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**(2013) 01 MAD CK 0245**  
**In the Madras High Court**  
**Case No : C.M.A. No. 3661 of 2004**

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|--------------------------------------------|------------|
| Branch Manager New India Assurance Co. Ltd | APPELLANT  |
| Vs                                         |            |
| K. R. Ganapathy                            | RESPONDENT |

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**Date of Decision :** 07-01-2013

**Acts Referred:**

**Citation :** (2013) 2 MadWN(Civil) 139 : (2013) 1 TNMAC 573

**Hon'ble Judges :** R. Mala, J.

**Bench :** Single Bench

**Advocate :** K. Padmanaban, Advocate, for the Appellant; N. Manokaran, Advocate, for the Respondent No. 1; A.K. Kumaraswamy, Advocate, for the Respondent Nos. 2 & 3

**Final Decision :** Dismissed

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## Judgement

R. Mala, J.—This Civil Miscellaneous Appeal arises out of the Judgment and decree dated 7.8.2003 made in M.C.O.P. No. 183 of 2000 on the file of Motor Accident Claims Tribunal, Subordinate Judge, Bhavani, Erode District.

2. The matrix of the case is as follows :

(a) The Petitioner/Claimant Ganapathy, who was aged about 30 years and doing coconut business, thereby, earning a sum of Rs. 4,000/- p.m. filed a Claim Petition before the Tribunal stating that on 9.4.1996 at about 3.00 p.m., when the Petitioner was returning to Kattur after purchasing some Coconut from a seller at Paruvachi by walking on the left side of the road, the vehicle bearing Registration No.TMT 1333 belonging to the Second Respondent before the Tribunal/3rd Respondent herein, driven by the 1st Respondent before the Tribunal/2nd Respondent herein, came from the opposite direction in a rash and negligent manner, without following the traffic rules and dashed against the Petitioner, due to which, he was thrown away from the vehicle and fell down on the road, thereby, he sustained grievous injuries. Immediately, he was admitted in the Hospital. Because of the injuries, he suffered permanent disability and

hence, he is unable to do his work. Therefore, he claimed a sum of Rs. 4,00,000/- as compensation. He pleaded that since the vehicle belongs to the Second Respondent which was driven by the 1st Respondent and the same was insured with the 3rd Respondent/Insurance Company, all the Three Respondents are liable to pay compensation.

(b) Resisting the same, the 3rd Respondent/Insurance Company filed a Counter Statement disputing the age, avocation, income, nature of injuries, period of treatment and permanent disability and also the manner of accident.

(c) The Tribunal, after considering the oral evidence of PW1 and PW2 and documents Exs.A1 to A 13 and Ex.B1, has awarded a sum of Rs. 3,04,621/- as compensation directing the 2nd and 3rd Respondents to pay compensation jointly and severally to the Claimant with interest at the rate of 9% p.a. from the date of Petition till the date of deposit and with proportionate interest from the date of Petition till the date of deposit.

(d) Challenging the said award amount, the present Appeal has been preferred by the Insurance Company stating that the compensation awarded by the Tribunal is on higher side.

3. The learned Counsel appearing for the Appellant/Insurance Company submitted that the Claimant sustained fracture only on his right knee and PW2-Doctor assessed the disability at 38%. He further submitted that the Claimant is a Coconut merchant, therefore, there is no loss of income due to the disability sustained by him. Hence, he prayed for reduction of compensation. To substantiate his arguments, he relied upon the following decisions :

(i) Sakthi @ Sathyamoorthy v. M. Sundararaj and another, 2012 (2) TN MAC 293;

(ii) Mookan and others v. Koti Orthopedic and Trauma Care Specialty Hospital and others, 2012 (1) TN MAC 770

(iii) Raj Kumar v. Ajay Kumar & another, 2010 (2) TN MAC 581 (SC).

4. Resisting the same, the learned Counsel appearing for the First Respondent/Claimant submitted that the First Respondent, who is the Claimant before the Tribunal is a bachelor and a Coconut merchant. At the time of accident, he was aged about 30 years. The Doctor assessed the disability sustained by the Claimant in the accident at 38% and due to which, he is unable to do his work. Learned Counsel for the First Respondent further submitted that earning power of the Claimant is affected since he is not a Government servant. Hence, he prayed for dismissal of this Appeal stating that the compensation awarded by the Tribunal is fair and reasonable. To substantiate his arguments, he relied upon the following decisions :

(i) Sanjay Batham v. Munnalal Parihar and others, 2011 (2) TN MAC 651 (SC) : 2011 (1) SCC 665;

(ii) Nagarajappa v. Divisional Manager, Oriental Insurance Co. Ltd., 2011 (1) TN

MAC 557 (SC) : 2011 (13) SCC 323;

(iii)B. Kothandapani v. Tamil Nadu State Transport Corporation Ltd., 2011 (2) TN MAC 62 (SC) 2011 (6) SCC 420;

(iv)New India Assurance Co. Ltd., Coimbatore v. C.K. Ramesh and others, 2009 (6) CTC 589;

(v)Ibrahim v. Raju and others, 2011 (6) CTC 904 (SC) : 2011 (2) TN MAC 641 (SC);

(vi)K. Suresh v. New India Assurance Co. Ltd. and another, 2012 {2} TN MAC 562 (SC) : 2012 (10) SCALE 516;

(vii)Govind Yadav v. New India Insurance Co. Ltd., 2011 (2) TN MAC 661 (SC) : 2011 (10) SCC 683.

5. I have considered the rival submissions made on either side and perused the records.

6. The only point to be decided by this Court is as to whether the multiplier method adopted by the Tribunal is correct or not ?

7. On the side of the 1st Respondent/Petitioner, the Petitioner/Injured examined himself as PW1 and Dr. Venkatachalam, who treated the injured, was examined as PW2. But, there is no contra evidence on the side of the Appellant/Insurance Company in respect of age, avocation, income and nature of injuries and permanent disability sustained by the Claimant.

8. This Court has to decide whether there is any Loss of Earning Power/ occupational disability? It is appropriate to incorporate the injuries sustained by the Respondent. In Ex. A3-Wound Certificate, the injuries sustained by the Claimant was mentioned as follows :

1. Lacerated injury right leg mid 1/3rd x 3" x 1" x 1/2"

2. Abrasion ankle 1" x 1".

X-ray right leg compound comminuted fracture both bones right leg.

In Ex.A3-Wound Certificate, the Doctor gave opinion that the Injury No.1 is grievous in nature and injury No.2 is simple in nature.

9. The compensation awarded by the Tribunal is tabulated as follows :

Loss of Income

-

Rs. 2,46,240/-

Pain and Sufferings

-

Rs. 10.000/-

Extra-Nourishment

-

Rs. 10,000/-

Transport Expenses

-

Rs. 1,000/-

Medical Expenses

-

Rs. 37,381/-

Total

-

Rs. 3,04,621/-

10. In respect of Pain and Sufferings, Extra-Nourishment and Transport Expenses, the amount awarded by the Tribunal under the above heads are reasonable and the same are hereby confirmed. In respect of Medical Expenses, the Tribunal has awarded a sum of Rs. 31,125/- on the basis of Ex.P8-Medical Bills and Rs. 6,256/- on the basis of Ex.P9-Medical Bills. Therefore, the said compensation awarded by the Tribunal under the aforesaid head is hereby confirmed.

11. The only point to be decided by this Court is as to whether the Tribunal is correct. in awarding a sum of Rs. 2,46,240/- towards Loss of Income by applying the multiplier method. Before deciding the above said point, this Court has to decide as to whether the multiplier method is applicable to the facts of the present case or not ?

12. Now, it is appropriate to consider the decisions relied upon by the learned Counsel for the Appellant as follows :

(i) In the decision of the Apex Court reported in Raj Kumar v. Ajay Kumar and another, 2010 (2) TN MAC 581 (SC), it was held in Paras 13 to 15 as under :

"13. We may now summarise the principles discussed above :

(1) All injuries (or permanent disabilities arising from injuries), do not result in loss of earning capacity.

(ii)The percentage of Permanent Disability with reference to the whole body of a person, cannot be assumed to be the percentage of Loss of Earning Capacity. To put it differently, the percentage of Loss of Earning Capacity is not the same as

the percentage of Permanent Disability (except in a few cases, where the Tribunal on the basis of evidence, concludes that percentage of Loss of Earning Capacity is the same as percentage of Permanent Disability).

(iii) The Doctor, who treated an injured-Claimant or who examined him subsequently to assess the extent of his Permanent Disability can give evidence only in regard to the extent of Permanent Disability. The Loss of Earning Capacity is something that will have to be assessed by the Tribunal with reference to the evidence in entirety.

(iv) The same Permanent Disability may result in different percentages of Loss of Earning Capacity in different persons, depending upon the nature of profession, occupation or job, age, education and other factors.

14.....

15. After the insertion of Section 163-A in the Act (with effect from 14.11.1994), if a claim for compensation is made under that Section by an injured alleging disability, and if the quantum of loss of future earning claimed, falls under the Second schedule to the Act, the Tribunal may have to apply the following principles laid down in Note (5) of the Second Schedule to the Act to determine compensation:

"5. Disability in nonfatal accidents :

The following compensation shall be payable in case of disability to the victim arising out of non-fatal accidents :

Loss of income, if any, for actual period of disablement not exceeding fifty two weeks.

PLUS either of the following:

(a) In case of permanent total disablement the amount payable shall be arrived at by multiplying the annual loss of income by the Multiplier applicable to the age on the date of determining the compensation, or

(b) In case of permanent partial disablement such percentage of compensation which would have been payable in the case of permanent total disablement as specified under item (a) above.

Injuries deemed to result in Permanent Total Disablement/Permanent Partial Disablement and percentage of Loss of Earning Capacity shall be as per Schedule I under Workmen's Compensation Act, 1923."

(ii) In the decision of this Hon'ble Court reported in Mookan and others v. Koti Orthopedic and Trauma Care Specialty Hospital and others, Batch, 2012 (1) TN MAC 770, the learned Single Judge of this Court applied the Multiplier method while calculating the award amount towards disability and not for loss of earning power. Hence, the above citation is not applicable to the facts of the present case.

(iii) Yet another decision of this Court reported in *Sakthi @ Sathyamoorthy v. M. Sundararaj and another*, 2012 (2) TN MAC 293, wherein, the Judgment in the case of Raj Kumar has been followed, in which, in Paras 11 & 12, it was held that if the Tribunal is not satisfied with the Medical evidence produced by the Claimant, it can constitute a Medical Board (from a panel maintained by it in consultation with reputed Local Hospitals/Medical Colleges) and refer the Claimant to such Medical Board for assessment of the disability. There is no quarrel over the proposition laid down in the above said decision.

13. Now, it is appropriate to consider the decisions relied upon by the learned Counsel for the Respondent as follows :

(i) In the decision of the Apex Court reported in *Sanjay Batham v. Munnalal Parihar and others*, 2011 (2) TN MAC 651 (SC) : 2011 (1) SCC 665, where, the injured was operated for fracture on his head, broken piece of the bone was removed and 22 stitches were given on his head. Due to the injuries on his head, left part of his body was paralysed and he was not able to do the work which he was doing prior to the accident. So, in this citation, multiplier method has been adopted and it is appropriate to incorporate Paras 15 & 16 of the said judgment.

"15. In view of the above noted judgment, we hold that multiplier of 18 deserves to be applied for the purpose of determining the compensation payable to the Appellant in lieu of the loss of earning. Thus, under this head the Appellant will be entitled to a sum of Rs. 1,62,000/-.

16. Although the Appellant had suffered temporary disablement, the evidence of the Doctor shows that he will require treatment in future. The Tribunal and the High Court have not awarded any compensation for future treatment, which would necessarily include doctor's fee, cost of medicine, transportation, diet, etc. Keeping in view the high cost of living, we feel that ends of justice will be served by awarding a lump sum amount of Rs. 2 lakhs for future treatment."

(ii) Another decision of the Apex Court reported *Nagarajappa v. Divisional Manager, Oriental Insurance Co. Ltd.*, 2011 (1) TN MAC 557 (SC) : 2011 (13) SCC 323, it has been held as follows :

"2. The Tribunal concluded that the accident occurred due to the rash and negligent driving of the bus driver as a result of which the Appellant had sustained injuries in the accident. On perusal of evidence, it was found that the Appellant had sustained injuries of compound fracture of ulnar styloid process of the left hand and subluxation of the left wrist. The Doctor assessed disability at 23% of the whole body. Therefore, it awarded Rs. 20,000/- for Loss of Amenities, Rs. 30,000/- for Pain and Suffering. Rs. 30,000/- for Medical Expenses and Conveyance and Rs. 2000/- for Future Medical Treatment.

3. For Loss of Income during the Period of Treatment, the Tribunal found that due to the nature of the disability the Appellant was unable to work as a coolie or do other manual work. It also added that only the left hand was injured, so,

the right hand was free to work. The Appellant was an indoor patient (in-patient) for 55 days. Thus, the Tribunal presumed that the Appellant was unable to work for 3 months. Further, though the Appellant claimed to be earning Rs. 4,500/- per month, it was not supported by documentary evidence. Hence, the Tribunal presumed his income to be Rs. 3,000/- per month and awarded Rs. 9,000/- for Loss of Income during the Period of Treatment.

10. The Appellant is working as a manual labourer, for which he requires the use of both his hands. The fact that the accident has left him with one useless hand will severely affect his ability to perform his work as a coolie or any other manual work, and this has also been certified by the Doctor. Thus, while awarding compensation it has to be kept in mind that the Appellant is to do manual work for the rest of his life without full use of his left hand, and this is bound to affect the quality of his work and also his ability to find work considering his disability. Hence, while computing loss of future income, disability should be taken to be 68% and not 20% as was done by the Tribunal and the High Court. Our view is supported by the ratio in *Raj Kumar* and from the fact that the Appellant is severely hampered and perhaps forever handicapped from performing his occupation as a Coolie."

(iii) Yet another decision of the Apex Court reported in *B. Kothandapani v. Tamil Nadu State Transport Corporation Ltd.*, 2011 (2) TN MAC 62 (SC) : 2011 (6) SCC 420, it was held as follows:

"6. The only point for consideration in these Appeals is whether the Appellant is entitled to a sum of Rs. 1,00,000/- towards "Permanent Disability" in addition to the amount awarded under the head "Loss of Earning Capacity".

7. Inasmuch as the issue is confined only to the quantum of compensation, it is not necessary to traverse the factual details relating to the accident. Even otherwise, as the claimant alone has filed the present Appeals and the Corporation has not challenged the findings relating to negligence, it is not necessary to go into the conclusion arrived at on the negligence aspect holding that the driver alone was responsible for the accident. Even, with regard to the quantum of compensation, except reduction of Rs. 1,00,000/- which was awarded by the Tribunal for permanent disability, it is not necessary to go into the quantum of compensation under various heads and the ultimate order of the Tribunal and the High Court".

15. It is true that the compensation for loss of earning power/capacity has to be determined based on various aspects including permanent injury/disability. At the same time, it cannot be construed that compensation cannot be granted for permanent disability of any nature. For example, take the case of a non-earning member of a family who has been injured in an accident and sustained permanent disability due to amputation of leg or hand, it cannot be construed that no amount needs to be granted for permanent disability. It cannot be disputed that apart from the fact that the permanent disability affects the

earning capacity of the person concerned, undoubtedly, one has to forego other personal comforts and even for normal avocation they have to depend on others.

16. In the case on hand, two Doctors had explained the nature of injuries, treatment received and the disability suffered due to partial loss of eyesight and amputation of middle finger of the right hand and ?c have already adverted to the avocation, namely, at the time of accident, he m as working as foreman in M/ s. Armstrong Hydraulics Ltd. Taking note of his nature of work, partial loss in eyesight and loss of middle finger of the right hand, not only affect his earning capacity but also affect normal avocation and day-to-day work. In such circumstance, we are of the view that the Tribunal was fully justified in granting a sum of Rs. 1,50,000/- towards Permanent Disability."

(iv) In the decision of this Court reported in *New India Assurance Co. Ltd., Coimabtoe District v. C.K. Ramesh and others*, 2009 (6) CTC 589, it was held as follows :

"Distinguishing the above arguments, learned Counsel for the Respondent would say that in Paras 11(b) & (d), this Court has laid down the principles that while the Court contemplates to adopt Multiplier method in a case of permanent disability, it has to take into account the nature and extent of disablement, avocation of the injured and whether it would affect his employment or earning power and mainly it depends upon the avocation or profession or nature of employment".

(v) Another decision of the Apex Court in *Ibrahim v. Raju and others*, 2011 (6) CTC 904 (SC) : 2011 (2) TN MAC 641 (SC), the following judgment has been referred:

"12. In *R.D. Hattangadi v. Pest Control (India) Pvt. Ltd. and others*, 1995 (1) SCC 551, this Court while dealing with a case involving claim of compensation under the Motor Vehicles Act, 1939, referred to the Judgment in *Ward v. James* (supra), Halsbuiy"s Laws of England. 4th Edn., Vol. 12 (page 446) and observed :

"Broadly speaking while fixing an amount of compensation payable to a victim of an accident, the damages have to be assessed separately as pecuniary damages and special damages. Pecuniary damages are those which the victim has actually incurred and which are capable of being calculated in terms of money; whereas non-pecuniary damages are those which are incapable of being assessed by arithmetical calculations. In order to appreciate two concepts pecuniary damages may include expenses incurred by the Claimant: (i) medical attendance; (ii) loss of earning of profit up to the date of trial; (iii) other material loss. So far non-pecuniary damages are concerned, they may include (1) damages for mental and physical shock, pain and suffering, already suffered or likely to be suffered in future; (ii) damages to compensate for the loss of amenities of life which may include a variety of matters i.e. on account of injury the Claimant may not be able to walk, run or sit; (iii) damages for the loss of expectation of life, i.e. on account of injury the normal longevity of the person concerned is shortened; (iv)

inconvenience. hardship, discomfort, disappointment, frustration and mental stress in life."

In the same case, the Court further observed :

"In its very nature whenever a Tribunal or a Court is required to fix the amount of compensation in cases of accident, it involves some guesswork, some hypothetical consideration, some amount of sympathy linked with the nature of the disability caused. But all the aforesaid elements have to be viewed with objective standards."

(vi) In the decision reported in K. Suresh v. New India Assurance Co. Ltd. and another, 2012 (2) TN MAC 562 (SC) : 2012 (10) SCALE 516, it was held in para 32 as follows:

"32. Calculated on the aforesaid base, the compensation would be payable on the heading, namely, Transport Charges, Extra-Nourishment., Medical Expenses, Additional Medical Expenses, Additional Transport Charges, Pain and Suffering, Loss of Earning Capacity and Permanent Disability and the amount on the aforesaid scores would be, in to, Rs. 13,48,000/-....."

14. Admittedly, this Court has considered the facts and circumstances of the case. The injured has examined himself as PW1. In his chief-examination, he stated that he sustained fracture in his right leg below the knee and sustained injuries all over his body. He further stated that he was admitted as inpatient at L.K.M. Hospital in Erode, where, he took treatment for 16 days and he has undergone for surgery twice. After the accident, he finds it difficult to walk and attend his natural calls since the length of his right leg has been shortened. Therefore, he is limping, due to which, his marriage proposal got affected. But, in his cross-examination, nothing has been suggested in respect of diminishing his marriage prospects and also his disability. He denied the suggestions posed to him that he has not suffered any disability and there is no need to pay compensation.

15. PW2-Dr. Venkatachalam, in his examination, has stated that bone has been mal united and there is a restriction of movements in his right ankle, so, the injured finds difficulty in attending natural calls and also to sit, squat, walk and to stand for a long time and there is also a restriction of his right knee movements. Hence, he fixed the disability at 38% and gave disability certificate, marked as Exs.P11. During the cross-examination, the suggestion was posed to him that he assessed the disability on higher side, was denied by him.

16. It is pertinent to note that no contra evidence on the side of the Respondent. At this juncture, it is appropriate to consider the decision relied upon the learned Counsel for the Respondent reported in New India Assurance Co. Ltd. v. C.K. Ramesh and others, 2009 (6) CTC 589, and submits that adverse inference has been drawn. Therefore, it is appropriate to incorporate Paras 17 & 18 of the Judgment.

"17. The next limb of contention of the learned Counsel for the Respondents is that even though the Appellant, before this Court strongly contends that the medical evidence on record could not be believed and relied upon, it has miserably failed to lead any evidence, rebutting the evidence let in by the claimant and in these circumstances, an adverse inference has to be drawn since in spite of the best particulars available to the Appellant. it had not adduced any evidence. For the proposition of law, he cited an authority of Apex Court reported in *Vidhyadhar v. Manikrao* and another, 1999 (3) SCC 573, in which Their Lordships after referring to various earlier decisions of the Privy Council and other High Courts. held as follows :

"17. Where a party to the Suit does not appear in the witness box and states his own case on oath and does not offer himself to be cross-examined by the other side, a presumption would arise that the case set up by him is not correct as has been held in a series of decisions passed by various High Courts and the Privy Council beginning from the decision in *Sardar Grubakhs-h Singh v. Gurdial Singeh*, AIR 1927 PC 230. This was followed by the Lahore High Court in *Kirupa Singh v. Ajaipal Singh*, AIR 1930 Lab 1, and the Bombay High Court in *Martant Pandhar Chaudhari v. Radhabai Krishnarao Deshmujkh*, AIR 1931 Born. 97. The Madhya Pradesh High Court in *Gulla Karagjit Carpenter v. Narsingh Nandkishore Rawat*, AIR 1970 MP 225, also followed the Privy Council decision in *Sardar Gurbakhsh Singh* case. The Allahabad High Court in *Arjun Singh v. Virendre Nath*, AIR 1971 All. 29, held that if a party abstains from entering the witness-box, it would give rise to an adverse inference against him. Similarly, a Division Bench of the Punjab and Haryana High Court in *Bhagwan Dass v. Bhishan Chand*, AIR 1974 P&H 7, drew a presumption under Section 114 of the Evidence Act, 1872 against a party who did not enter the witness-box."

18. Following the principles laid down by the Supreme Court, it has to be necessarily observed that: if a party to the proceedings does not enter into witness box to support his pleadings in spite of availability of better particulars, adverse inference has to be necessarily done against him"

17. Since there is no contra-evidence on the side of the Appellant/Insurance Company, this Court ought to have accepted the evidence of PWs.1 & 2. PW1 sustained fracture which leads to permanent disability and the same has been deposed by PW2-Dr. Venkatachalam. Considering the same, the claimant suffered. occupational disability. Hence, the Tribunal is correct in fixing the monthly income of the deceased and applying the occupational disability. So, I am of the view that the Multiplier method is applicable to the facts of present case and the Tribunal is correct in fixing the monthly income of the injured at Rs. 3,000/-, which is just and fair. The Tribunal, after applying the multiplier of "18" as the injured was aged about 30 years at the time of accident, has awarded a sum of Rs. 2,46,240/- for Loss of Earning Power, is fair and just compensation. So, the finding of the Tribunal does not warrant any "interference. Hence, the compensation awarded by the Tribunal is hereby confirmed as under :

Loss of Income

-

Rs.2,46,240/-

Pain and Sufferings

-

Rs.10,000/-

Extra-Nourishment

-

Rs.10,000/-

Transport Expenses

-

Rs.1,000/-

Medical Expenses

-

Rs.37,381/-

Total

-

Rs.3,04,621/-

18. In fine:

18. This Civil Miscellaneous Appeal is dismissed with costs by confirming the compensation awarded by the Tribunal.