
(2008) 06 MAD CK 0013
In the Madras High Court
Case No : C.M.A. No. 51 of 2002

S.R. Raja

APPELLANT

Vs

Sharma Transport and United India Insurance Co. Ltd.

RESPONDENT

Date of Decision : 16-06-2008

Acts Referred:

Motor Vehicles Act, 1988 — Section 149, 149(2), 170

Citation : (2008) 06 MAD CK 0013

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

Bench : Single Bench

Advocate : S. Sarumathi, for the Appellant; Radha Gopalan, for R1 and S. Arunkumar, for R2, for the Respondent

Judgement

P.R. Shivakumar, J.—This civil miscellaneous appeal has been filed against the award of the Motor Accidents Claims Tribunal (3rd Judge, Small Causes Court), Chennai dated 26.04.2001 made in M.C.O.P. No. 10/1998 by the claimant therein as against the disallowed portion of the claim is concerned.

2. The averments, in brief, made by the appellant herein in his claim petition filed before the Tribunal are as follows:

On 31.07.1997 at about 5.00 a.m, the petitioner was riding his fish cart along with one Kaja Mohideen who was travelling as an occupant of the

said fish cart. When they were proceeding thus slowly along the east-west E.V.R. Road through the northern half of the said road, as the southern

half had been closed for traffic since men were working on the southern half for spreading bitumen. While they were thus proceeding near Hotel

Breeze at Kilpauk, the bus bearing Regn. No. KA-01 A-3939 which came from west to east was turned suddenly to the left by its driver in a rash

and negligent manner as a result of which the same dashed against the fish cart and thereby caused the accident resulting in injuries to the petitioner

and the above said Kaja Mohideen. Since the first respondent was the owner of the said bus which stood insured with the second respondent as

on the date of the accident, the respondents 1 and 2 were jointly and severally liable to pay compensation to the appellant/petitioner. The

appellant/petitioner was aged about 20 years and was self-employed as a power fish cart rider having an average income of Rs. 3,000/- per

month. For the injuries sustained in the above said accident, the appellant/petitioner was admitted as an in-patient at Kilpauk Medical College

Hospital and took treatment as an in-patient till the date of filing of the M.C.O.P. Since, the injuries sustained by the petitioner resulted in

permanent disability, the respondents should be directed to pay a sum of Rs. 2,00,000/- as compensation together with a future interest and costs.

3. The claim was resisted by the respondents 1 and 2 by filing separate counter statements denying the petition averments regarding the manner in

which the accident took place, the alleged negligence on the part of the driver of the bus belonging to the first respondent and disputing the

contention of the appellant/petitioner that he sustained grievous injuries and the same resulted in permanent disability. They had also contended that

the driver of the bus belonging to the first respondent drove the said bus slowly and cautiously observing the rules of the road and that there was no

fault on the part of the said driver. Apart from making general denial of the petition averments, the first respondent had also submitted that the

vehicle had been insured with the second respondent; that the same was driven by a person holding valid driving license and that if at all the

petitioner was entitled to recover any compensation from the first respondent as the owner of the offending vehicle, the second respondent, being

the insurer of the vehicle should be directed to pay the same to the appellant/claimant. On the other hand, the second respondent, in addition to the

above said general contentions denying the petition averments, also contended that the fact that the offending vehicle, namely bearing Regn. No.

KA-01 A-3939 had been insured with the second respondent and that the driver of the said vehicle did have a valid driving license to drive the

same, should also be strictly proved by the appellant/petitioner. Apart from that, the second respondent had also denied the nature of injuries

sustained by the appellant/petitioner, the treatment given, the nature and extent of disability suffered by him and the reasonableness of the amount claimed as compensation.

4. A similar petition claiming compensation had been filed by the above said Kaja Mohideen in M.C.O.P. No. 3434 of 1997. The Tribunal, after

framing necessary issues in both the petitions, conducted joint enquiry in both the MCOPs in which, four witnesses were examined as P.W.1 to 4

and ten documents were marked as Ex.P1 to Ex.P10 on the side of the claimants. On the side of the respondents, no witness was examined and

no document was marked.

5. At the conclusion of enquiry, the Tribunal considered the evidence brought before it in the light of the arguments advanced on either side and

upon such a consideration, came to the conclusion that the rash and negligent driving of the bus bearing Regn. No. KA-01 A-3939 belonging to

the first respondent was the cause of the accident; that the said vehicle stood insured with the second respondent; that the driver of the vehicle

possessed a valid driving license at the time of accident and that hence the respondents 1 and 2 were jointly and severally liable to pay

compensation to the appellant herein and the Kaja Mohideen, the claimant in M.C.O.P. No. 3434 of 1997.

6. The Tribunal assessed the damages to which the appellant herein was entitled at Rs. 62,900/- and passed an award directing the respondents 1

and 2 herein to jointly and severally pay the said amount together with an interest at the rate of 9% per annum from the date of petition till

realisation along with proportionate cost. The Tribunal also passed an award in M.C.O.P. No. 3434 of 1997 directing payment of a sum of Rs.

22,350/- to the petitioner therein, namely Kaja Mohideen, with which we are not concerned in this appeal.

7. The common judgment of the Tribunal so far as it relates to M.C.O.P. No. 10 of 1998 and the award of the Tribunal in M.C.O.P. No. 10 of

1998 are challenged by the appellant herein/claimant contending that the amount awarded as compensation is highly inadequate and hence the

same should be enhanced.

8. The point that arises for consideration in this appeal is:

Whether the amount awarded as compensation by the Motor Accidents Claims

Tribunal is insufficient requiring enhancement in this civil miscellaneous appeal?

9. This court heard the submissions made by Ms. S. Sarumathi, learned Counsel appearing on behalf of the appellant, by Ms. Radha Gopalan

learned Counsel appearing on behalf of the first respondent and by Mr. S. Arunkumar, learned Counsel appearing on behalf of the second respondent. The materials available on record were also perused.

8. The alleged accident in question that occurred on 31.07.1997 has not been denied but rather admitted by the respondents herein. It is also not

in dispute that the first respondent was the owner and the second respondent was the insurer of the offending vehicle, namely the bus bearing Regn.

No. KA-01 A-3939 as on the date of accident. Though the contention of the appellant/claimant that the accident occurred due to the rash and

negligent driving of the said bus by its driver had been disputed by the respondents in the M.C.O.P, the first respondent stopped with simply

making a general denial denying the petitioner's contentions that the accident took place due to the rash and negligent driving of the bus by its

driver and stating that there was no fault on the part of the driver. The second respondent, being the insurer, shall not be entitled to raise any

defence other than those that are available to the insurer as per Section 149 of the Motor Vehicles Act, 1988, unless permission u/s 170 of the

Motor Vehicles Act, 1988 to avail the defences that could be raised by the owner of the vehicle also had been obtained. In this case there is no

question of seeking such a permission as the owner of the offending vehicle, namely the first respondent was also contesting the case. In fact, no

such permission was sought for and obtained. Therefore, the second respondent could not have raised any plea on the merit of the case, namely

the question of negligence and the quantum of compensation. In this case the Tribunal, after evaluating the evidence adduced on the side of the

appellant/petitioner and in the light of the fact that no evidence, either oral or documentary, had been adduced on the side of the respondents, came

to the conclusion that the accident occurred due to the rash and negligent driving of the bus bearing Regn.No.KA-01 A-3939 by its driver. The

first respondent has not chosen to prefer any appeal or cross-objection against the said finding rendered by the Tribunal on the question of

negligence. Therefore, the said finding has become final and the same is recorded so by this Court.

9. The appellant's/petitioner's contention that the offending vehicle, namely the bus bearing Regn. No. KA-01 A-3939, at the time of accident

belonged to the first respondent and stood insured with the second respondent had been admitted by the first respondent. In addition to the said

admission, the said respondent had also contended that since the vehicle stood insured with the second respondent, whatever compensation the

appellant/petitioner would be entitled to recover, should come from the second respondent. In this regard there is no specific denial of the

allegation that the offending vehicle belonging to the first respondent stood insured with the second respondent on the date of accident. The first

respondent had also made a specific plea in his counter statement that the vehicle was driven by a person holding valid driving license to drive it.

The second respondent did not make any specific plea that the vehicle was driven by a person not holding any valid driving license. On the other

hand, the second respondent had stated in its counter statement that the facts alleged in the petition to the effect that the vehicle stood insured with

the second respondent and that the vehicle was driven by a person having valid license should be proved by the petitioner herein. As already

pointed out, the factum of coverage of insurance has not been disputed but rather admitted by the second respondent. Any violation of policy

condition or the existence of any fact giving rise to any one of the defences enumerated in Section 149(2) available to the insurer shall be

specifically pleaded and proved by the insurer. The insurer cannot try to cast the burden on the claimant or the owner of the vehicle by simply

taking a stand that a policy condition has been violated giving rise to a right to the insurer to repudiate the contract of insurance.

10. In this regard, the second respondent has not chosen to produce any evidence, oral or documentary, to show either the absence of driving

license to the driver of the offending vehicle to drive the same at the time of accident or breach of any one of the conditions of the policy giving a

right to the second respondent to rescind the contract of insurance. Under such circumstances, the Tribunal has chosen to hold the respondents 1

and 2 in their capacities as the owner and insurer of the offending vehicle, jointly and severally liable to pay compensation to the

appellant/petitioner. It is also pertinent to note that as against the fixing of liability jointly and severally on the respondents 1 and 2, neither the first respondent nor the second respondent has chosen to prefer any appeal or cross-objection. Therefore the said question of fixation of liability on the respondents has also become final and no interference with the award of the Tribunal in this regard can be made.

11. So far as the quantum of compensation is concerned, the respondents have not come forward with any grievance that the amount awarded by the Tribunal is either excessive or exorbitant. On the other hand, the appellant/petitioner alone has come forward expressing his grievance that the amount awarded by the Tribunal is highly inadequate and disproportionate to the loss suffered by him. The Tribunal awarded a total sum of Rs.

62,900/- as against the claim of Rs. 2,00,000/- as compensation made by the appellant/petitioner, the split up particulars of which are as follows:

Loss of income during the period of
treatment and rehabilitation for
five months @ Rs. 1,500/- per month : Rs. 7,500.00
Transport expenses for to and from
the hospital : Rs. 200.00
Expenses on extra nourishment : Rs. 200.00
Damages for pain and suffering : Rs. 5,000.00
Damages for permanent disability : Rs. 50,000.00

Total Rs. 62,900.00

12. As per the petition averments, the petitioner was aged about 20 years at the time of accident. No document like birth certificate, school certificate etc. was produced to prove the age. In the absence of any other evidence, the age of the appellant/petitioner has to be fixed in accordance with the available documents, namely Ex.P2 and P3 discharge certificates, Ex.P4 - OP Sheet and Ex.P9 - Disability certificate. Out of the said documents, the first three issued in the year 1997 and show the age of the appellant/petitioner to be 22 years. The 4th document, namely

the disability certificate issued in the year 2000 shows the age of the appellant/petitioner to be 25 years. From the said documents, it is quite

obvious that the appellant/petitioner was aged about 22 years at the time of accident.

13. In the absence of any other document, the Tribunal has taken the average monthly income of the appellant/petitioner to be Rs. 1,500/-. The

Tribunal cannot be found fault with for arriving such a conclusion. As per the evidence of the appellant, who figured as P.W.2 and Ex.P2 he

suffered fracture of left femur for which a surgical intervention to join the broken pieces of bone with metal rod and wires was needed. He took

treatment as an in-patient at the first spell from 31.07.1997 to 29.08.1997 and then for the second time from 27.12.1997 to 13.01.1998.

Therefore, it is quite obvious that for about five months he was not in a position to go to work and earn and thus incurred a total loss of earning for

the said period of five months. The Tribunal rightly held that he was entitled to a sum of Rs. 7,500/- calculated at the rate of Rs.1,500/- per month

for the period of five months as total loss of earning incurred by him during the period of treatment and rehabilitation. Hence no interference is

needed in this regard.

14. It is quite obvious from the oral and documentary evidence that for the fracture on the left femur, the petitioner had to undergo surgery not

once but twice. It is also obvious from the evidence of P.W.2 - appellant, evidence of P.W.4 - medical officer and the disability certificate and X-

Ray films marked as Ex.P9 and Ex.P10, that despite treatment there was malunion, contraction of muscles and restriction of hip and knee

movements which has resulted in limping. P.W.4 has assessed the permanent disability at 55%. However, during cross-examination he would

admit that his assessment shall be subject to an error of + 5%. In view of the said admission, the marginal error admitted by the medical officer,

namely P.W.4 was taken in favour of the respondents and the Tribunal came to the conclusion that the extent of disability suffered by the

appellant/petitioner was to be reckoned at 50%. This court sees no defect or infirmity in the same.

15. However, the learned Counsel for the appellant pointed out the fact that the petitioner in his prime youth at the age of 22 years had sustained

such disability should have been paid a higher amount than Rs.50,000/- as compensation for permanent disability. This court in R. Senthil Kumar v.

P. Palani Swamy and Ors. reported in 2007 (4) CTC 642 and in Metropolitan Transport Corporation Ltd. rep. by its Managing Director, Chennai

(formerly known as Dr. Ambedkar Transport Corporation Ltd.) and Ors. v. N. Shanmugam @ Sami Shanmugam and Ors. reported in (2008) 5

MLJ 1439 has opined that application of uniform rate for disability disregarding the age of the claimant shall result in injustice in as much as the

same will amount to treating unequals equally and suggested that the lumpsum compensation for permanent disability shall range from Rs. 1,000/-

to Rs. 2,000/- per one percentage of disability depending upon the age of the victim and that the maximum rate shall be applicable for youngsters

and the minimum rate shall be applicable for the elderly persons. Taking into account all the facts and circumstances of the case, while upholding

the decision made by the Tribunal to award lumpsum compensation for the permanent disability, this Court feels that the rate to be applied in this

case shall be Rs. 1,200/- per one percentage of disability. Therefore, for 50% of permanent disability a sum of Rs. 60,000/- instead of Rs.

50,000/- shall be the reasonable amount to be awarded as lumpsum compensation. The Tribunal has rightly rejected the claim for damages for loss

of future earning capacity as it had chosen to award lumpsum amount for the permanent disability which shall take into its fold both the damages for

loss of future earning capacity and loss of amenities caused by the disability. A division bench of this Court in Cholan Roadways Corporation Ltd.

Vs. Ahmed Thambi and Others, has held that when a lumpsum payment is awarded towards permanent disability, those items cannot be separately

itemized. Following the same dictum, this Court comes to the conclusion that the rejection of the claim of compensation for loss of amenities and

loss of future earning capacity by the Tribunal is on sound principles and hence the same cannot be termed either defective or infirm.

16. Considering the nature of injuries sustained by the appellant/petitioner, the period of treatment, the nature of treatment and the fact that he is

now found with 50% disability, the sum of Rs. 5,000/- awarded towards pain and suffering seems to be too little and the same has got to be

enhanced to Rs. 20,000/-. For transport expenses and extra nourishment, the Tribunal has chosen to award Rs. 200/- each, which according to

the considered opinion of the court is grossly inadequate. Therefore the compensation for transport expenses and the expenses on extra nourishment should be enhanced to Rs. 1,000/- each. As the appellant/petitioner had taken treatment in the Government hospital and has failed to produce any document evidencing any amount spent by him towards medical expenses or purchase of medicine, the Tribunal has not awarded any amount towards medical expenses. However, the mere fact that the petitioner had taken free treatment in the Government hospital in the past which resulted in permanent disability, shall not be compelled to go for the very same type of treatment in future. Evidence of P.W.2 and P.W.4 are to the effect that in future also he may have to undergo a surgery for the removal of the rod. Taking into account the fact that such a necessity may or may not arise and that it depends upon the fact whether any complication arises in future, this Court is of the considered view that a sum of Rs. 8,000/- can be awarded as compensation for future medical expenses. If such a calculation is made, the total amount of compensation that can be reasonably awarded to the appellant/petitioner shall be Rs. 97,500/-. The Tribunal has awarded only a sum of Rs. 62,900/-. Therefore, it is hereby concluded that the appellant/petitioner has made out a case for enhancement of compensation and that the award of the Tribunal shall be modified by enhancing the compensation from Rs. 62,900/- to Rs. 97,500/-. For the sake of convenience, the split up particulars of the amount awarded by this Court are furnished.

Loss of income during the period of
treatment and rehabilitation for
five months @ Rs. 1,500/- per month : Rs. 7,500.00

Transport expenses for to and from
the hospital : Rs. 1,000.00

Expenses on extra nourishment : Rs. 1,000.00

Damages for pain and suffering : Rs. 20,000.00

Damages for permanent disability : Rs. 60,000.00

Future medical expenses : Rs. 8,000.00

Total Rs. 97,500.00

17. In the result, this appeal is allowed in part and the award of the Tribunal is modified by enhancing the compensation from Rs. 62,900/- to Rs.

97,500/-. In all other respects the award of the Tribunal shall stand confirmed. The appellant shall also be entitled to recover proportionate cost in the appeal from the respondents.