

(2011) 08 KL CK 0013
In the High Court Of Kerala
Case No : M.A.C.A. No. 1864 of 2010

National Insurance Co. Ltd.	Vs	APPELLANT
Nirmala Balachandran and Others		RESPONDENT

Date of Decision : 23-08-2011

Acts Referred:

Income Tax Act, 1961 — Section 145
Motor Vehicles Act, 1988 — Section 168, 173

Citation : (2012) 3 KLJ 214

Hon'ble Judges : R. Basant, J; M.C. Hari Rani, J

Bench : Division Bench

Advocate : Rajan P. Kaliyath, for the Appellant; VPK. Panicker and T. Rajesh, for the Respondent

Judgement

R. Basant, J.—All these four appeals are preferred by the common appellant/insurance company. Three persons were travelling in a Maruti car. They were proceeding along the road from South towards North. The road had a width of 8 metres. According to them, the insured vehicle/lorry which was proceeding in front, suddenly, without showing any signals, was rashly turned to the right hand side. Attempt was made to avoid the accident; but the driver of the car could not avoid collision. The car hit on the right rear wheel of the lorry. The car suffered damage and the three occupants of the car suffered personal injuries. Altogether four claims were staked before the tribunal - three for compensation for personal injuries suffered and the fourth for the damage suffered by the car. The driver and the owner of the insured vehicle remained ex parte. The appellant/insurance company alone resisted the claim. It was contended that the accident was not due to the negligence of the driver of the insured vehicle. It was contended that, at any rate, the driver of the car was also guilty of contributory negligence. Quantum of compensation claimed was also disputed.

2. Parties went to trial on these contentions. On the side of the claimants, two claimants, who were in the car at the time of the accident and who had

witnessed the incident were examined. In addition, a person - allegedly an independent witness who had witnessed the occurrence, was also examined by the claimants. All the three of them stated that the accident occurred only because the lorry driver suddenly and in a very rash and negligent manner without showing any signal attempted to abruptly take the lorry to the right side to go to a side road K.P. Chacko Memorial Road on the eastern side of the main road. It was only the rash and negligent conduct of the driver of the insured vehicle who suddenly turned the vehicle to the right hand side without showing any signal that led to the accident, asserted those witnesses. The claimants relied further on the final report submitted by the police after due investigation indicting the driver of the insured lorry as the sole accused.

3. The respondents, even after those three witnesses were examined and the final report/charge sheet was marked did not choose to adduce any evidence in support of the plea that the driver of the insured vehicle was not negligent and that the driver of the car had in any way contributed to the accident.

4. The tribunal, in these circumstances, on the basis of the materials placed before the tribunal came to the conclusion that there was sufficient evidence to conclude that the accident occurred on account of the negligence on the part of the driver of the insured vehicle and that the driver of the car is not proved to have contributed to the accident in any manner. Accordingly, the tribunal proceeded to hold that the driver of the insured vehicle was entirely responsible for the accident. The impugned award was passed directing the appellant/insurer of the lorry to compensate the claimants.

5. Arguments have been advanced before us. First of all, it is contended that the finding on the question of negligence is incorrect. The driver of the lorry was not, in any way, responsible for the accident. In any view of the matter, even if the entire allegations are accepted, the driver of the car has also contributed to the accident. To this extent, liability will have to be atleast apportioned, argues the learned counsel for the appellant/insurance company. There is, of course, a further contention that the quantum awarded in each case is not fair, reasonable and just. One of the claimants that is the claimant/respondent in M.A.C.A. No. 1863/2010 has preferred a cross objection. In that, he assails the quantum of compensation awarded for personal injuries suffered by the said claimant.

6. We shall first of all consider the dispute regarding negligence which is the common point raised in all the appeals. We shall then proceed to consider the other specific pleas in each appeal. Fundamental facts are not in dispute. The claimants were proceeding in a car. The insured lorry driven by its driver was proceeding in front. There was a collision between the lorry and the car. It is the case of the claimants that the lorry had suddenly and without showing any signal abruptly turned to the right. This version is rendered probable broadly by admitted existence of a side road joining the main road on the eastern side of the spot of occurrence. The impact, it is evident, was between the front side of the car and the rear right wheel of the lorry. This also lends support to the

claimants" version. The case of the claimants is that the lorry had suddenly taken a turn to the right side in an abrupt manner without any signal to the car which was proceeding at its rear. The impact was not on the rear of the lorry; but near the right rear tyre. This also indicates the probability of the lorry swerving to its right all on a sudden unanticipated by the car. The oral evidence of the two claimants and the eye witness examined as P.Ws. 3, 4 and 5 support this version about the accident. The final report Ext. A12 marked by the claimants does also support this version of the claimants. To us, it appears that the negligence of the driver of the insured vehicle is thus evident from the above circumstances.

7. The learned counsel for the insurance company contends that the spot of accident was at a distance of 3.45 Mtrs. to the east of the western kerb. The road at the scene of the crime has a width of 8 Mtrs. The imaginary mid line runs at a distance of 4 Mtrs. from either side. This indicates that the impact was on the left half of the road which is the correct side of both for the lorry and for the car. There was a further distance of 55 cms. between the spot of impact and the imaginary mid line. The learned counsel for the appellant argues that the car has width of only less than 1.5 Mtrs. and therefore it was not necessary at all for the car to proceed to the spot of impact which was at a point 3.45 Mtrs. East of the western kerb. We need only notice that on going to the right hand side of the allotted portion of the road (i.e., the left half of the road) the driver of the car cannot be assumed to have been negligent at all. Moreover, going by the case of the claimants the lorry was turned suddenly. Certainly an attempt must have been made by the driver of the car to avoid the accident by swerving to his right which attempt did not succeed and ultimately the front of the car hit against the right rear side of the lorry.

8. As against the evidence of P.Ws. 3, 4 and 5 and Ext. A12, we find that no contra evidence has been adduced by the owner, driver and insurer of the vehicle. In the nature of the materials available, it can certainly be held safely that the claimants had discharged the burden on them to indicate clearly that the accident was on account of negligence on the part of the driver of the insured lorry which was proceeding in front. The argument that the driver of the car (if he were careful) must have avoided the accident does not appeal to us probable or acceptable. Of course, if the car were going very slow and close to the end of the left half of the portion of the road allotted to the traffic proceeding forward probably the collision could have been avoided. But that is no reason to assume, on the basis of the materials available, that the lorry driver was not negligent or that the driver of the car had contributed to the accident.

9. It has already been referred to in the judgment dated 20/7/2011 in M.A.C.A. No. 1700 of 2008 (The New India Assurance Co. Ltd., v. Pazhaniammal and others) that the final report filed by the police in the absence of better evidence can be acted upon by the courts to come to an appropriate conclusion on the question of negligence. At least, such final report filed must bring about a shift in the burden. In the instant case we have Ext. A12. In addition, we have the oral

evidence of P.Ws. 3, 4 and 5. In spite of this, no contra evidence has been adduced. Merely from the location of the spot of accident at a distance of 3.45 Mtrs. to the East of the western kerb we are unable to accept the contention of the learned counsel for the appellant that the lorry driver was not negligent or that, at least, the driver of the car has contributed to the accident.

10. We must note that we are called upon to consider the findings of the Tribunal. Unless there are compelling reasons to take a different view, we will not be persuaded to interfere with the findings in the impugned award. In the facts and circumstances of this case, we find no reason to interfere with such findings which does appear to us to be absolutely fair, reasonable, cogent and just. In the facts and circumstances of this case we are unable to adopt the over simplistic argument that this is a case of the vehicle proceeding on the rear hitting against one that was proceeding in the front. Impact was between the rear right side of the lorry and the front of the car, it is crucial to note. The challenge raised on this ground therefore fails.

11. We now come to the challenge against the quantum of compensation fixed in each case.

12. In M.A.C.A. No. 1863/2010, the appellant in the appeal and the respondent/claimant in the Cross-objection assail the quantum of compensation awarded by the Tribunal. Against a total claim of Rs. 7,00,000/- the Tribunal awarded only an amount of Rs. 3,47,750/- as per the details given in paragraph-15 which we extract below:

13. The learned counsel for the appellant/insurance company contends that the appellant wants to assail only the amount awarded under the head of disability compensation. An amount of Rs. 2,31,0007/- was awarded ($7000 \times 12 \times 11 \times 25/100$). The appellant was aged 54 years at the time of the accident. He was employed as a Marketing Officer by the Coconut Development Board under the Ministry of Agriculture, Government of India. Admittedly, his age of superannuation is 60 years. Admittedly he continues his employment and there has been no actual reduction of salary consequent to the injury and the disablement suffered. His monthly income as per the salary certificate Ext. A17 produced by him dated 3/10/05 is Rs. 19,462/-. Less the admissible deductions including income tax of Rs. 415/-, his net pay was Rs. 11,901/-. The Tribunal resorted to the multiplier-multiplicand method. For a person aged 50 to 55 years the Tribunal took 11 to be the multiplier, that is justified by the dictum in Smt. Sarla Verma and Others Vs. Delhi Transport Corporation and Another, -.

14. However, the Tribunal accepted only 7000 as the multiplicand though Rs. 19,462/- is the monthly income and Rs. 415/- the income tax payable. Evidently therefore the Tribunal was not working out the compensation for reduction in earning capacity by the multiplier-multiplicand method on the basis of the loss of actual earnings. Rs. 7,000/- taken as the multiplicand was definitely taken into consideration by the Tribunal taking note of the indisputable fact that the

appellant was not immediately left to suffer any loss in earnings till he attains the age of superannuation.

15. How was 7000 taken as the multiplicand? We do not find much of reasoning. However, we note that a possible and reasonable amount of compensation has been fixed under the head of disability compensation. It is now trite that disability suffered by a person has two fold reflections on his life. It reduces his earning capacity. It also impairs the quality of life which a person can aspire to lead thereafter. The claimant was aged about 54 years. He has suffered permanent disability to the tune of 30% as certified by the medical officer. However, the Tribunal accepted only 25% as the disability. We have no hesitation to agree with the learned counsel for the claimant that the claimant is entitled to be compensated for both dimensions of the physical disability suffered by him, i.e. reduction in earning capacity and impairment in the quality of life. An amount of compensation is liable to be granted for all dimensions of the impairment in quality of life suffered by the claimant. This includes all the inconvenience, difficulties, discomfiture suffered by him as a result of the disability as also shortened expectation of life. For all these together, an amount of compensation has to be fixed under the head of loss of amenities.

16. Coming to the compensation payable for reduction in earning capacity, the appellant has not suffered immediate reduction in earnings. He is unlikely to suffer any actual reduction in earning till he attains the age of 60 years also. Certainly realities have to be taken note of. The claimant, who was working with 100% physical ability or efficiency till the accident, will hereafter have to work with 75% physical ability. This would definitely affect his performance. To cover up the physical disability, he will have to strain harder to put in the same amount of work which he is obliged to do even if he had not suffered any loss in earnings. Just compensation is the mantra u/s 168 of the Motor Vehicles Act and it will be idle for a Court to ignore this dimension of the suffering of the claimant - his obligation to strain harder with decreased physical ability to turn out the same amount of work which would fetch him salary without any reduction. It will also not be inappropriate in this context to note that a person labouring under such disability will certainly need more rest, leave etc. than a person working with full physical ability. The disability of 25% will oblige him at least 25% more of leave, it can reasonably be assumed, it is contended. Though at the moment, specific evidence of the number of days' leave that the claimant will have to avail on account of such disability cannot be authentically ascertained, it would be idle to assume that there will be no loss on that account also.

17. We will also have to take into account the indisputable reduction in earnings after the claimant attains the age of retirement. At 60 years when he retires, he would otherwise have been able to take up other employment. Even with reduced physical ability, he may be able to take up such employment. But it would be puerile to assume that there will be no reduction in earning at least for such post retiral earnings which the claimant/injured may take up after

superannuation. So considered, the claimant will certainly be entitled for compensation for the possible reduction in earnings after his superannuation. 25% disability has already been ascertained. There is no challenge against the same. We find the said conclusion to be reasonable. For persons of age group 60-65 years, 7 is the multiplier in accordance with the dictum in Smt. Sarla Verma and Others Vs. Delhi Transport Corporation and Another, . Reckoning 7 as the multiplier, certainly for the post retiral reduction in earning capacity, compensation will have to be awarded.

18. 7000 cannot, at any rate, be reckoned as the possible post retiral monthly income, contends the learned counsel for the appellant Sri. Rajan Kaliyath. The claimant, it cannot be forgotten, was earning an income of Rs. 19,462/- at the time of the accident. The post retiral earnings will have to be ascertained with the help of the inputs available about his present income. In any view of the matter, we are satisfied that the Tribunal has not committed any error in reckoning Rs. 7,000/- as the possible monthly income for the post retiral period.

19. This would mean that for the amount awarded under the disability compensation, 7 can safely be reckoned as the multiplier and an amount of Rs. 1,47,000/- ($7000 \times 12 \times 7 \times 25/100$) is justified. What remains is only the balance of Rs. 84,000/- ($7000 \times 12 \times 4 \times 25/100$) - in addition to the amount of Rs. 15,000/- already awarded as compensation for loss of amenities. We must note that the appellant is, at any rate, entitled for compensation for loss of amenities. For such loss of amenities from the age of 54 years for the physical disability of 25% suffered, and for the extra strain that the appellant will have to put in (and also the period of leave which he may be compelled to avail because of reduced physical ability) compensation deserves to be awarded. We are satisfied, in these circumstances, that the said amount of Rs. 84,000/- along with Rs. 15,000/- already awarded can be held to be adequate compensation for the loss of amenities also. We have only tried to look at the various dimensions of the problem. We feel that, at any rate, the composite amount of Rs. 2,31,000/- awarded under the head of disability compensation can be held to be perfectly justified and adequate in the facts and circumstances of this case. When the said amount is split up into various components, i.e.

i) post retiral reduction in earnings,

ii) the extra strain and the possible additional leave which may have to be availed for performing the same work that reduced physical ability and

iii) loss of amenities, in all its dimension including inconvenience, discomfiture, impairment in the quality of life and shortened expectation of life, we are satisfied that the amount of Rs. 2,46,000/- (2,31,000 plus 15,000) can be held to be fair, reasonable and just. The same does not warrant interference.

20. The learned counsel for the claimant has preferred a Cross Objection and in the Cross Objection, he raises various contentions. The contention that no proper amount has been awarded under the head of loss of amenities does not survive

now considering the view which we have taken to justify the award of the total amount of Rs. 2,46,000/- as compensation for disability.

21. The counsel then contends that towards medical bills, only an amount of Rs. 15,000/- has been awarded. All bills relied on by him were produced for reimbursement before his employer and the employer has admittedly reimbursed the admissible claim. Whatever was not produced before the employer was taken into account by the Tribunal in awarding an amount of Rs. 15,000/- towards medical expenses.

22. The learned counsel advances an argument before us that the Tribunal ought to have awarded the difference between the bills produced before his employer and the reimbursement granted to him by his employer. This is the main plank of the challenge raised in the Cross Objection.

23. Sufficient materials to explain why the employer did not admit the entire claim is not made available. The Tribunal took into consideration that the entire admissible reimbursement has been obtained from the employer. The learned counsel for the appellant raises a contention before us in the course of arguments that the employer of the appellant under the relevant rules would reimburse only 70% of the medical expenses and the balance will not be paid by the employer. That is why there is a gap between the expenses incurred as per medical bills and the reimbursement allowed by the employer, contends the learned counsel. On this aspect we find that adequate, specific and cogent evidence has not been adduced. In fact, admittedly such a plea has not been raised before the Tribunal or in the Cross Objection. In these circumstances, we are unable to agree that the appellant is entitled to any further amount as medical expenses being the deficit in the reimbursement made by his employer. That contention cannot be accepted.

24. We are, in these circumstances, satisfied that the total amount of Rs. 3,47,750/- awarded by the Tribunal as compensation is fair, reasonable and just and does not, at any rate, warrant interference at our hands by invoking the appellate jurisdiction u/s 173 of the Motor Vehicles Act at the instance of either side. The challenge raised in the appeal and Cross Objection would therefore fail.

M.A.C.A. No. 1842 of 2010

In view of the finding entered by us on the challenge against the impugned award on the ground of negligence/contributory negligence, nothing survives in this appeal for consideration as the quantum awarded to the claimant is not specifically challenged by the learned counsel for the appellant/insurance company in the course of arguments. The challenge raised in M.A.C.A. No. 1842 of 2010 therefore fails.

M.A.C.A. No. 1861 of 2010

We have heard the learned counsel for the appellant. The learned counsel for the appellant submits that in view of the finding on the question of negligence/

contributory negligence, the appellant does not want to raise any further challenge against the impugned award. The challenge raised in M.A.C.A. No. 1861 of 2010 does also, in these circumstances, fail.

M.A.C.A. No. 1864 of 2010

25. In this appeal, the insurance company assails the impugned award under which compensation of Rs. 60,000/- along with interest and cost was awarded to the claimant for the loss suffered by her on account of the damage suffered by her car in the accident. An amount of Rs. 80,987/- is claimed as compensation. The claimant relied on Ext. A4 certificate, a report prepared by PW 2 - a competent surveyor, who had allegedly ascertained the loss. According to him, the damage suffered by the car was such that it requires Rs. 64,987.84 as the cost of spare parts to be replaced. The repairing charges was assessed at Rs. 15,000/-. Thus according to PW 2, an amount of Rs. 79,987.84 would be required to replace the spare parts and get the necessary repairs done. The Tribunal considered the oral evidence of PW 2 and his report Ext. A4. The Tribunal was not persuaded to accept the entire claim. However, the Tribunal on a rough and ready basis came to the conclusion that Rs. 60,000/- can be awarded as compensation.

26. We have heard the learned counsel in detail. The learned counsel for the appellant insurance company contends that the surveyor had admitted in the course of cross examination that Rs. 50,000/- was the value of the second hand car. The learned counsel for the insurance company builds up an argument that when the second hand value itself is Rs. 50,000/-, the Tribunal had erred in awarding Rs. 60,000/- as the compensation. In coming to that conclusion, even the salvage value of the damaged car was not taken into consideration, contends the learned counsel for the appellant.

27. The learned counsel for the claimant on the other hand contends that Rs. 50,000/- was not the value spoken to by the surveyor at the time of the accident. He was asked the second hand value of a 1993 model Maruti 800 car on the date of his examination on 26.07.2008. It was then that he answered that the second hand value would be Rs. 50,000/-. This should not be confused with the second hand value of the car on the date of the accident. The surveyor himself had stated in his cross examination about the second hand value of the car on the date of the accident. It exceeded one lakh as per the specific evidence of PW 1, it is pointed out.

28. After hearing both sides, we wanted to work out a proper and harmonious settlement. We are happy to note that the counsel agree that an amount of Rs. 50,000/- (Rupees Fifty thousand only) can be fixed as the quantum of compensation payable for the loss suffered by the claimant as on the date of the accident. We are, in these circumstances, satisfied that as agreed by the counsel, this appeal can be allowed in part and the quantum of compensation can be reduced to Rs. 50,000/-. In the result:

- A) M.A.C.A. No. 1861 of 2010, 1863 of 2010 and 1842 of 2010 are dismissed and the impugned awards are upheld in all respects;
- B) M.A.C.A. No. 1864 of 2010 is allowed in part. The impugned award is upheld in all other respects. But the quantum of compensation payable is reduced from Rs. 60,000/- to Rs. 50,000/- as agreed. All other directions are upheld;
- C) The Cross Objection No. 56 of 2011 filed in M.A.C.A. No. 1863 of 2010 is dismissed.