IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 27.02.2020

CORAM:

THE HONOURABLE MS.JUSTICE V.M.VELUMANI

C.M.A.No.2926 of 2018
and C.M.P.No.22163 of 2018

The Branch Manager,
Tata AIG General Insurance Co. Ltd.
.. Appellant/2nd Respondent

Vs.

1.Jothilakshmi
2.Manirathinam
3.Vishnukumar
4.Mohanraj
5.Minor Yuvarani
6.Selvambal ... Respondents / Petitioners

7.Venugopal .. Respondent/1st Respondent
(minor rep by her mother Jothilakshmi)

Prayer: This Civil Miscellaneous Appeal is filed under Section 173 of the Motor Vehicles Act, 1988, against the Judgment and Decree dated 06.10.2017 made in M.C.O.P.No.72 of 2014 on the file of the Motor Accident Claims Tribunal / District Court No.2, Kanchipuram.

For Appellant : Mr.K.Vinod

For Respondents: Mr.M.Dinesh for
Mr.T.Dinagarane for R1 to R6

J U D G M E N T

This Civil Miscellaneous Appeal is filed by the Insurance Company against the award dated 06.10.2017 made in M.C.O.P.No.72 of 2014 on the file of the Motor Accident Claims Tribunal / District Court No.2, Kanchipuram.

2.The appellant/Insurance Company is the 2nd respondent in M.C.O.P.No.72 of 2014 on the file of the Motor Accident Claims Tribunal / District Court No.2, Kanchipuram. The respondents 1 to 6 filed the said claim petition claiming a sum of

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Rs.20,00,000/- as compensation for the death of one Poonambalam who died in the accident that took place on 21.08.2013.

3.According to the respondents 1 to 6, on 21.08.2013 at about 9.45 A.M, the deceased was proceeding in the two wheeler bearing Registration No. TN 32 A 5058 from Siruchery to Padur to his house on OMR road. At that time, a lorry driven by its driver in a rash and negligent manner belonging to the seventh respondent and insured with the appellant, dashed against the deceased two wheeler and caused the accident. In the said accident, the deceased sustained grievous injuries on his head and died on the spot. Due to the same, the respondents 1 to 6 have filed the above claim petition claiming compensation against the seventh respondent as well as the appellant, as owner and insurer of the lorry respectively.

4.The seventh respondent remained exparte before the Tribunal.

5.The appellant-Insurance Company filed counter statement denying the averments made in the claim petition and contended that the owner and insurer of the two wheeler, in which the deceased was riding are necessary parties to decide the negligence aspects of the drivers involved in the case. But they have not been implead them in the claim petition and prayed for dismissal of the claim petition for non-joinder of necessary parties. In any event, the compensation claimed by the respondents 1 to 6 are excessive and prayed for dismissal of the claim petition.

6.Before the Tribunal, on the side of the respondents 1 to 6, three witnesses were examined as P.W.1 to P.W.3 and marked 12 documents as Exs.P1 to P12. On the side of the appellant, one Manimaran was examined as R.W.1 and marked two documents as Exs.R1 and R2.

7.The Tribunal considering the pleadings, oral and documentary evidence, held that the accident occurred only due to rash and negligent driving by the driver of the lorry belonging to the 7th respondent and directed the appellant as insurer of the vehicle to pay a sum of Rs.14,86,144/- as compensation to the respondents 1 to 6.

8.Challenging the quantum of compensation awarded by the Tribunal in the award dated 06.10.2017 made in M.C.O.P.No.72 of 2014, the appellant-Insurance Company has filed this appeal.

9.The learned counsel appearing for the appellant contended that the Tribunal erred in awarding Rs.14,86,144/- as compensation to the respondents 1 to 6, after finding that the respondents have availed the benefits under the ESI Act. The Tribunal erred in holding that the benefits under the ESI Act

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are different than the benefits under Motor Vehicles Act and that all accident injuries were not employment injuries. The Tribunal failed to appreciate that as per the Sections 53 and 61 of the ESI Act, the beneficiaries are barred from receiving the benefits under any other enactments. The Tribunal erred in fixing the monthly income of the deceased at Rs.9,300/- and Rs.700/- towards overtime. The Tribunal erred in granting 30% enhancement towards future prospects. The Tribunal without any basis fixed the age of the deceased as 51 years and erred in applying multiplier '11'. The Tribunal is not correct in deducting 1/4th towards personal expenses from the income of the deceased. The amounts awarded by the Tribunal under conventional heads are excessive and respondents 1 to 6 are entitled to only Rs.70,000/- towards under the conventional heads and prayed for setting aside the award of the Tribunal. In support of his contention, he relied on the judgment of the Hon'ble Supreme Court reported in 2017 (2) TNMAC page 609(SC) (National Insurance Company v. Pranay Sethi).

10.Per contra, the learned counsel appearing for the respondents 1 to 6 contended that the benefits under ESI Act is entirely different from compensation payable under provisions of Motor Vehicles Act. As per ESI Act, only wife and minor children are entitled to compensation. When the minor becomes major, the minor is not entitled to compensation under ESI Act. The Tribunal, after considering all the materials on record has fixed the monthly income and granted enhancement towards future prospects. The amounts awarded by the Tribunal under different heads are not excessive and prayed for dismissal of the appeal. In support of his contention, he relied on the following judgments:

(i) 2012 (2) TNMAC 245 (New India Assurance Company Limited Vs. S.Govindaraj);

> "12.An "employment injury" is different from a "Motor injury". An insured person may sustain injury in the course of and out of his employment. He may also sustain injury not in the course of and out of his employment. He may sustain injury by reason of negligent driving of a vehicle in the public road by a person. He may sustain injury even in a bus belonging to his employer, in which, he had travelled not as a workman, travelled not in connection with his employment, but as an ordinary passenger like others. Such injury will not be an employment injury.
>
> 22.Thus, from the above, it is clear that only when the workman sustained employment injury, that is to say, an injury sustained by him in the course of and out of his employment the bar under Section 53 of the E.S.I.Act will apply to claim compensation under the Motor Vehicles Act, or under other enactment or under any

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other law including the Law of Torts."

(ii) ILR 2015 KAR 4137 (DB) (The Branch Manager, National Insurance Company Ltd., Vs. Sri Govindappa & others);

> "5.....Of course, if the said accident is due to rash and negligent driving of the driver of vehicle belonging to employer, then the injured claimant or dependants of the deceased would not be entitled to seek compensation under Section 166 MV Act as they will have to necessarily proceed under the provisions of ESI Act but not in a circumstance where the injured claimant or dependants of deceased are seeking compensation as third parties from the owner and insurer of the vehicle, which is not the vehicle belonging to the employer of the injured or deceased. In that view of the matter, this Court feel that the said line of argument would not hold water in the light of aforesaid unreported decision of this very Bench."

(iii) 2019 SCC online Del 9802 (United India Insurance Company Limited, Vs. Vipin Kumar & others);

> "Hence read with Section 61 of the Act, the Section 53 can be interpreted to prohibit only a second claim of similar compensation in his capacity as employee from the employer or from any person required to compensate such an injured person/dependent in his capacity as an employee under the ESI Act. Since there is no commonality between the benefits available under Motor Vehicles Act 19 of 26 and under the provisions of ESI Act, therefore, the provisions of two Acts cannot be mixed up to deny compensation to a person under Motor Vehicle Act. In a given case, even the monthly interest earned on the amount awarded under Motor Vehicles Act can be many fold higher than the total amount of benefits available under the provisions of ESI Act. Hence the benefits available under these two enactments are altogether different and separate."

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

12.It is the contention of the appellant that the claim petition is not maintainable under Motor Vehicles Act, on the ground that respondents 1 to 6 are receiving the benefits under provisions of ESI Act and Sections 53 and 61 of the ESI Act specifically bar the claim of compensation under any other enactments. The said contention is without merits. The benefits granted under ESI Act is different from the compensation awarded under Motor Vehicles Act. The compensation under Motor Vehicles Act is for tortuous liability and the benefits granted under the

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provisions of ESI Act is not a bar for granting compensation for the death caused in a accident involving the Motor Vehicle. Further all the dependants of the deceased are entitled to compensation under Motor Vehicles Act. For the above reason, the finding of the Tribunal that the claim petition under Motor Vehicles Act is maintainable is valid.

13.As far as quantum of compensation is concerned, the respondents 1 to 6 contended that the deceased was working as a Security Supervisor and was earning a sum of Rs.15,000/- per month. The Tribunal considering Exs.P8/appointment order and P11/ Salary Certificate held that the actual pay of the deceased was Rs.9,300/- per month. The Tribunal taking note that the deceased was earning overtime payment at Rs.700/- per month, arrived at notional income of the deceased at Rs.10,000/- per month. The accident is of the year 2013. The notional income fixed by the Tribunal and applying multiplier '11' are proper and there is no error in the said finding of the Tribunal, warranting interference by this Court. Having accepted Ex.P.11-Salary Certificate and Rs.9,300/- per month and overtime payment of Rs.700/- per month, totaling to Rs.10,000/- as monthly income of the deceased, while calculating the compensation for loss of dependancy, the Tribunal erroneously fixed the notional income as Rs.9,300/- per month. In view of the said error, the notional income is corrected and fixed as Rs.10,000/- per month. Further, the Tribunal has granted 30% enhancement towards future prospects and the same is excessive. The deceased was aged 51 years at the time of the accident. The respondents 1 to 6 are entitled only 10% enhancement towards future prospects. There are six dependants of the deceased and the Tribunal rightly deducted 1/4th towards the personal expenses of the deceased and after applying multiplier '11', the compensation awarded by the Tribunal towards loss of dependency is modified to Rs.10,89,000/- (Rs.10,000/- + 1,000/- [Rs.10,000/- X 10%] x 12 x 11 x 3/4). The Tribunal has awarded a sum of Rs.50,000/- towards loss of consortium to the first claimant which is excessive and the same is hereby reduced to Rs.40,000/-. The Tribunal has not awarded any amount towards loss of estate and hence, a sum of Rs.15,000/- is awarded towards loss of estate. The amounts granted by the Tribunal under the other heads are just and reasonable and hence, they are hereby confirmed. Thus, the compensation awarded by the Tribunal is modified as follows:

S.No	Description	Amount awarded by Tribunal (Rs)	Amount awarded by this Court (Rs)	Award confirmed or enhanced or granted or reduced

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1.	Loss of dependency	12,66,144	10,89,000	Reduced
2.	Funeral expenses Transportation	20,000	20,000	Confirmed
3.	Loss of consortium	50,000	40,000	Reduced
4.	Loss of love and affection	1,50,000	1,50,000	Confirmed
5.	Loss of estate	-	15,000	Granted
	Total	14,86,144/-	13,14,000/-	Reduced to Rs.1,72,144/-

14.With the above modification, the Civil Miscellaneous Appeal is partly allowed. The compensation of Rs.14,86,144/- awarded by the Tribunal is hereby reduced to Rs.13,14,000/- together with interest at the rate of 7.5% per annum from the date of petition till the date of deposit. The appellant/Insurance Company is directed to deposit the modified award amount along with interest and costs, less the amount already deposited, if any, within a period of six weeks from the date of receipt of a copy of this judgment. On such deposit, the respondents 1 to 4 and 6/claimants are permitted to withdraw their respective share of the award amount along with proportionate interest and costs, as per the apportionment made by the Tribunal, after adjusting the amount if any, already withdrawn. The share of the minor 5th appellant is directed to be deposited in any one of the Nationalized Bank, till the minor attains majority. The 1st respondent, mother of the minor 5th respondent is permitted to withdraw the accrued interest, once in three months for the welfare of the minor 5th respondent. The appellant/Insurance Company is permited to withdraw the excess amount lying in the deposit to the credit of M.C.O.P.No.72 of 2014, if the entire award amount has already been deposited by them. No costs. Consequently, connected Miscellaneous Petition is closed.

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Sd/-

Assistant Registrar

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Sub Assistant Registrar

vkr

To

1.Motor Accident Claims Tribunal,
The District Court No.2,
Kanchipuram.

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

+1cc to Mr.K.Vinod, Advocate, S.R.No. 17325
+1cc to Mr.M.Dinesh, Advocate, S.R.No.17985

C.M.A.No.2926 of 2018
and C.M.P.No.22163 of 2018

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