

(2014) 01 MAD CK 0098
In the Madras High Court
Case No : C.M.A. No. 355 of 2008

National Insurance Company Limited

APPELLANT

Vs

Dhanalakshmi and Others

RESPONDENT

Date of Decision : 24-01-2014

Acts Referred:

Motor Vehicles Act, 1988 — Section 140 163-A 166 173

Citation : (2014) 01 MAD CK 0098

Hon'ble Judges : P.R. Shivakumar, J

Bench : Single Bench

Advocate : N.B. Surekha, for the Appellant; Ma. P. Thangavel, for the Respondent

Final Decision : Allowed

Judgement

P.R. Shivakumar, J.—This Civil Miscellaneous Appeal has been preferred u/s 173 of the Motor Vehicles Act, 1988 challenging the award of the Motor Accidents Claims Tribunal (Additional District Judge, Fast Track Court II) Gobichettipalayam dated 20.03.2007 made in M.A.C.T.O.P. No. 164 of 2005 directing the appellant herein and the 6th respondent herein to pay a sum of Rs. 4,55,000/- together with an interest at the rate of 7.5% p.a. calculated on the above said amount from the date of filing of the M.C.O.P. till the date of payment to respondents 1 to 4 herein for the death of Thangarasu @ Ramasamy. The first respondent is the wife of Thangarasu @ Ramasamy. Respondents 2 and 3 are their sons. Respondent No. 4 is the father of deceased Thangarasu @ Ramasamy. They made a claim against the said Subramanian and the appellant herein as owner and insurer of the rig for compensation u/s 163-A of the Motor Vehicles Act, 1988, claiming that the above said deceased Thangarasu @ Ramasamy was employed as Driller under Subramanian, the owner of the Rig bearing Registration No. TN 27-1339 and contending that while they were engaged in digging a borewell into a well situated in the land of Krishnadas at Vembi Village, Villupuram Taluk on 13.04.2003, the deceased Thangarasu @ Ramasamy, who

was in the process of getting down into the well through a rope, slipped from the rope and fell down into the well which resulted in head injuries and injuries all over the body; that after a brief treatment at JIPMER Hospital, Puducherry, he succumbed to the injuries on 14.04.2003; that the accident occurred in the course of employment under Subramanian, who was shown as the first respondent in the M.C.O.P. and that the death occurred due to an accident arising out of the use of the motor vehicle, namely the Rig. It was contended further that the deceased was aged about 35 years and was earning a sum of Rs. 4,000/- per month as salary and that due to the death of Thangarasu @ Ramasamy, the respondents 1 to 4 herein being his wife, sons and father suffered pecuniary loss and that they were entitled to get compensation not only for the pecuniary loss suffered by them but also on other conventional heads. They had prayed for an award directing the said Subramanian and the appellant herein to jointly and severally pay a sum of Rs. 6,00,000/- as compensation together with interest on the above said amount from the date of claim till the date of payment. During the pendency of the M.C.O.P. Subramanian, who figured as the first respondent in the M.C.O.P. died and Karrupayaal, wife of Subramanian, was impleaded as his legal representative and was ranked as third respondent in the M.C.O.P.

2. The claim was resisted by the second and third respondents in the M.C.O.P., who have been shown as appellant and 6th respondent in the Civil Miscellaneous Appeal, based on their averments made in their respective counter statements. The appellant (second respondent in the M.C.O.P.) contended that it was not liable to pay compensation as claimed by the claimants since even as per the petition averments, there was no fault on the part of the driver of the vehicle, namely Rig and that there was no nexus between the use of the motor vehicle and the accident in which the deceased Thangarasu @ Ramasamy sustained injuries that subsequently proved to be fatal. Even as per the petition averments, the deceased while climbing down into the Well through a rope, slipped and fell down. Karrupayaal, who figured as the third respondent in the M.C.O.P. (impleaded as the legal representative of the owner of the vehicle) had contended that the deceased Thangarasu @ Ramasamy while trying to supply tea to the persons who were inside the Well, slipped and fell into the well and sustained the fatal injuries and hence it could not be said that it was an accident arising out of the use of the motor vehicle, namely Rig. Besides the above said contention, Karrupayaal also contended that since the vehicle had been insured with the appellant, if at all the respondents 1 to 4 herein (claimants in the M.C.O.P.) were entitled to get any compensation, the insurer, namely the appellant shall be liable to pay the said amount. Based on the above said pleadings, the Tribunal framed two issues which are as follows:

- 1) Whether the second respondent (appellant herein) is liable to pay compensation for the accident?
- 2) What is the amount to which the claimants are entitled?

3. In the enquiry before the Tribunal, two witnesses were examined as P.Ws. 1 and 2 and three documents were marked as Ex. A1 to A3 on the side of the claimants. No witness was examined and only one document was marked as Ex. B1 on the side of the respondents in the M.C.O.P.

4. The Tribunal, upon considering the evidence in the light of the arguments advanced on both sides, came to the conclusion that the accident took place when the Rig was used for drilling the borewell and that since the deceased was in the process of climbing down into the Well through a rope, the accident should be construed to be one arising out of the use of the motor vehicle. Accordingly, the Tribunal held the owner and insurer of the motor vehicle, namely the Rig, jointly and severally liable to pay compensation to the claimants who are respondents 1 to 4 herein. Though the claimants would have claimed that the deceased was having an income of Rs. 4500/- per month as salary for his employment under the owner of the Rig and evidence was also adduced through P.W. 2 to the effect that the deceased was in receipt of Rs. 4500/- per month, apart from the supply of food, the Tribunal chose to hold that the deceased was having an income of Rs. 3000/- per month at the rate of Rs. 100/- per day. The Tribunal thus fixed the annual income at Rs. 36,000/-. Deducting 1/3rd from it towards living and personal expenses of the deceased, took the balance of Rs. 24,000/- as the annual pecuniary loss occasioned to the claimants. Though the age of the deceased was fixed at 35 years, the Tribunal chose to apply the maximum multiplier, namely 18 holding that multiplier could be selected based on the age of the first claimant which was fixed by the Tribunal at 30 years. Accordingly, the Tribunal assessed the compensation for pecuniary loss at Rs. 4,32,000/-. Adding a sum of Rs. 10,000/- towards loss of consortium to the first claimant and a further sum of Rs. 10,000/- towards loss of love and affection for claimants 2 and 3 and yet another sum of Rs. 3,000/- towards funeral expenses, the Tribunal fixed the total amount of compensation at Rs. 4,55,000/- and passed an award directing the respondents in the M.C.O.P. to pay the said amount together with an interest at the rate of 7.5% from the date of filing of the M.C.O.P. till the date of deposit.

5. The above said award passed by the Tribunal on 20.03.2007 is challenged by the appellant herein/insurer (second respondent in the M.C.O.P.) on various grounds set out in the memorandum of Civil Miscellaneous Appeal.

6. The main contentions of the learned counsel for the appellant are that the accident did not occur during the motion of the vehicle or at least during the operation of the Rig unit and hence the accident could not be construed as one arising out of the use of the motor vehicle in which event alone a claim under the provisions of the Motor Vehicles Act, 1988 can be maintained and that the fixation of the liability on the appellant/insurer when no premium had been paid to cover the coolie was improper. Even though several grounds have been raised in the memorandum of Civil Miscellaneous Appeal, the award of the Tribunal is sought to be challenged only on the ground that there was no nexus between the

accident in which the deceased sustained injuries and the use of the motor vehicle and that hence the claim made under the provisions of the Motor Vehicle Act, 1988 should have been dismissed as not maintainable. The further contention is that since an Act only policy alone had been obtained for the vehicle in question, the deceased, a coolie was not a person covered by the policy and hence, the claim made against the appellant/insurer should have been rejected.

7. The point that arises for consideration in the appeal are:

1) Whether the accident leading to the death of Thangarasu @ Ramasamy was one that arose out of the use of the motor vehicle namely, Rig bearing Registration No. TN 27-1339 so that a claim under the provisions of the Motor Vehicles Act, 1988 shall be maintainable?

2) Whether the Insurance policy taken for the Rig bearing Registration No. TN 27-1339 did not cover the risk involved to the Coolie employed? Whether the fixation of liability on the appellant/insurer is not in accordance with law?

8. The arguments advanced by Ms. N.B. Surekha, learned counsel for the appellant and by Mr. Ma.P. Thangavel, learned counsel for the respondents are heard. The materials available on record were also perused.

9. The respondents 1 to 4 herein/claimants in the M.C.O.P. made a claim for compensation against the owner and insurer of the motor vehicle, namely Rig bearing Registration No. TN 27-1339 based on their contention that the deceased Thangarasu @ Ramasamy, sustained injuries leading to his death in an accident arising out of the use of the above said motor vehicle. There is no dispute that the Rig bearing Registration No. TN 27-1339 was owned by Subramanian who figured as the first respondent in the M.C.O.P. and it was in the field of one Krishnadas at Vembi Village, Villupuram Taluk for digging a Borewell. It is also an admitted fact that a borewell was sought to be dug into an existing Well. According to the respondents 1 to 4/claimants 1 to 4, three persons including Thangarasu @ Ramasamy, were employed by the owner of the Rig as Drillers. While the other two had already gone into the Well, the deceased Thangarasu @ Ramasamy also was in the process of getting into the Well through a rope for the purpose of digging a borewell and in the said process, he slipped from the rope, fell down and sustained injuries leading to his death. In this regard, not only the appellant/insurer, but also the legal representative of Subramani who was impleaded as third respondent in the M.C.O.P. took a stand that the claim under the Motor Vehicles Act was not maintainable since the accident did not arise out of the use of the motor vehicle. It was also contended in their counter statements that the vehicle was not in motion and it was also not in use for drilling purpose and that hence the accident in which the deceased Thangarasu @ Ramasamy sustained fatal injuries cannot be termed an accident arising out of the use of the motor vehicle. Karrupayaal, who figured as the third respondent in the M.C.O.P., took a further stand that the contention of the claimants that the

deceased Thangarasu @ Ramasamy slipped and fell down while climbing down the rope to get into the Well was not true and that the same was made only as an afterthought to make a claim for compensation under the Motor Vehicles Act. It was her contention that the deceased Thangarasu, while attempting to supply tea to the persons inside the Well by letting down the container through a rope, slipped down and fell into the Well; that if at all the claimants were entitled to any compensation, the same could have been made only under the Workmen's Compensation Act before the appropriate authority and that the claim made under the provisions of the Motor Vehicles Act was misconceived.

10. In the light of such clear stand taken by the respondents in the M.C.O.P., the claimants ought to have lead sufficient and reliable evidence in proof of their contention that the accident in question arose out of the use of the motor vehicle, namely Rig. In this regard, an attempt was made by the claimants by leading evidence through P.W. 1 (first claimant) and P.W. 2 (one of the alleged co-workers) to the effect that while the Rig was in operation, the deceased Thangarasu @ Ramasamy was in the process of getting into the Well through a rope and while doing so, he slipped, fell down and sustained injuries leading to his death. However, during cross-examination, P.W. 2 has chosen to state that the deceased fell down because the rope through which he was climbing down got cut. The said testimony of P.W. 2 is quite contrary to what has been stated in the claim petition. P.W. 1, namely the first claimant, in her chief examination in the form of proof affidavit has made a statement in tune with the averments found in their claim petition to the effect that while climbing down the rope to get into the Well, the deceased slipped and fell down. It is not the case of anybody that the vehicle itself had been taken into the Well down below the ground level and the deceased fell down on the vehicle when it was in operation. However, P.W. 1 in her evidence in cross-examination has made an attempt to state that while the vehicle was in operation inside the Well, the deceased fell down on the vehicle since the rope with the help of which he was climbing down got cut. The same will show the conflicting and contrary statements made by P.W. 1 and P.W. 2 as to how the accident took place, besides there being an in-built contradiction in the evidence of P.W. 1.

11. It is also pertinent to note that P.W. 1 was the person who lodged the complaint with the police based on which a criminal case was registered as Crime No. 102 of 2003 on the file of Kanjanur Police Station. P.W. 1 herself in the later part of her cross-examination admitted that she had no knowledge as to whether the Rig was in operation at the time of accident. Though P.W. 1 would have admitted having given such a complaint to the police, based on which a case was registered, she has denied the contents of the same. She herself produced Ex. A1 as the certified copy of the F.I.R. From Ex. A1, it is obvious that she gave statement to the police to the effect that her husband, in order to supply tea to the persons who were inside the Well, was in the process of sending the tea to those persons through a rope and while doing so, he lost his grip of the ground and fell down into the Well sustaining injuries leading to his death. Ex. A2 is the

certified copy of the Postmortem Report which simply says that there had been multiple injuries and the final opinion was reserved pending receipt of chemical examination report. Copy of the final opinion has not been filed. However, it shall be obvious from the above said evidence that there had been a shift in the stand taken by the claimants, perhaps, on being appraised of the fact that the accident having no nexus with the operation of the Rig would make the claim under the Motor Vehicles Act not maintainable. The Tribunal, without properly appreciating the evidence on this aspect, has chosen to hold that accident arose out of use of the Motor Vehicle, namely the Rig. The said finding, according to the considered view of this Court, is totally erroneous and the same can even be stated to be perverse. Hence, the finding of the Tribunal that the accident in which Thangarasu @ Ramasamy sustained injuries leading to his death was one arising out of the use of the motor vehicle, namely the Rig bearing Registration No. TN 27-1339 is hereby set aside and reversed. Accordingly, both the points are answered in favour of the appellant and against the respondents.

12. Apart from the erroneous finding rendered by the Tribunal that the accident arose out of use of the motor vehicle, the Tribunal has committed a number of blunders which are briefly highlighted hereunder:

(i). A claim was made u/s 163-A of the Motor Vehicles Act. When a claim is made u/s 163-A of the Motor Vehicles Act for compensation in case of death or permanent disablement due to accident arising out of the use of the Motor Vehicle, the claimants shall not be required either to plead or establish that the death or permanent disablement, in respect of which the claim has been made, was due to any wrongful Act or negligence or default of the owner of the vehicle or of any other person. The Tribunal committed a blunder in construing the claim petition to be one made u/s 166 of the Motor Vehicles Act and the judgment of the Tribunal also contains a recital that the claim was made u/s 166 of the Motor Vehicles Act, whereas in fact the claim was made u/s 163-A of the Motor Vehicles Act, 1988. Perhaps, the Tribunal did it conscious of the fact that the claimants shall not be entitled to make a claim on the structured formula found in the schedule relying on Section 163-A, since the income of the deceased according to their own statement exceeded the maximum limit found in the table. The claimants had stated that the deceased was having a monthly income of Rs. 45,00/- as salary received from the owner of the Rig. It will come to Rs. 54,000/- per annum. Now it has been held that the benevolent provision u/s 163-A is meant for benefiting a particular class of people, namely the injured or dependents of the deceased whose income did not exceed Rs. 40,000/- per annum. The same could be the reason why the Tribunal could have wrongly recited the claim to have been made u/s 166 of the Motor Vehicles Act, whereas actually the claim was made u/s 163-A of the Motor Vehicles Act.

(ii) Both P.Ws. 1 and 2 gave evidence to the effect that the deceased was in receipt of Rs. 4500/- per month as salary. However the Tribunal has chosen to fix the monthly income of the deceased on the premise that he would have been

paid Rs. 100/- per day. It was done on the assumption that the deceased would have got job on all days without any rest. It seems to have been done with a view to contain the annual income at Rs. 36,000/- which shall be below Rs. 40,000/-, the maximum prescribed in the schedule. If at all the Tribunal had chosen to take it as a claim made u/s 166 of the Motor Vehicles Act, then the Tribunal ought to have given a finding as to whether there was any fault on the part of the driver of the vehicle or any employee of the owner of the vehicle incharge of or on duty in the vehicle. Quite surprisingly the Tribunal avoided giving any finding as to who was at fault, which lead to the accident. The Tribunal has not chosen to hold that either the driver or any other person on duty on the vehicle was to be blamed for the accident, in which event alone a claim u/s 166 of the Motor Vehicles Act can be maintained, barring the no fault liability u/s 140 of the Motor Vehicles Act.

(iii) Even while selecting the multiplier, the Tribunal seems to have shown its inclination to favour the claimants. The view that prevailed earlier was that either the age of the deceased or the age of the claimant which will attract the smaller multiplier shall be adopted for selection of the multiplier in case of death. If a person aged 70 dies and the claimants are in the age group of 25 to 20, there cannot be any justification for selecting a multiplier based on the age of claimants. In the case on hand the age of the deceased Thangarasu @ Ramasamy was fixed by the Tribunal at 35 years. At the same time, the Tribunal fixed the age of the first claimant as 30 years. Based on the same, the Tribunal selected the multiplier 18. The same is against the established principles of law governing the assessment of compensation in fatal accident cases. Furthermore, now it has been well settled by a catena of cases and finally by the larger Bench of the Supreme Court in Reshma Kumari and Others Vs. Madan Mohan and Another, that multiplier shall be selected only based on the age of the deceased alone and the age of the claimant shall be irrelevant.

(iv) In addition, the Tribunal has chosen to award Rs. 10,000/- towards loss of consortium, Rs. 10,000/- towards loss of love and affection and Rs. 3,000/- towards funeral expenses. When a claim is made u/s 163-A, the conventional damages shall be in accordance with II Schedule. As per clause 3(i), funeral expenses awardable shall be Rs. 2,000/- and as per clause 3(ii), compensation for loss of consortium shall be Rs. 5000/-. There is no clause authorizing payment of any amount as compensation for loss of love and affection. On the other hand, Clause 3(iii) states that a sum of Rs. 2500/- shall be payable as compensation for loss of estate which the Tribunal has omitted to do. Though the said amount would appear to be meager, when claim is made u/s 163-A, the Courts shall adopt only the amounts specified the schedule and if it is not on pace with the escalating living costs, it is for the Parliament to amend the schedule. Till then, the Tribunal/Courts should adopt the figures found in II schedule.

13. All the above aspects will go to show that the Tribunal has committed a grave

error in passing the above said award in every respect. The award of the Tribunal is defective, infirm and unsustainable in law, which has got to be interfered with and corrected by this Court in exercise of its appellate powers. For all the reasons stated above, this Court comes to the conclusion that the award passed by the Tribunal is liable to be set aside and M.C.O.P. No. 331 of 2004 filed by the respondents 1 to 4 herein is bound to be dismissed. The only course open to the respondents 1 to 4 herein shall be to approach the Commissioner for Employees Compensation under the Employees Compensation Act, 1932 for compensation against the employer, if they feel that the accident arose out of and occurred during the course of employment. The claim made under the provisions of the Motor Vehicles Act, is misconceived and hence, the same is bound to be rejected without prejudice to the claimants' right to apply before the appropriate authority under the Employees Compensation Act for compensation.

In the result, the appeal is allowed and the award of the Tribunal dated 20.03.2007 is set aside and the M.A.C.T.O.P. No. 164 of 2005 shall stand dismissed without prejudice to the right of the claimants to make a claim under the Employees Compensation Act against the employer of the deceased. However, there shall be no order as to costs.