BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 07.11.2022

Pronounced on : 25.01.2023

CORAM

THE HONOURABLE MRS.JUSTICE **R.THARANI**

C.M.A(MD)No.711 of 2018

Manager,
New India Assurance Company Ltd.,
No.82,Dr.Thirumalai Plaza Upstairs,
New Dharapuram Road,
Palani, Dindigul District. ...Appellant / 2nd respondent

Vs

1.M.Durairaj ... 1st respondent / claimant

2.T.Srinivasan ... 2nd Respondent /1st Respondent

PRAYER :-

This Civil Miscellaneous Appeal is filed under Section 173 of Motor Vehicles Act 1988, to set aside the judgment and decree of the learned Motor Accident Claims Tribunal, Dindigul (Special Subordinate Judge, Dindigul) in M.C.O.P.No.318 of 2012 dated 28.04.2016.

For Appellant : M/s.Jayashree Ramesh
for S.Ramesh

For R1 : Mr.A.Vadivel

For R2 : Mr.K.Abiya

JUDGMENT

This Civil Miscellaneous Appeal is filed against the order in M.C.O.P.No.318 of 2012 on the file of the Motor Accident Claims Tribunal, Dindigul (Special Subordinate Judge, Dindigul). The appellant is the second respondent. First respondent is the claimant. Second respondent is the first respondent in the claim petition.

2.Brief substance of the claim petition is as follows:

On 02.10.2010, the petitioner along with three others travelled with their goods in a TATA ACE vehicle bearing registration number TN 57 T 2048 from Palani to Tirunelveli. When the vehicle was nearing Sathirareddiyapatti, a pedestrian by name Thuritha Krishnamoorthy was hit by the van and he died on the spot. Then vehicle hit against the bridge. The petitioner sustained severe injury and fracture in the spinal cord. The accident has happened due to the rash and negligent driving of the bus driver. The petitioner claimed Rs.6,00,000/- as compensation.

3.Brief substance of the counter filed by the first respondent is as follows:

The driver of the vehicle was having valid driving licence. The vehicle was insured with the second respondent and the insurance policy was in force. The first respondent is not liable to pay compensation.

4.Brief substance of the counter filed by the second respondent is as follows:

The petitioner is liable to prove his profession, income and medical expenses. The van driver drove the vehicle in a careful and cautious manner. It was the pedestrian who suddenly crossed the road, without observing the traffic and the pedestrian is responsible for the accident.

5.Brief substance of the additional counter filed by the second respondent is as follows:

The petitioner travelled in the goods vehicle violating the policy conditions. The petitioner was not the owner of the goods and the second respondent is not liable to pay compensation.

6.Three witnesses were examined and nine documents were marked on the side of the petitioner. One witness was examined and one document was marked on the side of the respondent. The Tribunal has awarded a sum of Rs.10,78,540/- as compensation to be paid by the respondents.

7.Against the award, the second respondent preferred this appeal on the following grounds:

The Tribunal failed to consider that the availability of goods was not at all mentioned in the First Information Report. There was no evidence as to the availability of goods in the vehicle. The Tribunal failed to consider that the claimant travelled in the vehicle only as a gratuitous passenger. P.W.2 did not give any treatment to the petitioner and the Tribunal failed to consider this aspect. The Tribunal failed to consider Ex.P8 and Ex.P9 in the proper perspective. The Tribunal fixed the monthly income as Rs.6,500/- which is excessive. There is no document to prove the income. The claim is only Rs. 6,00,000/-. But the Tribunal has awarded Rs.10,78,540/-, which is excessive. When P.W.2 has not spoken anything, the Tribunal wrongly found that the claimants suffered paraplegia. There is no evidence to prove that the petitioner was the owner of the goods or the agent of the goods loaded in the vehicle. The claimant did not travel in the cabin. The owner of the goods can travel only in the cabin.

8.On the side of the appellant, a judgment of the Hon'ble Supreme Court in **2008 ACJ 268** in the case of **National Insurance Co.Ltd., vs Cholleti Bharatamma and others**, is cited, wherein it is held that,

> " *Motor insurance - Goods vehicle - Gratuitous passenger - passenger risk - Passengers travelling along with their goods - Liability of insurance company - Whether insurance company is liable for the death of or injuries sustained by passengers travelling in goods vehicle gratuitously - Held: no; and whether insurance company is liable for passengers travelling in a goods vehicle along with their goods - Held: yes.*"

9.On the side of the respondent it is stated that the claimant was travelling with mirrors and photo frames for sale. There was no evidence on the side of the appellant to disprove that the claimant was not the owner of the goods. Claimant was not a gratuitous passenger. The evidence before the Court has to be given more importance than the statement in the FIR. He travelled only as the owner of the goods. A judgment of this Court reported in **2015(2) TN MAC 244** in the case of **New India Assurance Co.Ltd Vs Sekar** is cited, wherein it is held as follows:

"Persons travelling in Mini Lorry, whether gratuitous passengers or owners of goods carried in vehicle - Claimants pleaded and adduced evidence before Tribunal hat they travelled in Lorry as owners of Rice bags carried in vehicle - Contention of Insurer that said fact having not been stated in earliest document viz. Fir, Tribunal ought to have rejected both pleadings and oral evidence - While considering FIR, Courts must also take into account pleadings and evidence on record for arriving at conclusion - Tribunal considered FIR as well as pleadings and evidence on record - Tribunal considering ration in Rattani (SC) held that evidence given on oath must be given more importance - Witnesses examined by Insurer stated that they made private investigation - Neither Investigation Officer examined nor Report filed - Tribunal accepting pleadings and evidence of Claimants rightly held that claimants travelled in Mini Lorry as owners of goods / rice bags carried in it."

10.On the side of the claimant, a judgment of this Court reported in **2014(1) TN MAC 714** in the case of **United India Insurance Co.Ltd Vs Selvi** is cited, wherein it is held that,

"Claimant travelling in Goods Vehicle - Whether as a Gratuitous passenger or as an owner of goods carried in vehicle

- Liability of Insurer - Claimant after loading ground nut bags in Mini Door Auto when attempted to step in, driver suddenly started the vehicle without noticing her - Claimant fell down and sustained injuries - Oral testimony of Claimant/ PW1, manner of accident as also transportation of goods duly corroborated by Ex.Pf1-FIR and Ex.P2-Accident Register - Specific suggestion that Claimant travelled as gratuitous passenger, denied - RW1-Insurance Officer admitted being not aware of fact as to whether Claimant travelled as owner of goods or as a gratuitous passenger - No statement obtained either from owner or from the driver of vehicle - Finding of Tribunal that Claimant travelled as owner of goods and holding Insurer liable to pay Compensation, upheld in Appeal."

11.Copy of the FIR was marked as Ex.P1, charge sheet was marked as Ex.P6. On the basis of the evidence of P.W.1 and on the basis of Ex.P1 and Ex.P6, it is decided that the accident has happened due to the rash and negligent driving of the van driver. The insurance policy was marked as Ex.P7 and Ex.R1.

12.On the side of the appellant it is stated that the claimant is only a gratuitous passenger who is not entitled to claim compensation. On the side of the respondent it is stated that the claimant travelled in the van only as a owner of the goods.

13.It is seen that the goods loaded in the auto was not mentioned in the FIR. Except an official from the insurance company who was examined as R.W.1, no other witness was examined on the side of the appellant to prove that the claimant travelled only as a gratuitous passenger. The Tribunal has decided that the claimant travelled only as the owner of the goods on the basis of the evidence given by the P.W.1. There was no document or evidence on the side of the respondent to rebut the evidence of P.W.1. Hence it is decided that the claimant travelled in the vehicle only as a owner of the goods.

14.On the side of the appellant, it is stated that the award amount fixed by the Tribunal is excessive. On the side of the respondent it is stated that the award fixed by the Tribunal is to be enhanced.

15.On the side of the claimants it is stated that the L-1 and L-2 bones in the spinal cord were fractured. The claimant has undergone a surgery and iron rods were fixed in both the legs. There is malunion of the bones. The claimant cannot move without a wheel chair. He sustained 100% permanent disability. Ex.P8 is the disability certificate. Ex.P9 is the X-ray. P.W.2 has deposed that since L-1 and L-2 bones were fractured, both the legs were affected. The petitioner was 34 years old at the time of accident and multiplier 16 is to be adopted. The Tribunal failed to consider the future prospects in calculating the loss of income and pray the award to be enhanced.

16.P.W.2 was examined before the Tribunal. He assessed the disability as 75% and he issued the disability certificate Ex.P8. Since the spinal cord was affected and both the legs were affected by the injuries, the Tribunal adopted multiplier method and the same is reasonable. The claimants claimed that he was earning Rs.15,000/- per month by selling the photo framed pictures and by selling mirrors. The Tribunal fixed the notional monthly income as Rs.6,500/-. Considering the date of accident, it is decided that the monthly income fixed by the Tribunal is reasonable.

17.The Tribunal has fixed the disability at 65% which is reasonable. For 65% of disability, the monthly income is calculated as Rs.4225/- (6500 x 65/100). The age of the petitioner at the time of accident is 34 years. Hence, multiplier 16 is applicable. The loss of income is fixed as Rs.8,11,200/- (4225 x 16 x 12). The medical receipts were marked as Ex.P3.

18.P.W.3 has deposed that he gave physiotherapy to the petitioner. It is stated that P.W.3 was not an approved physiotherapist. Since the petitioner failed to prove that P.W.3 was a qualified physiotherapist, the medical charges claimed by the P.W.3 is not wholly acceptable. Hence a sum of Rs.60,000/- is reduced and it is decided that the petitioner is entitled to Rs. 1,59,340/-(219340-60000) towards medical expenses. The Tribunal has awarded Rs.40,000/- towards pain and sufferings, Rs.6000/- towards extra nourishment, Rs.2000/- towards transport expenses which are all reasonable.

Hence, the award is modified as under:

Loss of Income	-	Rs. 8,11,200/-
Medical expenses	-	Rs. 1,59,340/-
Pain and sufferings	-	Rs. 40,000/-
Extra nourishment	-	Rs. 6,000/-
Transport expenses	-	Rs. 2,000/-

Total	-	Rs.10,18,540/-

19.Accordingly, this Civil Miscellaneous Appeal is partly allowed.

(i) The quantum of compensation awarded by the Tribunal is reduced from Rs.10,78,540/- to **Rs.10,18,540/- (Rupees Ten Lakhs Eighteen Thousand Five Hundred and Forty only)** which shall carry interest at the rate of 7.5% per annum.

(ii) The appellant/ insurance company is directed to deposit the entire compensation of Rs.10,18,540/- (if not already deposited) together with interest at the rate of 7.5% per annum from the date of claim petition till the date of deposit and proportionate costs to the credit of M.C.O.P.No.318 of 2012 on the file of the Motor Accident Claims Tribunal, Dindigul (Special Subordinate Judge, Dindigul), within a period of eight weeks from the date of receipt of a copy of this order.

(iii) On such deposit being made by the appellant / insurance company, the first respondent / claimant is permitted to withdraw the entire award amount of Rs.10,18,540/- (Rupees Ten Lakhs Eighteen Thousand Five Hundred and Forty only) with interest and cost. The appellant is not entitled to interest for the default period, if there is any.

25.01.2023

Index: Yes / No
Internet : Yes / No

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R. THARANI, J

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To

1.The Motor Accident Claims Tribunal /Special Subordinate Judge, Dindigul.

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

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