

(1989) 01 MAD CK 0085
In the Madras High Court
Case No : C.M.A. No. 160 of 1983

Subramania Naicker and Another

APPELLANT

Vs

Kuppuswamy and Another

RESPONDENT

Date of Decision : 03-01-1989

Acts Referred:

Motor Vehicles Act, 1939 — Section 110AA, 110B

Citation : (1990) ACJ 261 : AIR 1989 Mad 297

Hon'ble Judges : Padmini Jesudurai, J

Bench : Single Bench

Advocate : N. Rosi Naidu, for the Appellant; T. Dhanyakumar and K.S. Ahmed for , N.A. Kader Mohideen, for the Respondent

Final Decision : Allowed

Judgement

Padmini Jesudurai, J.—The owner of the vehicle and his insurer, against whom the Motor Accidents Claims Tribunal has passed an Award, apportioning the liability as between them, have filed the present appeal, challenging their liability to pay compensation.

2. Facts briefly are : The deceased. Umapathy was employed as a Truck Driver, in the tractor bearing Registration No. TNM 7005 belonging to the first appellant and insured with the second appellant. On 25-7-1980 while the deceased was driving the tractor on the Madras Bangalore Road, a bus bearing Registration No. TMN 8068 belonging to the second respondent, being driven in a rash and (negligent) manner by its driver, dashed against the tractor, which over-turned on the road. The deceased Umapathy sustained serious injuries and succumbed to them later. The first respondent, who is the father of the deceased Umapathy, filed M.A.C.T.O.P. No. % of 1981 u/s 110A of the Motor Vehicles Act (hereinafter referred to as the Act) before the Motor Accidents Claims Tribunal/Principal, Subordinate Judge), Vellore claiming a total Compensation of Rs. 35,000/-

3. Lakshmipathy, who was driving the bus at the time of the accident, was

arrayed as the first respondent before the Tribunal and was later exonerated. The appellants resisted the claim contending that the accident was due only to the rash and negligent driving of the bus belonging to the second respondent by its driver and that, therefore, it was only the second respondent who would be liable to pay compensation to the first respondent. The claim was also challenged as excessive. The second respondent resisted the claim contending that the accident was due only to the careless driving of the tractor by the deceased and that, therefore, the second respondent was not liable to pay any damages to the first respondent. The claim was also excessive.

4. Before the Tribunal, the first respondent examined himself as P.W. 1 and examined one Chinnapaiyan, an eye witness to the occurrence, as P.W. 2, Exts. A1 to A6 were marked on his side. On behalf of the second respondent, his driver Lakshmipathi was examined as R.W. I and on behalf of the first appellant, Ex. B.I, a copy of the policy of insurance relating to the tractor was marked.

5. On the above evidence, the Tribunal found that the accident was due solely to the rash and negligent driving of the bus belonging to the second respondent by its driver, R.W. 1 The Tribunal assessed the total compensation at Rs. 19,200/-. Holding that though the accident had occurred due to the rash and negligent driving of the second respondent's bus, since the deceased was an employee: under the first appellant and the accident had occurred out of and in the course of his employment, the first appellant was bound to indemnify the deceased at least to the extent of his liability under the Workmen's Compensation Act and his insurer, the second appellant herein, was also bound to indemnify the deceased, passed an Award directing the second appellant to pay Rs. 16,800/- on the basis of Schedule IV of the Workmen's Compensation Act 1923 and directing the second respondent herein to pay the remaining sum of Rs. 2,400/-. Challenging their liability to pay compensation, the appellants have preferred this appeal.

6. The first respondent in the appeal, who was the claimant before the Tribunal, has preferred memorandum of cross-objections contending that the amount of compensation awarded is grossly inadequate, and requires enhancement.

7. Thiru N. Rosi Naidu, learned counsel for the appellants, contended that this being a claim under the Act, which arises out of a tortious liability, the Tribunal, having found that the accident was due solely to the rash and negligent driving of the bus belonging to the second respondent, ought not to have held the appellants liable to pay compensation on the basis of the liability under the Workmen's Compensation Act. The Tribunal had imported into the claim petitions under the Act, the principles underlying the payment of compensation under the Workmen's Compensation Act. The second respondent along would be liable to pay the entire compensation awarded to the first respondent. The compensation awarded by the Tribunal could not be characterised as grossly inadequate.

8. Per contra, Thiru K. S. Ahamed, learned counsel appearing for the second respondent, contended that the Tribunal had rightly held the appellants liable to

pay the compensation to the first respondent and if the second appellant felt aggrieved with the apportionment as between it and the first appellant, it should pursue its remedies in a separate suit to be filed against the first appellant. The amount of compensation cannot be described as grossly inadequate.

9. Thiru T. Dhanvakumar, learned counsel for the first respondent, on the basis of the cross objections filed by him, urged that the Tribunal ought to have taken Rs. 400A as the monthly pay of the deceased, since there was no contra evidence to that of P.W. 1. Learned counsel also contended that the claim being a very small one, no deduction for lump payment was called for; particularly when the salary itself was fixed at low amount and one half of it had been deducted for the living expenses of the deceased. Learned counsel also submitted that on the basis of the interlocutory orders passed in this appeal, the appellants had deposited the entire amount into Court and the first respondent had withdrawn half the amount, the remaining half continued to be in Court deposit and in the event of this Court allowing the appeal, the first respondent need not be directed to pay back the amount withdrawn to either of the appellants and instead the first respondent, could be permitted to withdraw the amount now in Court deposit and suitable direction may be given to the second respondent to pay the amount under the Award direct to the appellants.

10. The points that arise for determination are:

1. Whether the finding of the Tribunal making the appellants liable could be sustained in view of its finding that the accident was solely due to the rash and negligent driving of the second respondent's bus?

2. Whether the quantum of compensation fixed could be considered as grossly inadequate?

11. Point No, 1 : The finding of the Tribunal that the accident was solely due to the negligence of the driver of the bus belonging to the second respondent has now become final. In fact, neither of the parties challenge the above finding. It has, therefore, to be taken that the accident was due only to the rash and negligent driving of the bus belonging to the second respondent. The Tribunal assessed the compensation on the basis of the principle applicable to accidents claims under the Act and fixed the compensation at Rs. 19,200/-. On such a finding, one would have expected the Tribunal to make the tortfeasor, viz., the second respondent, liable to pay the compensation R.W. 1, the driver of the second respondent has been found to be rash and negligent and his employer, the second respondent herein, was bound to indemnify the victim of the accident. Instead, the Tribunal has held that though the accident was due only to the rashness and negligence of the second respondent's driver, yet in view of the fact that the deceased was an employee under the first appellant and the accident has arisen out of and in the course of his employment, his employer, the first appellant, was liable to pay compensation under the Workmen's Compensation Act and that, therefore, his insurer, the second appellant, was also liable to

indemnify. The Tribunal, therefore, taking the monthly wage of the deceased at Rs. 200/-has calculated the compensation on the basis of Schedule IV of the Workmen's Compensation Act and had arrived at the figure Rs. 19,200/- and has directed the second appellant to pay the amount of Rs. 16,800/-and the second respondent to pay the balance of the amount of Rs. 2,400/-.

12. A workman who suffers a motor accident, which arises out of and in the course of his employment, would be entitled to compensation either under the Workmen's Compensation Act, 1923 or under the Motor Vehicles Act, 1939. Before the passing of the Motor Vehicles Act, claim for damages in respect of death of or bodily injury to any person who was a workman was entertainable both under the Workmen's Compensation Act, 1923, and in any civil Court. In order to prevent duplication of the claim in two forums, Section 3(5) of the Workmen's Compensation Act provided, that a workman who had instituted in the civil Court a suit for damages in respect of injury against the employer or any other person could not maintain a claim for compensation under the Workmen's Compensation Act and similarly a workman who had instituted a claim for compensation in respect of injury, under the Workmen's Compensation Act could not maintain a suit for damages in any civil Court in respect of the same injury. This was to prevent duplication of claim proceedings, in 1939 when the Motor Vehicles Act was passed, civil Court's jurisdiction to entertain claims in respect of damages for death of or bodily injury to a person in motor accident was ousted and Claims Tribunal was constituted under the Act to entertain such claims. In fact, Sections. 110 to 110F of the Act merely deal with the substitution of forums for Motor Vehicles Claims.

13. There are certain differences between the claims under the Act and the claims under the Workmen's Compensation Act. Under the latter Act, compensation is provided only to a "workman" as defined in Section 2(1)(a) of that Act and that too only when he is involved in an accident arising out of and in the course of his employment. The provisions of the Act, however, are applicable to any type of victim provided the accident has arisen out of the use of the motor vehicles in a public place. Further, under the Workmen's Compensation Act only those persons who are described as "dependants" in Section 2(1) (d) of that Act are entitled to get compensation. There is no such rigidity under the Act and Section 110A of the Act provides that an application for compensation could be made by the person who has sustained an injury, by the owner whose property has been damaged and where death has resulted from the accident, by all or any of the legal representatives of the deceased, including the agents duly authorised by those persons. The term "legal representative" has not been defined under the Act and has been very liberally construed by courts. Again under the Workmen's Compensation Act, the quantum of compensation is more or less tabulated and found in Schedule IV of the Act, containing different slabs on the basis of the wage of the workman. It would not be open to the Commissioner acting under that Act to award any compensation which was not provided in the schedule. On the contrary, Section 110B of the Act provides that the Claims

Tribunal can award such compensation as it appears to it to be just. Judicial recognition has been given to various heads under which the claimants would be entitled for damages. Finally, the Workmen's Compensation Act casts a statutory duty on the employer to indemnify his employee or his legal representatives in the case of a fatal accident, whenever the accident has arisen out of and in the course of his employment, irrespective of other considerations. On the contrary, a claim under the Act is based upon a tortious liability and proof of negligence, except when the application made u/s 92A of the Act, is necessary before a claim for damages could be accepted.

It has therefore to be established that the person from whom damages are sought to be recovered is a tortfeasor, the only exception being Section 92A of the Act.

14. The same intent, which permitted the Legislatures to introduce Section 3(5) if the Workmen's Compensation Act, Section 110 AA of the Act has been introduced by Amending Act 56 of 1969. Section 110AA of the Act is as follows:

"Notwithstanding anything contained in the Workmen's Compensation Act, 1923 (8 of 1923), where the death of or bodily injury to any person gives rise to a claim for compensation under this Act and also under the Workmen's Compensation Act, 1923 (8 of 1923) the person entitled to compensation (may without prejudice to the provisions of Chap. VII A claim such compensation) under either of those Acts but not under both)."

The opening words "notwithstanding anything contained in the Workmen's Compensation Act," show that a workman who has suffered a motor accident in the course of his employment in a public place, and who would be entitled to compensation from his, employer under the Workmen's Compensation Act, would also be entitled for damages under the Act. Option is given to such a workman, to choose either of the forums. He can apply for compensation either under the Workmen's Compensation Act, 1923 or under the Motor Vehicles Act. 1939. The only limitation placed in such a contingency is that it would not be open to him to claim compensation under both the enactments.

15. It, therefore, follows that when a workman suffered a motor accident in the course of his employment, as a result of the tortious act of a third party and he has not opted to get compensation from his employer under the Workmen's Compensation Act and instead has opted to claim damages from the tortfeasor under the Act, the Motor Accidents Claims Tribunal is found to follow the principles that underline such claims and fix the liability. Sitting as a Motor Accidents Claims Tribunal, it is not open to the Tribunal to import into the proceedings, the principles on the basis of which the liability under the Workmen's Compensation Act is fixed. If the claimant alleges that the accident was due to the tortious act of a, third party and adduces evidence in support of that allegation and if the Tribunal finds that the accident was solely due to the act of a tortfeasor, the Tribunal has no other option but to fasten the tortious liability

on the tortfeasor alone, even though the accident might have occurred in the course of his employment and the employee would have a right to recover damages from his employer and did not choose to do so.

16. Coming to the facts of this case, the first respondent has come forward with a positive case that though the accident had occurred during the course of his employment under the first appellant, yet the accident was due to the tortious act of the driver of the second respondent in driving the vehicle in a rash and negligent manner. Damages were sought to be recovered on the basis of the tortious liability alleged against the second respondent. Even in the claim petition, the first respondent had added a verification that he had not claimed or obtained any compensation under the Workmen's Compensation Act, 1923 so far as that case was concerned. This declaration has been made in due compliance of Section "110AA of the Act, to indicate that he had opted the Motor Accidents Claims Tribunal as his forum for recovering the damages from the tortfeasor. The first respondent had also succeeded in establishing that the accident was due to the tortious act of the driver of the second respondent. In fact, the Tribunal has given a positive finding that the accident was solely due to the rash and negligent driving of the bus of the second respondent. Having found so, the Tribunal proceeded to hold that since the accident had arisen out of and in the course of the employment of the deceased, his employer the first appellant and his insurer, the second appellant, are liable to indemnify the deceased. The Tribunal has referred to Schedule IV of the Workmen's Compensation Act and has fixed the liability of the second respondent on the basis of the tabulation found in Schedule IV. I am afraid that such a course is against law. Once a workman has opted not to get damages from his employer from the forum constituted under the Workmen's Compensation Act and opted to recover damages from the tortfeasor, viz., the second respondent, who has been found to be a tortfeasor by the Tribunal, it is not open to the Tribunal to fasten the liability on the employer and his insurer on the basis of the liability created under the Workmen's Compensation Act. The Tribunal ought to have held the second respondent liable to pay the entire compensation. The finding of the Tribunal to the contrary, cannot be sustained and has to be set aside.

17. Point No. 2 : The grievance of the learned counsel for the first respondent is that the Tribunal ought to have taken Rs. 400/- as the monthly income of the deceased and ought not to have deducted half of it towards his living expenses and at any rate, ought not to have made a further deduction of Rs. 4,800/- for lump sum payment. The deceased was aged 39 years. The first respondent, who is his father, was aged 56. The Tribunal has been very liberal in adopting multiplier of 20 assuming that the first respondent would live up to the age of 76. The Supreme Court has deducted one half of the monthly income as expenses which the deceased was likely to spend on himself and has taken the remaining one half as his contribution to the family. Further, at the time of the death, the deceased was still a bachelor: The deceased was likely to marry, in which case, his contribution to his father, the first respondent herein would be

considerably reduced, taking an overall assessment of the various circumstances, I feel that the basis on which the amount of compensation has been arrived at, cannot be said to be erroneous nor can the compensation be described as grossly inadequate, so as to call for any enhancement.

18. In the result, the appeal is allowed and the order of the Tribunal directing the second appellant to pay Rs. 16,800/- and directing the second respondent to pay the remaining sum of Rs. 2,400/- is set aside. Instead the entire amount of compensation of Rs. 19,000/- will be paid by the second respondent. No costs. The cross objection is dismissed. No costs.

19. In *National Insurance Co. Ltd. v. Jugal Kishore* 1988 ACJ 270 : AIR 1998 SC 719 where pending appeal by the Insurance Company, the Insurance Company had deposited the full amount and the claimant had withdrawn the same without any condition and in the appeal the liability of the insurance Company was reduced to Rs. 20,000/- the Supreme Court held that all sums withdrawn by the claimant in excess of Rs. 20,000/- need not be recovered from the claimant and instead the Court observed that the Insurance Company could recover the excess amount from the owner and the driver of the vehicle. Similarly, in *British Indian General Insurance Co. Ltd., Bombay Vs. Maya Banerjee and Others*, the Supreme Court, settled the liability, of the insurance company at Rs. 20,000/- out of the award of Rs. 30,000/-. The sum of Rs. 30,000/- initially had been paid by the insurance company, pending appeal. The Court held that at that belated point of time it would be difficult for the widow to recover the compensation from the owner and hence it did not disturb the direction that the insurance company should pay the entire amount. In the instant case, also, it is stated that one half of the amount has been withdrawn by the first respondent and the other half still lies in Court deposit. I, therefore, direct that the amount withdrawn by the first respondent from the Court will be retained by him and the first respondent is also at liberty to withdraw the remaining amount together with interest that could have accrued during the period when it had been in Court deposit. The second respondent will pay the award amount to each one of the appellants to the extent to the amount already deposited by each one of them in Court.