle TN 01W 7617 from North to South direction in Therodum Veethi, Thiruverkadu, Chennai. When he was proceeding near Sridevi Karumari Amman marriage hall entrance, the TATA Ace Van bearing registration number TN 20 AD 0457 which was proceeding ahead of him, took a right turn rash and negligently without any indication. Due to which, the claimant sustained multifarious fracture and injuries. They are:- multiple compound and comminuted fracture in left leg knee, below knee and lower end of the thigh bone. Dislocation of jaw and severe injury in the chin leading to shaken teeth and mal alignment of dentition, kneecap smashed. For these multiple injuries, compensation of Rs.24 lakhs sought. Alleging that the Van Driver was solely responsible for the accident and the Van being insured under the second respondent insurance company, the Insurance company is liable to pay the compensation.

3.In support of his claim, the claimant has mounted the witness box examined as PW-1. In support of his case, the Doctor who gave the disability certificate has been examined as PW-2. Seven exhibits were marked on his side.

4.Insurance company version:

The claim petition is not maintainable. It is liable to be dismissed in limine. The accident occurred due to the fault of the claimant. The claimant drove the two Wheeler after consuming alcohol and hit the parked Van. The accident report of the claimant states that he slipped and fell from the vehicle and sustained injuries. His breath smell of alcohol. The Police has registered criminal case against the claimant for causing road accident by rash and negligent driving. The claimant being the tortfeasor, he is not entitled for any compensation. Further, the Van Driver also not competent to drive the goods van. Since, the Driver of the Van was not permitted to drive goods vehicle without valid licence and batch endorsement, the insurance company is not liable to indemnify the insured. If at all any compensation to be paid, it is the vehicle owner who is liable to pay and not the Insurance Company. The claim of compensation under different heads are fanciful, exaggerated and arbitrary. The investigation report and the admission of the claimant about his fault in causing the accident clearly exonerate the Insurance Company from any liability.

5.To prove the above contention, the Insurance Company has examined two witnesses on its side and marked seven exhibits.

6.The Tribunal after appreciating the evidence let in by either side passed the award for Rs.4,69,000/- as under:-

Transportation, nourishing food and miscellaneous expenditure	Rs.50,000/-
Medical expenses	Rs.10,000/-
Attender charges	Rs.10,000/-
Disability	Rs.1,05,000/-
Loss of earning during the period of treatment	Rs.13,000/-
Loss of earning capacity / power	Rs.2,10,600/-
Damages for pain, suffering and trauma	Rs.50,000/-
Loss of amenities	Rs.20,000/-
Total	Rs.4,68,600/-

7.The total compensation fixed as Rs.4,68,600/- rounded off to Rs.4,69,000/- payable with interest at 7.5% pa from the date of presentation of the petition (21/08/2013) till the date of deposit.

8.Grounds of appeal in CMA No.2700 of 2016

This appeal seeking enhancement of compensation filed by the claimant states that, at the time of accident, he was only 18 years old (in fact, he was 24 years old) and was working in a Courier Company. Due to the accident, he lost income and not able to do any work for a complete one year. However, the Tribunal awarded only Rs.26,000/- as against the claim of Rs.72,000/- while calculating loss of earning during the treatment period (in fact the Tribunal has awarded Rs.13,000/- as against the claim of Rs 1,05,000/- under this head). The Tribunal ought to have awarded Rs.3 lakhs towards the medical expenses but, it awarded only Rs.19,000/- (the Tribunal has actually awarded Rs.10,000/- since, there was no supporting bills for the medicines purchased). The claimant was bedridden for six months therefore, the attendant charges of Rs.10,000/- is very low. Atleast Rs.75,000/- ought to have been given under the said head. Similarly, for loss of amenities, the Tribunal ought to have awarded more and for pain and suffering, the Tribunal ought to have awarded at least Rs.2,50,000/-.

9.Grounds of appeal in CMA No.9 of 2017

In the appeal preferred by the Insurance Company challenging the Tribunal award as excessive and baseless, it is stated that the Tribunal has miserably failed to appreciate the documents produced by the Insurance Company which establishes the claimant as the tortfeasor. The award is silent about the evidence let in by the Insurance Company attributing negligence on the part of the claimant. In the accident report, the Doctor has recorded smell of alcohol in the breath of the injured claimant. Police has registered FIR against the claimant indicating him as the tortfeasor.

10.The Tribunal has failed to assign reason for not considering Exhibits R.1 to R.7, which clearly establishes the fact that the claimant has fallen down from the vehicle losing his balance after hitting the parked Van due to the impact of alcohol, he consumed. The Tribunal has awarded exorbitant compensation under different heads without any relevance to the injury sustained. Without any evidence and proof about the earning capacity of the claimant, the Tribunal has awarded compensation for loss of earning capacity. It had awarded exhorbitant compensation under the heads of transportation, extra nourishment, pain and suffering and loss of amenities without any proof. Hence, the award has to be interfered and reduced.

11.Heard the learned counsel appearing for the Claimant and the learned counsel appearing for the Insurance Company. Records perused.

12.At the outset, it is necessary to record that the appeal filed by the claimant contains several error in the facts and figures. Nevertheless, the grievance of the claimant is that, the compensation awarded is not fair and sufficient. On the other hand, the Insurance Company has stated that the

Tribunal has deliberately ignored the evidence placed before it to fix the person who was cause for the accident.

13.Ex.R-3 is the FIR registered at Poonamallee Police station against the two wheeler driver (claimant). The FIR is given by the Driver of the TATA Ace Van. Ex R-5 is the Accident Report issued by the hospital where the injured claimant was admitted for treatment. This report reveals that the smell of alcohol in the breath of the injured was noticed. The Tribunal, ignoring these two essential documents, has accepted the oral evidence of the claimant as worthy of credence and has fixed the negligence on the part of the Van Driver contrary to the facts proved through documents. The manner in which the Tribunal arrived at this conclusion is far from appreciation.

14.No doubt, the claimant was diagnosed fracture of mid third left Clavicle (collar bone) for which Open Reduction Internal Fixation for Broken Bones (ORIF) with reconstruction plate was fixed and the fracture in the head of fibula collar was mal united causing stiffness. The uncontroverted evidence exhibited through the FIR - Ex R3 and Accident Report - Ex R5 goes to show that the claimant was the tortfeasor. The investigator appointed by the Insurance Company has submitted his report - Ex R-2 and its content has been spoken by the respondent witnesses before the Tribunal. In fact, the claimant himself had given a letter admitting his negligence for causing the accident. His signature in the letter has been marked as Exhibit R-1. During the cross examination, he has denied its content except his signature. But for his own self-serving evidence, the other materials before the Court indicates the negligence of the claimant was the cause for the accident. In addition, Exs. R-3 and R-5 provide reasons to believe that the claimant was drunk at the time of accident. The Tribunal relying upon the judgement reported in 2016 (1) TNMAC 204 rendered by the Division Bench of Kerala High court in PV Jose -vs- United India insurance Co. Ltd., has held that to prove the claimant was under the influence of alcohol, the Insurance Company has relied only on the exhibits R-1 , R-3 and R-5, but there is no oral evidence in support of those documents.

15.The facts of the case in PV Jose case (cited supra), is that, the victim was a pedestrian. While crossing the road, he was hit by a motor car. The wound certificate issued by the Doctor indicates that the victim was found under influence of alcohol. Smell of alcohol presence in breath was observed and recorded. Hence, the Tribunal deducted 50% of the compensation towards contributory negligence. On appeal, the division bench of the Hon'ble Kerala High Court concluded that attributing 50% contributory negligence on the part of the injured is not sustainable. The Driver of the motor car must have driven the vehicle with due diligent where the public cross the road. The said facts of the case is not applicable to the case in hand. The case of a drunken pedestrian is different from the case of a drunken motorcycle rider. Drunken driving is license violation and an act by itself punishable in law.

16.In the instant case, as per the FIR, the claimant in drunken state had hit a stationary van and sustained injuries. Exhibits R-1, R-2 and R-5 been spoken by witnesses RW-1 and RW-2. While fact being so, contrary to these evidence, the Tribunal had held that the insurance company failed to prove the negligence of the claimant and had gone ahead to award compensation of Rupees Rs.4,69,000. While arriving at the compensation, this Court finds that the Tribunal has awarded Rs.1,05,000/- for disability relying upon the disability certificate given by the Doctor - PW-2 and the disability certificate Ex.P3. The Doctor has assessed the disability as 50% with 5% margin. The Tribunal has fixed the disability as 45% and awarded Rs.3,000/- for each percentage of disability. In addition, it has concluded that the disability has caused 15% functional disability to the claimant and therefore he is entitled for another sum of Rs.2,10,600/- towards loss of earning capacity.

17.Though in the appeal filed by the claimant, it is contended that the tribunal should have ordered more under the head loss of earning capacity and loss of income, the disability certificate and the evidence of the claimant would only indicates that without any material evidence, compensation has been awarded for medical expenses, attender charges and the loss of earning capacity during the period of treatment by notionally fixing the income at the rate of Rs.6,500/- per month. Applying multiplier 18, the Tribunal has awarded Rs.2,10,600/- for loss of earning capacity (Rs.6500 x 12 x 18 x 15/100).

18.It is relevant and pertinent to point at this juncture that the loss of income during the period of treatment and loss of earning capacity has been fixed based on the claim that the injured was running a barbershop in a particular address. However, no evidence is placed to infer that the claimant was actually running a barbershop for his livelihood. In any event, the Tribunal has fixed a total compensation of Rs.4,68,600/- for the fracture of collar bone and fibula joint. The injured was treated as inpatient from 23/02/2013 to 05/03/2013. This Court finds that the Tribunal ought to have taken note of the claimant’s contribution for the accident. A misplaced sympathy totally ignoring the records against the claimant will only encourage drunken-driving. Though this Court finds that the Tribunal has awarded compensation under the nonconventional heads also on the higher side, if it had taken note of the contribution and deducted at least 10% for the contribution, then it would have been a fair and just compensation.

19.The Courts have time and again emphasised that compensation for a road accident victim should be fair and just. This principle of 'fairness' is common for the claimant as well as the Insurance Company. Therefore, while dismissing the appeal filed by the claimant, the appeal filed by the Insurance Company is partly allowed. From out of the total award Rs,4,69,000/-, 10% shall be deducted, towards the contributory negligence of the claimant.

20.As a result, the award is modified and reduced to Rs.4,22,100/- with interest at the rate of 7.5% payable from 21/08/2013 till the date of deposit. The Insurance Company shall deposit the above modified amount with interest within a period of eight weeks from the date of receipt of a copy of this judgment, if so far not deposited. On such deposit, the claimant shall withdraw the same on making appropriate petition before the Tribunal. Accordingly. C.M.A.No.2700 of 2016 is dismissed and C.M.A.No.9 of 2017 is partly allowed. No order as to costs.

Sd/-
Assistant Registrar(CS-VIII)

// True Copy//

Sub Assistant Registrar

jbm

To

1. The Motor Accidents Claims Tribunal,
II Small Causes Court,
Chennai.

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

+ 1 cc to Mr. M. Swamikannu, Advocate Sr.27155

C.M.A.No.2700 of 2016 and 9 of 2017

TM(CO)
Eu 19.12.2020