

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 27.02.2020

CORAM:

THE HONOURABLE MS.JUSTICE V.M.VELUMANI

C.M.A.No.3073 of 2017

Saravanakumar

... Appellant

Vs.

1.Shahanawaz Kazi

2.Subramanian

3.TATA AIG General Insurance

Company Limited,

Peninsula Corporate Park,

Piramal Tower,

9th Floor, Ganpatrao Kadam Marg,

Lower Parel, Mumbai 400 013.

4.Muthuselvam

5.The Oriental Insurance Company Ltd.,

6-A, North Cotton Road, Tuticorin.

... Respondents

(The claim petition dismissed as against all the respondents; hence the respondents 1 to 3 are given up and 4th respondent is set exparte before the tribunal, hence notice may be dispensed with for 4th respondent in this appeal)

Prayer: This Civil Miscellaneous Appeal is filed under Section 173 of the Motor Vehicles Act, 1988, against the Judgment and Decree dated 23.01.2017 made in M.C.O.P.No.582 of 2013 on the file of the Motor Accident Claims Tribunal, I Additional District Court, Tiruppur.

For Appellant :Mr.Ma.P.Thangavel

For Respondents :Mr.K.Vinod for

Mrs.Elveera Ravindran for R5

J U D G M E N T

This Civil Miscellaneous Appeal has been filed challenging the order of dismissal dated 23.01.2017 made in M.C.O.P.No.582 of 2013 on the file of the Motor Accident Claims Tribunal, I Additional District Court, Tiruppur.

2.The appellant is the claimant in M.C.O.P.No.582 of 2013 on the file of the Motor Accident Claims Tribunal, I Additional District Court, Tiruppur. He filed the above said claim petition, claiming a sum of Rs.8,00,000/- as compensation for the injuries sustained by him in the accident that took place on 02.01.2013.

3.According to the appellant, on the date of accident i.e., on 02.01.2013, at about 05.00 a.m., while he was driving the lorry bearing Registration No. TCS 6663 belonging to the fourth respondent, insured with the fifth respondent, at the extreme left side of the road at a very slow speed, the crane bearing Registration No.TN 38 BH 3043, which was parked in a careless and negligent manner without any traffic rules and danger lights, the unknown vehicle came in the opposite direction with bright light and the appellant was not able to identify the crane, hit the crane and he sustained grievous injuries. Hence, he filed the claim petition before the Tribunal as against the respondents.

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

5.The third respondent/Insurance Company being insurer of the crane filed counter statement denying the averments made by the appellant and stated that the accident has occurred only due to rash and negligent driving by the appellant and there is no FIR and charge against the first respondent. The claim petition is filed for the self negligence of the appellant and it is basic principle of tort-feasor that no one can claim for his own negligence. Hence the third respondent is not liable to pay any compensation to the appellant and prayed for dismissal of the claim petition.

6.The fifth respondent/Insurance Company being insurer of the lorry filed counter statement denying the averments made by the appellant and stated that the appellant has impleaded this respondent only as a formal party for proper adjudication. The accident has occurred only due to negligence of the first respondent and not by the appellant. If the first respondent had parked the crane adhering to traffic rules and regulations, this accident would not have happened. Hence, the fifth respondent is not liable to pay any compensation to the appellant and prayed for dismissal of the claim petition.

7.Before the Tribunal, the appellant examined himself as P.W.1, examined one Muthukumar, eye-witness as P.W.2 and Dr.P.Senthilkumar as P.W.3 and marked nine documents as Exs.P1 to P9. On the side of the respondents, one Eswaramoorthi, driver

of the crane was examined as R.W.1 and marked four documents as Ex.R1 to R4.

8.The Tribunal considering the pleadings, oral and documentary evidence, held that the accident occurred due to rash and negligent driving by the appellant, driver of the lorry belonging to the fourth respondent and insured with the fifth respondent, however, dismissed the claim petition on the ground that the claimant has to seek compensation under Employee's Compensation Act.

9.Against the order of dismissal dated 23.01.2017 made in M.C.O.P.No.582 of 2013, the appellant has come forward with the present appeal.

10.The learned counsel appearing for the appellant contended that the Tribunal erred in fixing the negligence on the part of the appellant based on the FIR and Criminal Proceedings. The Tribunal erroneously rejected the evidence of P.W.2, eye-witness. The Tribunal erred in directing the appellant to approach the authority under Workmen Compensation Act instead of awarding compensation to the appellant. The Tribunal wrongly quoted the judgment reported in 2006 2 SCC 641 (National Insurance Company Vs. Mastan and another) and erroneously dismissed the claim petition, directing the appellant to approach the authority under Workmen Compensation Act. The Tribunal ought to have fixed notional income of the appellant as per Minimum Wages Act for the year 2013 and granted compensation and prayed for allowing the appeal.

11.Per contra, the learned counsel appearing for the fifth respondent/Insurance Company contended that the accident has occurred only due to rash and negligent driving by the appellant and he is not entitled to any compensation as he is a tortfeasor. The Tribunal has rightly dismissed the claim petition and directed the appellant to approach the authority under Workmen Compensation Act and prayed for dismissal of the appeal.

12. Heard the learned counsel appearing for the appellant as well as the learned counsel appearing for the fifth respondent and perused the entire materials available on record.

13.It is the contention of the appellant that the first respondent without any indicator parked the crane and due to the vehicle with bright light coming in the opposite direction, he could not see the parked crane and dashed on the crane. According to the appellant, the accident has occurred only due to negligent parking of the crane by the first respondent. To substantiate the same, he examined himself as P.W.1 and one

Muthukumar, eye-witness was examined as P.W.2. P.W.2 in his cross-examination has admitted that he did not lodge any complaint and did not admit the appellant in the hospital. In the cross-examination, he admitted that he did not know the colour of the crane. The Tribunal in view of these admissions by P.W.2, held that evidence of P.W.2 is not reliable one. After holding so, the Tribunal considering the evidence of R.W.1/the driver of the crane, Ex.P1/FIR, Ex.R2/Rough sketch and admission of the appellant that he has paid fine admitting his guilt in Criminal Proceedings, held that the accident has occurred only due to rash and negligent driving by the appellant, driver of the lorry belonging to the fourth respondent. There is no error in the said findings of the Tribunal warranting interference by this Court.

14. Further, the contention of the appellant is that he is an employee of the fourth respondent and the vehicle was insured with fifth respondent. Therefore, the appellant is entitled for compensation under Workmen Compensation Act from the respondents 4 and 5. The Tribunal erred in directing the appellant to approach the authority under Workmen Compensation Act instead of granting compensation. The said contention has considerable force and is acceptable. 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 insurance held that a claim petition under Motor Vehicles Act as well as Workmen Compensation Act are maintainable. The claimant 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 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 in the 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."

15. This judgment was followed by another Division Bench of this Court in the judgment reported in 2015 (2) TNMAC 362 (DB) in M.Anbalagan vs. K.M.Asalm Basha, in paragraph 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 Compensation Act in the claim petition filed under Sections 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 appellant is entitled to compensation as per the provisions of the Workmen Compensation Act, 1923. The calculation 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. In the present case, the appellant has stated in the claim petition that he was working as a driver and was earning a sum of Rs.10,000/- per month. There is no contra evidence let in on the side of the respondents, to disprove the contention of the appellant that he was working as a driver. At the same time, the appellant failed to produce any material to show that he 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 appellant. The accident is of the year 2013. The appellant was working as a driver and as per Minimum Wages Act, a sum of Rs.8,000/- per month is fixed as notional income of the appellant. 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 IV is against the entry in the 1st column with regard to the age of the appellant. The age of the appellant was mentioned in the claim petition as 23 years. As per the IV Schedule incorporated as per Section 4 of the Employees Compensation Act, for the age of 23 years, the factor is 219.95. Applying the said factor, taking into consideration 60% of the amount fixed by this Court, the compensation payable to the appellant comes to Rs.5,67,999/- (Rs.8000 x 60% x 219.95 x 53.8%).

17. Apart from the above, the appellant is entitled only to medical expenses incurred by him as per Ex.P7/Medical bills. Accordingly, a sum of Rs.1,23,175/- is awarded towards medical expenses. Thus, a sum of Rs.6,91,174/- is awarded as compensation to the appellant/claimant, break-up as follows - सत्यमेव जयते

Srl.No.	Description	Amount awarded by this Court (Rs.)
1.	Loss of income	5,67,999/-
2.	Medical expenses	1,23,175/-
	Total	6,91,174/-

18. In the result, this Civil Miscellaneous Appeal is partly allowed and a sum of Rs.6,91,174/- is awarded as compensation, together with interest at the rate of 12% per annum from the date of petition till the date of deposit. The appellant is directed to pay necessary Court fee, if any, on the award amount. The fifth respondent/Insurance Company is directed to deposit the award amount now determined by this Court, along with interest at 12% p.a. and costs, within a period of six weeks from the date of receipt of a copy of this judgment. On such deposit, the appellant is permitted to withdraw the award amount now determined by this Court, along with interest and costs. No costs.

(*)Deleted and Submitted Para Nos.16 to 18
vide Court-Order dated 27/02/2020

Sd/-
Assistant Registrar(Inspe.)

//True Copy//

Sub Assistant Registrar

To

The I Additional District Court,
Motor Accident Claims Tribunal,
Tiruppur.

Copy to

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

+lcc to Ma.P.Thangavel, Advocate Sr.18058
+lcc to M/s.Elveera Ravindran, Advocate SR.17324

C.M.A.No.3073 of 2017

srg 29/12/2020