

(2015) 07 MAD CK 0379

In the Madras High Court

Case No : C.M.A. No. 3135 of 2015 and M.P. Nos. 1 and 2 of 2015

M. Anbalagan

APPELLANT

Vs

K.M. Asalm Basha and Others

RESPONDENT

Date of Decision : 01-07-2015

Acts Referred:

Motor Vehicles Act, 1988 — Section 166

Citation : (2015) 07 MAD CK 0379

Hon'ble Judges : V. Ramasubramanian, J;T. Mathivanan, J

Bench : Division Bench

Advocate : M. Swamikannu, for the Appellant

Final Decision : Partly Allowed

Judgement

V. Ramasubramanian, J—This appeal arises out of the dismissal of a claim petition filed by the appellant before the Motor Accident Claims Tribunal.

2. Heard Mr. M. Swamikkannu, the learned counsel for the appellant and Mr. J. Michael Visuvasam for Mrs. C. Bhuvana Sundari for the second respondent/ Insurance Company.

3. In a road traffic accident that happened on 08.08.2011, the appellant, who was driving a lorry, got seriously injured. He took treatment as inpatient in the Government Royapettah Hospital and in other private hospitals, on four different spells. Therefore, he filed claim petition, in M.C.O.P. No. 3380 of 2011, on the file of the Motor Accident Claims Tribunal, Chennai, claiming compensation in a sum of Rs. 27 lakhs.

4. But by an award dated 6.8.2013, the Tribunal dismissed the claim on the ground that the appellant was guilty of rash and negligent driving and was himself a tort-feasor and that therefore, he is not entitled to claim any compensation. Aggrieved by the said award, the claimant is on appeal.

5. Mr. Swamikannu, the learned counsel for the appellant submitted that before

the Tribunal, the second respondent admitted that the claimant was entitled to compensation at least in terms of the provisions of the Employees' Compensation Act, 1923 and that since, he was not a third party with respect to the vehicle, which was driven in a rash and negligent manner, he was not entitled to make a claim under Section 166 of the Motor Vehicles Act, 1988. Therefore, the learned counsel for the appellant contended that the Tribunal ought not to have dismissed the claim petition.

6. Relying upon two decisions of the Supreme Court one in *Oriental Insurance Company Ltd. Vs. Dyamavva and Others*, (2013) 3 ABR 327 : (2013) 1 ACC 424 : (2013) ACJ 709 : (2013) 3 AD 505 : AIR 2013 SC 1853 : (2013) 137 FLR 417 : (2013) 2 JT 538 : (2013) LabIC 2639 : (2013) 2 LLJ 149 : (2013) LLR 295 : (2013) 2 RCR(Civil) 384 : (2013) 2 SCALE 244 : (2013) 9 SCC 406 : (2014) 1 SCC(L&S) 716 : (2013) 2 SCT 192 : (2013) 2 SLJ 341 : (2013) AIRSCW 1506 : (2013) 1 Supreme 686 and another in *Ramachandra v. Regional Manager* (2013(2) TN MAC 304 (SC)), it is contended by Mr. M. Swamikannu, the learned counsel for the appellant that the choice of the forum cannot actually deprive the victim of compensation. Therefore, the learned counsel contended that if a person is entitled to claim compensation in terms of the Employees' Compensation Act, 1923, he cannot be deprived of compensation under the Motor Vehicles Act, 1988.

7. We have carefully considered the above submissions. But we are unable to sustain the said argument in total.

8. It is true that the victim is entitled to choose any one of the two fora, depending upon the benefits that he may get before either of them. But in so far as the claim under the Motor Vehicles Act, 1988 is concerned, the claimant should establish that he was entitled to approach the Court under Section 166 and that he was not himself a tort-feasor. This question played a vital role in distinguishing the claim made under the Motor Vehicles Act from the claim made under the Employees' Compensation Act, 1923.

9. However, as rightly contended by the learned counsel for the second respondent, this Court is empowered to award compensation as payable under the Employees' Compensation Act, 1923. In *The Oriental Insurance Company Ltd. Vs. Kaliya Pillai, Thangam and N. Velu*, (2003) 1 ACC 447 : (2003) ACJ 1021 : (2003) 96 FLR 399 : (2003) 1 LLJ 536 : (2003) 1 LW 113 : (2002) 3 MLJ 777 , a Division Bench of this Court held that the aggrieved or interested person can make a claim for compensation either under the Workmen's Compensation Act or under the Motor Vehicles Act. The only bar is that the claim cannot be made under both the Acts.

10. The Division Bench pointed out that the insurer's liability is to be determined not only with reference to the provisions of the Motor Vehicles Act, but also with reference to the contract of insurance. Therefore, the Division Bench held that the compensation as payable under the Workmen's Compensation Act, could at

least be awarded.

11. A similar view was taken by yet another Division Bench of this Court in the *The Oriental Insurance Co. Ltd. Vs. Krishnan, Thayammal, M. Velusamy, National Insurance Co. Ltd. and Thangaraj*, (2004) ACJ 1790 : (2003) 2 LW 73 . Therefore, even if the appellant is not entitled to make a claim, as a third party, under Section 166 of the Motor Vehicles Act, he can at least make a claim under the Employees' Compensation Act, 1923.

12. Coming to the quantum of compensation that should be awarded, at least under the Employees Compensation Act, 1923, it is seen from the pleadings and the evidence on record that the appellant was aged 38 years on the date of the accident. Therefore, the relevant factor under Schedule-IV to the Employees' Compensation Act, 1923, is 189.56.

13. No evidence was let in on the side of the appellant with regard to the quantum of wages. However, it is admitted that the minimum wages payable to a driver at the time of accident was Rs. 6,401/- per month under the Minimum Wages Act. If 60% of the minimum wages is taken, the same works out to Rs. 3,840.60.

14. The Doctor has opined that the appellant suffered 40% disability. However, it is contended by Mr. M. Swamikannu, the learned counsel for the appellant that since there were multiple fractures leading to the insertion of plates in the thigh and leg, the claimant is unable to perform the duties of a driver. Hence, it is contended by him that considering the nature of employment, the claimant should be taken to have suffered continuing permanent disability. In this connection, the learned counsel relies upon a decision of the Supreme Court in *B. Kothandapani Vs. Tamil Nadu State Transport Corporation Ltd.*, (2011) ACJ 1971 : (2011) 6 JT 257 : (2011) 3 RCR(Civil) 206 : (2011) 6 SCALE 41 : (2011) 6 SCC 420 : (2011) 2 SCC(Cri) 1002 : (2011) 3 TAC 7 .

15. But unfortunately, for the claimant, the decision relied upon by him arose under the Motor Vehicles Act, 1988. In so far as the Employees' Compensation Act, 1923 is concerned, the percentage of loss of earning capacity is fixed in Part-II of Schedule-I as 50% even for amputation below the knee. Therefore, we do not think that the appellant, whose claim is considered only under the Employees' Compensation Act, 1923, can rely upon the parameters fixed under the Motor Vehicles Act, 1988. Hence, we fix the disability at 50%.

16. If so done, the compensation payable would work out as follows:

17. In view of the above, the appeal is allowed partly directing the second respondent to pay a sum of Rs. 3,64,012/- (Rupees three lakhs sixty four thousand twelve only) to the appellant, within a period of six weeks from the date of receipt of a copy of this order together with interest at the rate of 12% per annum from the date of expiry of 30 days from the date of accident up to the date of payment. No costs. Connected miscellaneous petitions are closed.