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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 14.07.2021	Delivered on: 21.09.2021
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CORAM:

THE HONOURABLE MRS.JUSTICE S.KANNAMMAL

C.M.A.No.2925 of 2014

and

M.P.No.1 of 2014 & C.M.P.No.15853 of 2016

The Branch Manager,
The Oriental Insurance Company Limited,
No.25-C, Arunagiri Complex,
IIIrd Floor, Bye Pass Road,
Hosur - 635 109.

.. Appellant/3rd Respondent

Vs.

1.S.Sekar

..1st Respondent/Petitioner

2.Girijesha

3.N.Basavaraj

.. Respondents 2 and 3/Respondents 1 and 2

Prayer: This Civil Miscellaneous Appeal is filed under Section 173 of the Motor Vehicles Act, 1988, against the Judgment and Decree dated 23.07.2013 made in M.C.O.P.No.350 of 2013 on the file of the Motor Accidents Claims Tribunal, Special Sub Court, Krishnagiri.

For Appellant : Mr.S.Arunkumar

For R1 : Mr.Mukund R.Pandiyan

For RR2 & 3 : No appearance

J U D G M E N T

(The matter is heard through "Video Conferencing/Hybrid mode".)

This Civil Miscellaneous Appeal has been filed against the award dated 23.07.2013 made in M.C.O.P.No.350 of 2013 on the file of the Motor Accidents Claims Tribunal, Special Sub Court, Krishnagiri.



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2.The appellant is the 3rd respondent in M.C.O.P.No.350 of 2013 on the file of the Motor Accidents Claims Tribunal, Special Sub Court, Krishnagiri. The 1st respondent filed the said claim petition claiming a sum of Rs.10,00,000/- as compensation for the injuries sustained by him in the accident that took place on 12.07.2005.

3.According to 1st respondent, on 12.07.2005 at about 02.00 P.M., while he was walking on the left side of the road (new road) near Vasa Road, the driver of the auto bearing Registration No.KA 05 C 4771 belonging to 3rd respondent drove the same in a rash, reckless and negligent manner and hit on the 1st respondent and the auto got capsized on the new road and caused the accident. In the accident, the 1st respondent sustained injuries on his left leg and head. Immediately after the accident, the 1st respondent was taken to St.Johns Medical College Hospital, Bangalore and then he was referred to Abhaya Hospital, Bangalore, where he has taken treatment as inpatient from 12.07.2005 to 05.08.2005. Thereafter he has taken treatment as inpatient at Ashok Hospital, Hosur from 05.08.2005 to 20.09.2005 and again from 22.06.2006 to 29.06.2006. Further, the 1st respondent has taken treatment till filing of the claim petition. Therefore, he filed the said claim petition claiming a sum of Rs.10,00,000/- as compensation for the injuries sustained by him against the respondents 2, 3 and appellant-Insurance Company, being the driver, owner and insurer of the Auto respectively.

4.The respondents 2 & 3, being the driver and owner of the Auto remained exparte before the Tribunal.

5.The appellant-Insurance Company, being the insurer of the Auto filed counter statement and denied all the averments made by the 1st respondent. According to appellant, the accident occurred on 12.07.2005 at 02.00 P.M., involving the Auto belonging to 3rd respondent in Vasa Road between Athipalli to Bangalore, but the 1st respondent claims that he walked on the left side of the road, whereas in the F.I.R., it reveals that he traveled in the said Auto at the time of accident. Hence, the appellant denied the fact that the 1st respondent sustained injuries in the accident. The 2nd respondent-driver of the Auto was not possessing valid driving license at the time of accident. The appellant denied the age, avocation, income, alleged injuries, period of treatment taken and the medical expenses incurred by the 1st respondent. In any event, the quantum of compensation claimed by the 1st respondent is excessive and prayed for dismissal of the claim petition.

6.Before the Tribunal, the 1st respondent examined himself as P.W.1, Dr.M.Devendran was examined as P.W.2 and 13 documents



were marked as Exs.P1 to P13. The appellant-Insurance Company examined one Panneer Selvam, Administrative Officer as R.W.1 and the Insurance Policy was marked as Ex.R1.

7.The Tribunal considering the pleadings, oral and documentary evidence held that the accident occurred due to rash and negligent driving by the driver of the Auto belonging to 3rd respondent and directed the appellant-Insurance Company to pay a sum of Rs.8,38,600/- as compensation to the 1st respondent at the first instance and recover the same from the 3rd respondent.

8.To set aside the said award dated 23.07.2013 made in M.C.O.P.No.350 of 2013, the appellant has come out with the present appeal.

9.Though the appellant-Insurance Company has raised various grounds with regard to quantum of compensation, at the time of arguments, the learned counsel appearing for the appellant restricted his arguments only with regard to liability fastened on the appellant-Insurance Company is erroneous and contended that the Tribunal having come to the conclusion that the 1st respondent traveled as an unauthorized passenger in the goods auto, ought to have dismissed the claim petition as against the appellant-Insurance Company. The award passed by the Tribunal is unsustainable as per the judgment of the Hon'ble Apex Court reported in 2008 ACJ 1741 (United India Insurance Company Limited Vs. Suresh K.K. and another). In support of his contention, the learned counsel appearing for the appellant relied on two judgments:

(i) The judgment of the Hon'ble Apex Court reported in 2004 (1) CTC 210 [National Insurance Company Ltd., Vs.Baljit Kaur and others] and

(ii) The Division Bench judgment of this Court reported in 2018 (2) TNMAC 731 DB (Bharati AXA General Insurance Co. Ltd., Vs. Aandi and others) and prayed for setting aside the award passed by the Tribunal.

10.Per contra, the learned counsel appearing for the 1st respondent contended that the 1st respondent sustained fracture of shaft of left femur, traumatic senboorach hammerhage and odema chest, contusion of left lung, lacerated wound over middle 1/3rd of medical aspect of right leg and multiple injuries all over the body in the accident caused by the driver of the Auto belonging to 3rd respondent. Further, at the time of accident, the 1st respondent was aged 40 years, doing Vegetable and Seasonal Business and was earning a sum of Rs.6,000/- per month. P.W.2/Doctor assessed the percentage of disability of the 1st



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respondent at 60% and the Tribunal without giving any valid reason, reduced the same to 50%. The Tribunal considering the nature of injuries, percentage of permanent disability, evidence of P.W.1 and P.W.2/Doctor and the nature of work done by the 1st respondent, fixed a sum of Rs.5,000/- per month as notional income of the 1st respondent, applied multiplier '15' and awarded a sum of Rs.4,50,000/- as compensation for loss of earning capacity and the same is not excessive. Further, the 1st respondent has taken treatment as inpatient at Abhaya Hospital, Bangalore from 12.07.2005 to 05.08.2005 and at Ashok Hospital, Hosur from 05.08.2005 to 20.09.2005 and also from 22.06.2006 to 29.06.2006. The Tribunal considering the nature of injuries, percentage of disability and the period of treatment taken by the 1st respondent, awarded a sum of Rs.8,38,600/- as compensation to the 1st respondent and the same is not excessive and prayed for dismissal of the appeal.

11.Though notice has been served on the respondents 2 and 3 and their names are printed in the cause list, there is no representation on behalf of them, either in person or through counsel.

12.Heard the learned counsel appearing for the appellant as well as the learned counsel appearing for the 1st respondent and perused the entire materials on record.

13.From the claim petition filed by the 1st respondent, it is seen that it is the case of the 1st respondent that on 12.07.2005 at about 02.00 P.M., while he was walking on the left side of the road (new road) near Vasa Road, the driver of the auto bearing Registration No.KA 05 C 4771 belonging to 3rd respondent drove the same in a rash, reckless and negligent manner and hit on the 1st respondent and the auto got capsized on the new road and caused the accident. To prove the said contention, the 1st respondent examined himself as P.W.1 and marked F.I.R., which was registered against the driver of the auto as Ex.P1. On the other hand, it is the case of the appellant that the accident occurred on 12.07.2005 at 02.00 P.M., involving the Auto belonging to 3rd respondent in Vasa Road between Athipalli to Bangalore, but the 1st respondent claims that he walked on the left side of the road, whereas in the F.I.R., it reveals that he traveled in the said Auto at the time of accident and hence, he is not entitled to claim any compensation. To prove the said contention, the appellant examined one Panneer Selvam, Administrative Officer as R.W.1 and marked the Insurance Policy as Ex.R1. To prove the said contention that the 1st respondent has traveled only in the Auto at the time of accident, the appellant has neither examined the driver of the Auto, 2nd respondent herein, who is the best witness to depose about the accident nor examined any other



independent eyewitness to prove their case. Further, R.W.1 is not an eyewitness to the accident and he deposed only based on the contents available in F.I.R. P.W.1 in his evidence has admitted that he walked on the left side of the road and the driver of the van only drove the same in a rash and negligent manner, hit on him and caused the accident. The appellant failed to disprove the said contention except examining R.W.1, who was not an eyewitness to the accident. The evidence on oath must be given more weightage than criminal investigation. In the present case, F.I.R. was registered by the Police based on the complaint given by one Arul Anand, younger brother of the 1st respondent on 20.07.2005. The said Arul Anand was also not an eyewitness to the accident and he has given complaint to the Police only based on the hearsay information he has received. Further, the appellant has not filed any objection to the F.I.R., which was registered against the driver of the auto. The Tribunal considering the evidence of P.W.1, Ex.P1/F.I.R. and failure on the part of the appellant for not filing any objection to the F.I.R. and not examining the driver of the auto or any other independent witness, held that accident has occurred only due to the negligence on the part of the driver of the auto belonging to 3rd respondent. There is no error in the said finding of the Tribunal.

14.The Tribunal having come to the conclusion that the accident has occurred only due to rash and negligent driving by the driver of the auto belonging to 3rd respondent, held that the 1st respondent traveled in the auto as an unauthorized passenger based on the evidence of R.W.1. R.W.1 is not an eyewitness to the accident and he deposed only based on the contents available in F.I.R. F.I.R. is not the conclusive proof for fixing negligence. The appellant has neither examined the driver of the Auto, 2nd respondent herein, who is the best witness to depose about the accident nor examined any other independent eyewitness to prove their case that the 1st respondent traveled in the auto at the time of accident. Therefore, the finding of the Tribunal that the 1st respondent traveled in the auto as an unauthorized passenger is not correct. Further, from the cross examination of P.W.1, it is seen that P.W.1 deposed that he has not invited the accident by crossing the road. Had the Insurance Company is of the view that the 1st respondent travelled only in the Auto at the time of accident, the counsel for the Insurance Company who appeared before the Tribunal would not have suggested the 1st respondent, that he invited the accident while crossing the road. This shows that the Insurance Company is not of the view that the 1st respondent traveled only in the Auto at the time of accident. In view of the same, the finding of the Tribunal that the 1st respondent traveled in the auto only as unauthorized passenger is not correct. Therefore, when it is not proved by acceptable evidence that the 1st respondent traveled in the auto



only as an unauthorized passenger, the portion of the award directing the appellant to recover the compensation from the 3rd respondent alone is liable to be set aside and it is hereby set aside. The appellant-Insurance Company is directed to pay the entire compensation. The ratio of the judgment of the Hon'ble Apex Court reported in 2008 ACJ 1741 (United India Insurance Company Limited Vs. Suresh K.K. and another) relied on by the learned counsel appearing for the appellant is not applicable to the present case.

15. In the result, this Civil Miscellaneous Appeal is dismissed and a sum of Rs.8,38,600/- awarded by the Tribunal as compensation to the 1st respondent, along with interest and costs is confirmed. The appellant-Insurance Company is directed to deposit the award amount 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 to the credit of M.C.O.P.No.350 of 2013 on the file of the Motor Accidents Claims Tribunal, Special Sub Court, Krishnagiri. On such deposit, the 1st respondent is permitted to withdraw the award amount along with interest and costs, after adjusting the amount, if any already withdrawn, by filing necessary applications before the Tribunal. Consequently, the connected Miscellaneous Petitions are closed. No costs.

Sd/-

Assistant Registrar (CS-V)

//True copy//

Sub Assistant Registrar

krk

To

The Special Subordinate Judge,
Motor Accidents Claims Tribunal,
Krishnagiri.

+1cc to Mr.S.Arunkumar, Advocate SR.No.48652

+1cc to Mr.Mukund R.Pandiyan, Advocate SR.No.48437

C.M.A.No.2925 of 2014

GPL (CO)
GMY (25/10/2021)