**BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT**

**RESERVED ON : 02.06.2023**

**PRONOUNCED ON : 07.06.2023**

**CORAM**

**THE HONOURABLE MR.JUSTICE R.VIJAYAKUMAR**

**C.M.A(MD)No.1262 of 2016**
**and**
**Cross Objection No.31 of 2016,**
**CMP(MD).No.10787 of 2016 and**
**CMP(MD).No.3716 of 2022**

The General Manager
National Insurance Co.,Ltd.,
No.638, Gudalur Main Road
Post Box No.1, I Floor
Athur, Salem District .....Appellant in the appeal / First Respondent in Cross Objection

Vs.

1.Gopinath ...First Respondent in the appeal / Cross Appellant

2.S.Sivakumar ...Second Respondent in the appeal and in the Cross Objection

**PRAYER in CMA(MD).No.1262 of 2016:-** Civil Miscellaneous Appeal filed under Section 173 of Motor Vehicle Act, 1988, to set aside the award dated 18.01.2016 passed in MCOPNo.4057 of 2013 on the file of the Motor Accident Claims Tribunal, Special Sub Judge, Tiruchirappalli, and allow this appeal with costs.

**PRAYER in Cross Objection No.31 of 2016: -** Cross Objection has been filed under Order XLI, Rule 22 R/W Section 96(1) & (2) of C.P.C. , to set aside the award dated 18.01.2016 passed in MCOP.No.4057 of 2013 on the file of the Motor Accident Claims Tribunal, Special Sub Judge, Tiruchirappalli, in so far as the disallowed portion of compensation is concerned and allow the present cross appeal.

For Appellant : Mr.R.Rajamani
in the appeal
& 1st Respondent in the Cross Objection

For Respondents : Mr.M.Saravanan
For Mr.R.Subramanian
For R1 in the appeal and
Cross Appellant in Cross Objection

: No Appearance for R2
in both cases.

## JUDGMENT

The appeal has been filed by the Insurance Company challenging the award passed by the Motor Accident Claims Tribunal, Trichy in MCOP.No.4057 of 2013 primarily on the ground of negligence and quantum.

2.The injured claimant had contended that while he was driving a two wheeler at about 5.00 a.m on 24.01.2009 in Trichy-Chennai National

Highways, a Harvesting Machine was proceeding ahead of him. The said Harvesting Machine had suddenly applied brake and it resulted in dashing of the two wheeler as against the Harvesting Machine. The said accident has resulted in grievous injuries to the claimant in his right wrist, left knee and left thigh.

3.According to the claimant, he was a Yoga Teacher and he was a spiritual teacher in Hare Rama and Hare Krishna movemnet. He had further contended that at the time of the accident, he had received passport and visa to reach Switzerland for teaching yoga. In view of the accident, he is not able to join his employment at Switzerland. According to the claimant, had he gone to Switzerland, he would have earned a sum of Rs.1,00,000/- as monthly salary. Hence, he prayed for compensation of Rs.25/- lakhs.

4.The owner of the Harvesting Machine had remained exparte and the insurance company had filed a counter contending that only the driver of the two wheeler had driven the same in a rash and negligent manner and dashed against the rear side of the Harvesting Machine.Therefore, it is clear that the accident has happened only due to the negligence on the part of the claimant and hence, the insurance company is not liable to pay any compensation.

5.The Tribunal after considering the oral and documentary evidence arrived at a finding that the driver of the Harvesting Machine while parking the vehicle in the road had not switched on the parking lights. The Tribunal further found that the two wheeler had dashed only against a parked vehicle. The Tribunal arrived at a finding that there is no evidence to the effect that the claimant himself was rash and negligent and came to a conclusion that the accident has happened only due to the negligence on the part of the driver of the Harvesting Machine. The Tribunal further found that the claimant has not filed any document to establish that he is a yoga teacher and therefore, the Tribunal had fixed the notional monthly income at Rs.4500/-. The Tribunal had fixed the loss of income at Rs.54,000/-.

6.The Tribunal further awarded a sum of Rs.5000/- towards attender charges, Rs.10,000/- towards transport expenses and another Rs.10,000/- towards extra nourishment. The Tribunal had further awarded a sum of Rs. 27,000/- towards loss of income for a period of 6 months during which he was under a treatment. The Tribunal had further awarded a sum of Rs.2,75,400/- towards loss of future income. The

Tribunal further awarded a sum of Rs.30,000/- towards pain and suffering and Rs.1,54,906/- towards medical expenses and another sum of Rs.10.315/- towards repair of the two wheeler. Totally a sum of Rs.5,17,306/- was awarded by the Tribunal. This award is under challenge in the present appeal.

7.According to the learned counsel appearing for the appellant/insurance company, the claimant had dashed against the rear side of the Harvesting Machine which was going ahead. Though the claimant had contended that the driver of the Harvesting Machine had suddenly applied brake, the same has not been established by him. He had further pointed out that during the cross examination, the claimant had admitted that he had seen the tractor/ Harvesting Machine from a distance of 10 meter. Therefore, the claimant had every opportunity to stop the vehicle. However, only due to the rash and negligent driving, he had dashed against the rear side of the Harvesting Machine. Hence, the accident had happened only due to the negligence on the part of the claimant and hence, the insurance company is not liable to pay any compensation. The Tribunal has not properly appreciated the deposition of the claimant and has arrived at an erroneous finding that the accident has happened solely due to the negligent on the part of the driver of the Harvesting Machine.

8.The learned counsel for the appellant had further contended that the Tribunal was not right in applying multiplier method to award future loss of income when the claimant has not established any functional disability. He had further pointed out that the Tribunal has arrived at a finding that the disability sustained by the claimant is 30%. In such view of the matter, the Tribunal ought not to have adopted the multiplier method. He had further contended that the Tribunal has arrived at a specific finding that the claimant has not established his avocation as a yoga teacher. When such being the matter, the Tribunal ought not to have awarded a sum of Rs.27,000/- towards loss of income during the treatment period. Hence, he prayed for allowing the appeal.

9.The claimant had filed Cross Objection No.31 of 2016 seeking to enhance the compensation.

10. The learned counsel appearing for the cross objector had contended that Exhibits B13 and B14- medical bills will clearly reveal that the medical expenses incurred by the claimant are Rs.2,46,000/-. However, only a sum of Rs.1,54,906/- has been awarded by the Tribunal.

He had further contended that the claimant being a Yoga Teacher, he is not in a position to move his hands and legs freely so as to continue his profession as a yoga teacher. Admittedly, plates have been implanted in his hand and thigh and therefore, he is not in a position to perform yoga and therefore, the disability sustained by him should be treated as a functional disability.

11.The learned counsel for the first respondent had further contended that the claimant was issued with a disability certificate under Exhibit P18 to an extent of 68%. However, without assigning any reason whatsoever, the Tribunal has reduced the percentage of disability to 30%. The learned counsel had further contended that the medical records will clearly establish that he requires treatment in future also, in view of the injuries and disability sustained by him. However, no amount has been awarded by the Tribunal towards future medical expenses.

12.The claimant had filed CMP(MD).No.3716 of 2022 under Order 41 Rule 27 of C.P.C to receive additional documents in order to establish the fact that the claimant is still continuing his treatment. All the hospital bills placed before this Court are dated 06th and 7th of December 2021. The accident has taken place on 24.01.2009. There are no records whatsoever to connect the present medical bills to the accident that has taken place 11 years back. The claimant has sought to produce a medical certificate dated 07.12.2021 to impress upon the Court that the claimant was admitted to Retna Global Hospital, Trichy on 07.12.2021 and he was advised for implant exit on left elbow and debrima of left knee which would incur an expense of Rs.1,50,000/-. Though the additional evidence application was filed on 19.04.2022, it is not known whether the said advise was followed up and the claimant had undergone the said surgery for exit of implant. Therefore, this Court is not inclined to accept the receipts filed towards the medical bills relating to December 2021 without establishing any connection with the accident of the year 2009.

13.The appellant had stated that though the learned counsel appearing for the first respondent/claimant had vehemently contended that the claimant is a yoga teacher and his entire performance as a yoga teacher could not be continued in view of the grievous injuries sustained by him, except the pleadings in the claim petition, no other document has been placed on record. Though the claimant had sought several adjournments to place on record, the certificates relating to the claimant's yoga education and his teaching experience, he was not able to produce any records. Though the claimant has pleaded that he had already received passport and visa for reaching Switzerland for yoga teaching, he has not chosen to file those documents for reasons best known to him. Therefore, except the pleading in the claim petition, no oral or documentary evidence is available to establish the fact that the claimant was a yoga teacher. Therefore, the Tribunal was right in taking into consideration the notional income of the claimant as Rs.4,500/- per month.

14.When the claimant has not established about his avocation, the question of considering the physical disability as a functional disability does not arise. Hence, the contention of the learned counsel appearing for the cross objector, is devoid of any merits.

15.A perusal of Exhibit P13 medical bills indicate that on the date of the accident namely on 24.01.2009, the claimant was admitted to Kavery Hospital, Trichy and he was discharged on 12.02.2009. A consolidated medical bill indicates that the claimant has incurred a sum of Rs.2,46,190/-as expenses in the said hospital. However, the Tribunal has awarded only a sum of Rs.1,54,906/- towards medical expenses.

Therefore, this Court is inclined to enhance the medical expenses to Rs. 2,46,190/-.

16.The Doctor who had examined the claimant had issued a disability certificate which is marked as Exhibit P18. As per the said certificate, plates and screws have been fixed in his hand and thigh region. The claimant cannot squat/sit cross leg/carry out/ heavy work/chew hard foods as before. The plates and screws that have been fixed, restrict the movement in the left elbow and in the right thigh. Therefore, it is clear that the claimant has sustained grievous injuries which are likely to affect his daily work and he may not able to perform as before. After considering the said disability certificate, the Tribunal has fixed the functional disability of the claimant at 30% and applied multiplier method and awarded a sum of Rs.54,000/- towards loss of income for one year. When the claimant has not established his avocation that he is a yoga teacher, the disability sustained by him could only be considered to be physical and not a functional disability. Therefore, the Tribunal was not right in arriving at a finding that the disability is a functional disability and awarding compensation by applying multiplier method. Hence, the contention of the learned counsel appearing for the respondent that the disability certificate issued by the Doctor at 68% was reduced to 30% by the Tribunal is not factually correct. In fact, 30% that was arrived at by the Tribunal is the functional disability and not the physical disability.

17.The learned counsel appearing for the Cross Objector had further contended that admittedly the claimant has been implanted with plates and screws in his right hand as well as in the left thigh. This plates and screws have to be removed by way of a second surgery. Hence, he prayed for awarding of the amount under the said category.

18.Considering the disability certificate, this Court concurs with the submissions made on the side of the cross objector, that the claimant will be required to undergo second surgery for exit and implanting the plates and screws. It is not the case of the insurance company that already the claimant had undergone the second surgery. Therefore, this Court is inclined to award a sum of Rs.1,00,000/- towards future medical expenses.

19.The Tribunal has awarded a sum of Rs.2,75,400/- towards future loss of income by applying multiplier method. When the functional disability has not been established by the claimant, the question of awarding future loss of income following multiplier method is not legally sustainable.

20.The claimant who was riding a two wheeler had dashed against the rear side of the Harvesting Machine which is said to be parked. The claimant during his cross examination has clearly admitted that he could see the Harvesting Machine at least 10 meters in distance. Therefore, it is clear that the claimant could have avoided the accident even when the Harvesting Machine had been parked without parking light. In a way, the claimant has also contributed to the accident. Therefore, this Court is of the considered opinion that the negligence on the part of the claimant could be fixed at 25%.

21.In view of the above said deliberation, this Court is inclined to modify the award of the Tribunal as follows:

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| (i).Partial permanent disability(68x2000) | Rs. 1,36,000.00 |
| (ii).Damages to vehicle | Rs. 5,000.00 |
| (iii).Medical expenses | Rs. 2,46,190.00 |
| (iv).Transport expenses | Rs. 10,000.00 |
| (v).Extra nourishment | Rs. 10,000.00 |
| (vi).Attender charges | Rs. 5,000.00 |
| (vii).Future medical expenses | Rs. 1,00,000.00 |
| (viii).Pain and Suffering | Rs. 50,000.00 |
| Total | Rs.5,62,190.00 |

22.After deducting 25% towards contributory negligence, a compensation of Rs.4,21,643/- is arrived at. The compensation fixed by the Tribunal at Rs.5,17,306/- is reduced to Rs.4,21,643/-.

23.The appellant Insurance Company is directed to deposit the modified compensation of Rs.4,21,643/- with 7.5% interest per annum from the date of claim petition till the date of deposit, less the amount already deposited, if any, to the credit of the claim petition within a period of eight weeks from the date of receipt of a copy of this judgment. On such deposit, the claimant is permitted to withdraw the entire amount with interest by filing a formal permission petition before the Tribunal.

24.In view of the above said deliberation, the appeal filed by the insurance company namely CMA(MD).No.1262 of 2016 is partly allowed to the extent as stated above. The cross objection filed by the claimant in Cross Appeal(MD).No.31 of 2016 stands dismissed and CMP(MD).No.3716 of 2022 stands closed. No costs. Consequently, connected miscellaneous petition is closed.

**07.06.2023**

Index : Yes/No
Internet : Yes/No
NCC : Yes/No
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To

1. The Motor Accident Claims Tribunal,
Special Sub Judge, Tiruchirappalli,

2.The Record Keeper,
Vernacular Section,
Madurai Bench of Madras High Court,
Madurai.

**R.VIJAYAKUMAR,J.**

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Pre-delivery Judgement made in
C.M.A(MD)No.1262 of 2016
and
Cross Objection No.31 of 2016,
CMP(MD).No.10787 of 2016 and
CMP(MD).No.3716 of 2022

**07.06.2023**