

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 14.02.2020

CORAM:

THE HONOURABLE MS.JUSTICE V.M.VELUMANI

C.M.A.No.2777 of 2017

1.Kalyanasundaram
2.Sundari

.. Appellants

Vs.

1.Jeyakumar
2.Reliance General Insurance Co.Ltd.,
Villupuram Branch,
Villupuram.

.. Respondents

Prayer: This Civil Miscellaneous Appeal is filed under Section 173 of the Motor Vehicles Act, 1988, against the Judgment and Decree dated 08.03.2017 made in M.C.O.P.No.49 of 2015 on the file of the Motor Accident Claims Tribunal, Special District Court, Villupuram.

For Appellants : Mr.C.Munusamy

For Respondents : No Appearance

J U D G M E N T

This Civil Miscellaneous Appeal has been filed against dismissal of the claim petition by award dated 08.03.2017 made in M.C.O.P.No.49 of 2015 on the file of the Motor Accident Claims Tribunal, Special District Court, Villupuram.

2.The appellants are the claimants in M.C.O.P.No.49 of 2015 on the file of the Motor Accident Claims Tribunal, Special District Court, Villupuram. They filed the above said claim petition, claiming a sum of Rs.25,00,000/- as compensation for the death of their son namely Anbuezhhiyan, who died in the accident that took place on 19.04.2012.

3.According to the appellants, their son namely Anbuezhhiyan was working as a driver under the 1st respondent. On the date of accident at 05.30 a.m., the 1st respondent who is the owner of the TATA ACE bearing Regn.No.TN-32-AA-2704 drove the same in a rash and negligent manner and dashed against the Tamirand Tree. Due to the said impact, the deceased who was sitting by the side of the 1st respondent sustained grievous

injuries and died on 21.04.2012. Hence, the appellants filed the claim petition claiming compensation against the respondents.

4.Before the Tribunal, the first appellant, father of the deceased examined himself as P.W.1, one Vijayasundaram was examined as P.W.2 and one Palanisamy was examined as P.W.3 and marked six documents as Ex.P1 to P6. No oral or documentary evidence was let in on the side of the respondents.

5.The respondents remained ex-parte before the Tribunal.

6.The Tribunal, considering the pleadings, oral and documentary evidence, has held that the accident occurred due to rash and negligent driving by the driver of the TATA ACE belonging to the first respondent, however, dismissed the claim petition on the ground that the claimants have to seek compensation under Workmen Compensation Act.

7.Aggrieved by the order of the Tribunal, the claimants have come forward with the present appeal.

8.The learned counsel appearing for the appellants contended that the deceased was driver working under the 1st respondent and he travelled in the offending vehicle as driver. At the time of accident, the 1st respondent drove the vehicle and deceased was sitting next to him. The deceased died due to the injuries sustained in the accident which took place during the course of employment. The Tribunal after having held that the deceased was driver employed by 1st respondent, ought to have awarded compensation under Workmen Compensation Act instead of directing the appellants to approach the authority under Workmen Compensation Act. The deceased was employed as driver by the 1st respondent and was paid Rs.10,000/- per month. The insurance policy was in force at the time of accident. The Tribunal ought to have directed the 2nd respondent/Insurance Company as insurer of the vehicle to pay the compensation and prayed for setting aside the award of the Tribunal and to grant compensation to the appellants.

9.Though notice was served on the respondents 1 and 2 and their names are printed in the cause list, there is no representation on behalf of them either in person or through counsel.

10.Heard the learned counsel appearing for the appellants and perused the materials available on record.

11.The appellants have filed M.C.O.P.No.49 of 2015 claiming a sum of Rs.25,00,000/- as compensation for the death of their son namely, Anbuchezhian who died in the accident that had occurred on 19.04.2012. According to the appellant, their son

was employed as driver under the 1st respondent, the owner of the vehicle which was insured with 2nd respondent/Insurance Company. At the time of accident, their son was travelling in the TATA ACE by sitting on the side of the driver of the vehicle.

12.To prove the nature of accident and negligence, the first appellant examined himself as P.W.1 and two others as P.W.2 & P.W.3 and marked F.I.R as Ex.P1. The appellants in the claim petition have stated that the deceased was a driver working under 1st respondent. The Tribunal considering the evidence of P.W.1 to P.W.3 and the pleadings held that the deceased was the driver employed by 1st respondent and travelled in the TATA ACE as employer of 1st respondent. Having held so, the Tribunal has directed the appellants to approach the authority under Workmen Compensation Act. The said direction given by the Tribunal is erroneous. 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 only 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 insured, held that a claim petition under Motor Vehicles Act as well as Workmen Compensation Act are 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 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 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."

13. The above 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 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.

14. In the above two judgments, the Division Bench of this Court had granted compensation as per the provisions of Workmen Compensation Act in the claim petition filed under Section 166 and 167 of the Motor Vehicles Act. The ratio in the above two judgments is squarely applicable to the facts of the present case. The appellants are entitled to compensation as per the provisions of the Workmen Compensation Act, 1923. The calculations of compensation payable to the employee or the legal heirs of the deceased employee is as per Section 4 of the Workmen Compensation Act, 1923. As per Section 4(1) of the Act, the salary could be taken into account for calculating compensation and in case of death of an employee, 50% of salary received by him is calculated at the time of his death. In the present case, the appellants have stated in the claim petition that the deceased was working as driver under the 1st respondent and was earning a sum of Rs.10,000/- per month. The respondents remained ex-parte before the Tribunal and there is no contra evidence let in to disprove the contention of the appellants that the deceased was working as a driver. At the same time, the

appellants failed to produce any material to show that the deceased was earning a sum of Rs.10,000/- per month. In such circumstances, it is for this Court to fix the notional income of the deceased. The accident is of the year 2012. The deceased was working as a driver and hence a sum of Rs.9,000/- per month is fixed as notional income of the deceased. The factor to be applied for calculation of the compensation is mentioned in proviso to Section 4(1) of the Workmen Compensation Act, 1923. As per the said proviso, the factor in the 2nd column of Schedule 4 is against the entry in the 1st column with regard to the age of the deceased. The appellants have mentioned the age of the deceased in the claim petition as 22 years. As per the postmortem report, the age of the deceased is mentioned as 22. As per the 4th Schedule incorporated as per Section 4 of the Employees Compensation Act, for 22 years, factor is 221.37. Applying the said factor, taking into consideration 50% of the amount fixed by this Court, the compensation payable to the appellants is Rs.9,96,165/- (Rs.4500/- X 221.37).

15.The compensation is being granted under Workmen Compensation Act and therefore, the appellants are not entitled to any compensation under the loss of love and affection and loss of estate. This Court by exercising the discretion, can award compensation for funeral expenses. In the present case, the deceased died in the accident at an early age and the appellants are deprived of the income of their deceased son. Considering this fact, a sum of Rs.25,000/- is awarded towards funeral expenses. Thus, a total sum of Rs.10,21,165/- is awarded to the appellants/claimants as compensation.

S.No	Description	Amount awarded by this Court (Rs)
1.	Loss of income	9,96,165
2.	Funeral expenses	25,000
	Total	10,21,165/-

16.In the result, this Civil Miscellaneous Appeal is Allowed and a sum of Rs.10,21,165/- is awarded by this Court, together with interest at the rate of 12% per annum from the date of petition till the date of deposit. At the time of filing appeal, the appellants filed C.M.P.No.13474 of 2017 seeking exemption of paying court fee. The appellants gave an undertaking, "if the award amount is enhanced in the appeal, the appellants would pay necessary court fee before obtaining copy of the judgement". This Court recording the said undertaking, ordered the petition seeking exemption of court fee. Hence, the appellants are directed to pay the Court fee, on the award amount of compensation. The second respondent-Insurance Company

is directed to deposit the award amount now determined by this Court, along with interest and costs, within a period of six weeks from the date of receipt of a copy of this judgment. On such deposit, the appellants/claimants are permitted to withdraw the award amount now determined by this Court equally among themselves along with proportionate interest and costs. No costs.

Sd/-
Assistant Registrar(Insp.Cell)

//True copy//

Sub Assistant Registrar

gbi

To

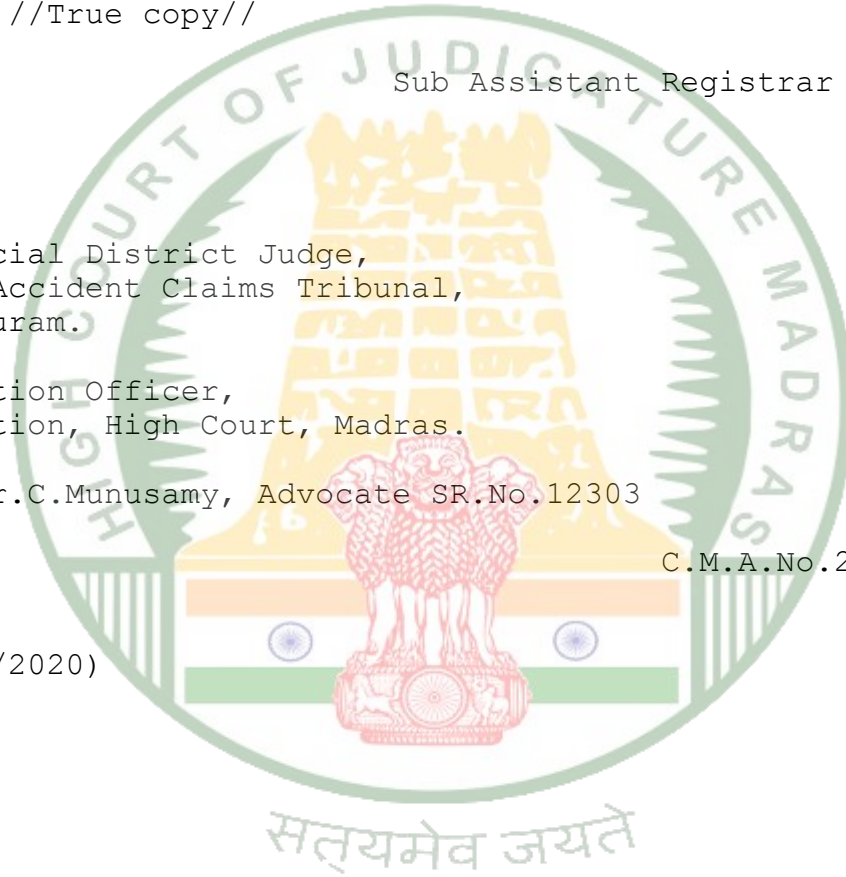
1.The Special District Judge,
Motor Accident Claims Tribunal,
Villupuram.

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

+1cc to Mr.C.Munusamy, Advocate SR.No.12303

C.M.A.No.2777 of 2017

RLD(CO)
GMY(03/09/2020)



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