IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 02.11.2022

CORAM:

THE HONOURABLE **MS.JUSTICE V.M.VELUMANI**

and

THE HONOURABLE **MR.JUSTICE SUNDER MOHAN**

C.M.A.No.3509 of 2021

and C.M.P.Nos.20322 & 17555 of 2021

ICICI Lombard General Insurance Company Limited,

ICICI Lombard House,

No.414, Veersavarkar Temple,

Near Siddhi Vinayak Temple,

Prabhadevi, Mumbai-400 025. ... Appellant

Vs.

1.K.Murugan

2.K.C.Velayudham ... Respondents

[R-2 remained ex-parte before the Tribunal. Hence,

notice to R-2 is dispensed with]

Prayer: This Civil Miscellaneous Appeal is filed under Section 173 of Motor Vehicles Act, 1988, against the judgment and decree dated 10.01.2018 made in M.C.O.P.No.635 of 2012 on the file of Motor Accident Claims Tribunal, Subordinate Court, Sankagiri.

For Appellant : Mr.K. Poomalai

For R1 : Mr.N.Manokaran

JUDGMENT

(Judgment of the Court was delivered by SUNDER MOHAN,J.)

The Civil Miscellaneous Appeal has been filed by the appellant/Insurance Company against the Judgment and decree dated 10.01.2018 made in M.C.O.P.No.635 of 2012 on the file of Motor Accident Claims Tribunal, Subordinate Court, Sankagiri.

2.The appellant/Insurance Company is the second respondent in M.C.O.P.No.635 of 2012 on the file of Motor Accident Claims Tribunal, Subordinate Court, Sankagiri. The first respondent herein filed the claim petition claiming a sum of Rs.31,00,000/- as compensation for the injuries sustained by him in the accident that took place on 16.06.2012.

3.According to the first respondent, on the date of accident i.e., on 16.06.2012, at about 7.30 a.m., while he was riding in his bike bearing Registration No.TN52 C 3892 from Adaiyar to Vannakuttai to visit his sister and when he was nearing Peruvalakuttai, on the said road, TATA ACE bearing Registration No.TN 52 C 3713 came from the opposite direction in a rash and negligent manner and caused the accident. In the said accident, the first respondent sustained grievous injuries all over the body and hence, filed a claim petition for a sum of Rs.31,00,000/- against the owner of the TATA ACE Vehicle, the second respondent herein and the appellant/Insurance Company, the insurer of the said TATA ACE.

4.The second respondent herein remained ex-parte before the Tribunal.

5.The appellant/Insurance Company filed counter statement denying the averments made in the claim petition and submitted that the first respondent did not possess driving license for riding a two wheeler. The claim petition is bad for non-joinder of the insurer of the two wheeler. The accident took place because of the negligent act of the first respondent. Hence, the appellant is not liable to pay any compensation to the first respondent. In any event, the total compensation claimed by the first respondent is excessive and prayed for dismissal of the claim petition.

6.Before the Tribunal, the first respondent examined himself as P.W.1 and marked 19 documents as Ex.P.1 to Ex.P.19. The appellant/Insurance Company did not let in any oral and documentary evidence.

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 TATA ACE belonging to the second respondent herein and directed the appellant/Insurance Company to pay a sum of Rs.60,00,000/- as compensation to the first respondent.

8.Questioning the quantum of compensation awarded by the Tribunal, the appellant/Insurance Company has come out with the present appeal.

9.The learned counsel for the appellant/Insurance Company submitted that the first respondent had not established his functional disability and the Tribunal had erroneously assessed the functional disability at 100% and adopted the multiplier method. The learned counsel further submitted that the Tribunal had erroneously assesed the annual income at Rs.3,92,000/- for which the first respondent had not let in any evidence. The Tribunal rejected Ex.P.12 and the oral evidence of the first respondent that he was earning Rs.15,000/-per month through the chicken farm run by him and Rs.20,000/- per month through the milk business, at the time of the accident. The learned counsel further submitted the Transport Charges awarded at 70,000/- is excessive and the documents filed by the first respondent does not inspire confidence as it has been issued by the same taxi owner. The learned counsel further submitted that the compensation assessed at Rs.1,00,000/- for simple injury suffered by the first respondent is erroneous and prayed for setting aside the award of the Tribunal.

10.Learned counsel for the first respondent made submissions in support of the award of the Tribunal and contended that the total compensation awarded by the Tribunal is not excessive and prayed for dismissal of this appeal.

11.Heard, the learned counsel for the appellant and the learned counsel for the first respondent and perused the materials available on record.

12.On perusal of the materials on record, we find that the Tribunal has fixed the functional disability of the first respondent as 100% and applied the mulitiplier method. The income assesed by the Tribunal is Rs.3,92,000/- per annum. In order to arrive at the functional disability, the learned Tribunal has relied upon Ex.P.18, Disability Certificate issued by the Medical Board, Government Hospital Omalur. The diability Certificate shows the nature of injury which is as follows:

"Open Clavicle Fracture left with left Brachial Plexus injury multiple lacerated wounds over face and scalp."

The clininal features as on date of examination was observed as follows:

"Difficulty Dorsiflexion writ elbow flexion passive 90 degree shoulder movements only passive muscle power 2/5. sensory loss all over left upper limb."

13.The total percentage disability was assessed at 90%. The Medical Board has not assessed the functional disability. The clinical features do not suggest that the first respondent had become 100% functionally disabled. There is no other evidence to suggest that he had totally lost his earning capacity. Even according to the first respondent, he had chicken farm and was doing agriculture and milk business. In the absence of any evidence to show that the first respondent had become totally disabled and was incapable of doing any work, the Tribunal ought not to have assesed the functional disability at 100%. The clinical features as observed in Ex.P.18 would show that the shoulder movements and the wrist movement were restricted and there was sensory loss over the left limb and the percentage of disability in those parts of the body is assesed as 90%. The disability assessed by the Medical Board is only for a particular part of the body. Applying the principles laid down by the Hon'ble Apex Court and this Court, the disability is converted for whole body and fixed functional disability at 30%.

14.As regards the income, the Tribunal had assesed the income at Rs.3,92,000/- per annum. The Tribunal had rejected Ex.P.12, Salary certificate which has been issued to the first respondent. However, the Tribunal took into consideration the nature of work and business done by the first respondent. The

Tribunal based on certain assumptions, came to the conclusion that the first respondent would have earned Rs.3,92,000/- per annum. In our view, the approach of the Tribunal is erroneous. In the absence of any acceptable evidence establishing the income earned by the first respondent, the notional income has to be fixed. Since the accident is of the year 2012, the notional income is taken at Rs.8000/- per month. The first respondent was aged about 41 years at the time of accident and was self employed. As per the judgment of the Hon'ble Apex Court in ***National Insurance Company Ltd. Vs. Pranay Sethi*** reported in ***2017 (2)TN MAC 609 (SC)*** the first respondent is entitled to only 25% enhancement towards future prospects. Hence, the future prospects is taken as 25% and the multiplier applied is 14. Adopting multiplier method, loss of earning capacity is calculated as follows:

The loss of earning capacity is [8000+2000 (25% of 8000) x 12x 14 x30% = Rs.5,04,000/-

15.The learned judge has awarded Rs.70,000/- towards Transport charges on the basis of Ex.P.15 - Receipts which are the receipts issued by the taxi service. We find that the receipts on the face of it, does not appear to be genuine, in as much as it is stated that the first respondent used the same taxi bearing Registration No.TN 52 Z 1596 for his transportation, which is improbable. Further, the owner of the taxi has not been examined in which case the appellant could have had an opportunity to cross examine him in order to prove the genuiness of the receipts. Therefore, we reject Ex.P.15. In any event the first respondent would have incurred some amount for Transportation. Considering the distance between the place of occurrence and hospital and residence of first respondent, the compensation awarded under transport charges is hereby reduced to Rs.20,000/-. The compensation awarded for the loss suffered on account of the simple injury at Rs.1,00,000/- is erroneous and therefore it is set aside. The compensation awarded by the Tribunal under other heads are confirmed. Thus, the compensation awarded under 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
1.	Loss of earning capacity	49,40,000	5,04,000	reduced

2.	Medical Expenses as per bill	7,00,000	7,00,000	confirmed
3.	Pain and Suffering	1,00,000	1,00,000	confirmed
4.	Transport Expenses	70,000	20,000	reduced
5.	Food and Nutrition	40,000	40,000	confirmed
6.	Attendant Charges	40,000	40,000	confirmed
7.	Simple injuries	1,00,000	-	Set aside
8.	Loss of Estate	10,000	10,000	confirmed
	Total	**60,00,000/-**	**14,14,000/-**	**Reduced by Rs.45,86,000/-**

16. With the above modification, the Civil Miscellaneous Appeal is partly allowed. The compensation of Rs.60,00,000 /- awarded by the Tribunal is hereby reduced to Rs.14,14,000 /- with interest at the rate of 7.5% per annum from the date of petition till the date of realisation. The appellant/Insurance Company is directed to deposit the modified award amount 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 order. On such deposit, the first respondent is permitted to withdraw the award amount with accrued interest and costs, after adjusting the amount if any, already withdrawn. The appellant/Insurance Company is permitted to withdraw the excess amount, if any lying in the deposit to the credit of M.C.O.P.No.635 of 2012, if the entire award amount has already been deposited by them. No costs. Consequently, connected Miscellaneous Petitions are closed.

(V.M.V., J) (S.M., J)

02.11.2022

Index : Yes / No
vsn

To

1.The Subordinate Judge
Motor Accident Claims Tribunal,
Sankagiri

2.The Section Officer
VR Section
High Court
Madras.

V.M.VELUMANI,J.
and
SUNDER MOHAN,J.

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