tIN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 31.10.2006

CORAM:

THE HONOURABLE MR.JUSTICE F.M.IBRAHIM KALIFULLA

C.M.A.No.1053 of 2001

M.Nagip .. Appellant (Petitioner)

Vs

1. K.Manimegalai

2. The United India Insurance Co.Ltd.,
No.38, Anna Salai,
Chennai - 2. .. Respondents (Respondents)

Civil Miscellaneous appeal is filed under Section 173 of the Motor Vehicles Act against the Judgment and decree dated 12.04.2000 made in OP No. 2134 of 1998 on the file of VI Small Causes Court, Chennai.

For Appellant : Mr. Surya
For R1 : No appearance
For R2 : Mr.R.Ravichandran

JUDGMENT

The claimant is the appellant. His challenge is to the award of the Motor Accidents Claims Tribunal, Chennai dated 12.04.2000 passed in MCOP No.2134 of 1998.

2. According to the appellant, on 12.03.1998 at 13.30 hrs., while he was travelling in a van bearing Registration No.TCV-8157 in Sardar Patel Road from west to east, the lorry belonging to the first respondent bearing Registration No.TMA-2589, which was coming in the opposite direction, driven in a rash and negligent manner, dashed against the van in which the appellant was travelling, by which he sustained multiple injuries. The appellant claimed a sum of Rs.1,00,000/- on different heads. The claim was resisted by the second respondent alone inasmuch as the first respondent remained ex parte before the Tribunal.

3. According to the second respondent, the accident occurred due to the negligent driving by the drivers of both the vehicles and that the compensation claimed was on the higher side.

4. The Tribunal found as a matter of fact that based on Exs.P2, P3 and P4 that the accident occurred due to the rash and negligent driving of the lorry belonging to the first respondent. As far as the quantum of compensation was concerned, the Tribunal found that the appellant suffered partial permanent disablement to an extent of 25% due to the injury sustained by him in his left wrist, which was a fracture. To reach the said conclusion, the Tribunal relied on the evidence of P.W.2 - Doctor as well as Exs.P.1, 5 and 6. The Tribunal thereafter, awarded a sum of Rs.25,000/- based on the percentage of disability assessed by it and the said compensation was inclusive of loss of earning, pain and suffering, transport expenses and extra nourishment.

5. Assailing the award, Mr.Surya, learned counsel for the appellant would contend that by virtue of the formula provided under the Second Schedule to the Motor Vehicles Act under which any claim made under Section 163-A even in respect of non fatal accident, an assessment of loss of earning can be made by applying the multiplier theory. It was thus contended that the Tribunal ought to have considered the appellant's claim for loss of earning by applying the multiplier theory. According to the learned counsel for the appellant, the percentage of disablement once having been ascertained and such disablement was held to be partial permanent one, the failure of the Tribunal in making the assessment by applying the multiplier theory was not justified. As regards the non-pecuniary losses, the learned counsel would contend that as the appellant was a coolie, the partial permanent disablement suffered by him in his left wrist should have been weighed in his favour by the Tribunal for assessing the deprivement of his livelihood during the pendency of the O.P., apart from the other losses suffered by him. The learned counsel would therefore contend that the Tribunal ought to have considered the non-pecuniary items independently instead of awarding an adhoc sum of Rs.25,000/- inclusive of pecuniary loss as well as non-pecuniary losses. Learned counsel relied upon the decisions reported in 2003 ACJ 1298 [P.Kalavathi vs. G.Murali and another] and 2005 (1) CTC 38 [United India Insurance Company Ltd., vs. Veluchamy and another] in support of his submissions.

6. As against the above submissions, Mr.R.Ravichandran, learned counsel appearing for the second respondent would contend that the Hon'ble Supreme Court in the decision reported in 2004(2) ACJ 934 [Deepal Girishibhai Soni and others vs. United India Insurance Co. Ltd.] has held that the structure and formula provided under the Second Schedule to the Motor Vehicles Act was applicable in respect of the claim made under Section 163-A of the Act and therefore, the said formula cannot be applied to an application filed under Section 166 of the Act. Learned counsel for the second respondent relied upon paragraph No.57 of the said judgment and contended that it is for the claimant to opt or elect either for a proceeding under Section 163-A or under Section 166 of the Act and in the event of a claim being made under Section 166 of the Act, there is no scope for applying the multiplier theory provided under the Second

Schedule of the Act. The learned counsel would therefore contend that the award of the Tribunal in having determined the compensation at the rate of Rs.1,000/- per percentage of the disability and thereby awarding a sum of Rs.25,000/- was justified.

7. Having heard the learned counsel for the respective parties, on a perusal of the decision of the Supreme Court reported in 2004(2) ACJ 934 cited supra, I find that the Supreme Court, while dealing with a case where an application came to be filed both under Sections 163-A and 166 of the Act, has held that both the claims are meant to be determined finally and a claim made under Section 163-A cannot be equated to no fault liability to be granted under Section 140 of the Act. In paragraph No.51 of the Judgment, the Supreme Court has held that a distinct and specified class of citizens, namely, persons whose income per annum is Rs.40,000/- or less is covered by Section 163-A under which a structured formula is provided in the Second Schedule. Ultimately, in paragraph No.57, the Supreme Court has held that the remedy provided under Sections 163-A and 166 being final and independent of each other as statutorily provided, a claimant cannot pursue his remedies simultaneously and that one must opt or elect to go either for a proceeding under Section 163-A or under Section 166 of the Act, but not under both. The Supreme Court has again reiterated in paragraph No.67 that the proceeding under Section 163-A being a social security provision, providing for a distinct scheme, only those whose annual income is up to Rs.40,000/- can take the benefit thereof and that all the other claims are required to be determined in terms of Chapter XII of the Act. A reading of the above decision goes to show that the question that fell for consideration before the Supreme Court related to a specific issue as to whether a claim under Section 163-A can be construed as one by way of an interim measure pending consideration of a claim under Section 166 of the Act. It was in that context, the Supreme Court has held that the claim under Section 163-A vis-a-vis Second Schedule cannot be an interim one and that it is also by way of final relief. Though such a relief was restricted to a particular class of claimants whose annual income per annum is Rs.40,000/- or less, going by the provision contained in Section 163-A vis-a-vis the Second Schedule and Sections 166 and 168 of the Motor Vehicles Act, it can be easily found that while for the purpose of examining a claim under Section 163-A, the structured formula provided under the Second Schedule is the basis, the same is not the case with a claim made under Section 166 of the Act. In other words, the procedure contemplated for dealing with the claim made under Section 166 having been specifically spelt out in Section 168 and the reading of both the above referred provisions, namely Sections 166 and 168 of the Act do not state that the Second Schedule can be invoked in contra distinction to the specific provision contained in Section 163-A of the Act, wherein it is specifically stated that the claim for compensation can be made as indicated in the Second Schedule, it will have to be held that the formula provided in the Second Schedule is not statutorily applicable to an application filed under Section 166 of the Act.

8. In the case on hand, the claim was made under Section 166 of the Act. In the claim statement, the appellant categorized his claim under eight different heads namely loss of earning for a period of three months between 12.03.1998 and 11.06.1998, transportation expenses to hospital, extra nourishment, damage to clothes, medical expenses, compensation for pain and suffering, compensation for continuing or permanent disability if any and compensation for loss of earning power. As far as the claim relating to non-pecuniary losses are concerned, the Tribunal has not made any independent consideration of such claims. In this context, it will be relevant to refer to the recent Full Bench decision of this Court reported in 2006(4)CTC 433 [Cholan Roadways Corporation vs Ahmed Thambi). In paragraph No.19 of the said decision, the Full Bench has held as under:

> "19. In order to avoid any future confusion and to bring more clarity and transparency in the award of damages, it is necessary that the Tribunal, while awarding damages, should itemise the award under each of the head namely, pecuniary losses and non-pecuniary losses. In the non-pecuniary losses the Tribunal shall consider: (a) pain and suffering, (b) loss of amenity, (c) loss of expectation of life, hardship, mental stress, etc., (d) loss of prospect of marriage and under the head pecuniary losses, the Tribunal shall consider loss of earning capacity and loss of future earnings as one component apart from medical and other expenses and loss of earning, if any from the date of accident till the date of trial. When loss of earning capacity is compensated as also the non-pecuniary losses under (a) to (d), permanent disability need not be separately itemised. The reference is answered accordingly. C.M.A. No.231/94 be placed before the single Judge for final disposal in the light of our answer to the reference."

9. A reading of the said paragraph discloses that there should be independent consideration of pecuniary losses and non-pecuniary losses. Among the pecuniary losses, the consideration can be either loss of earning capacity and loss of future earnings as one component apart from medical and other expenses plus loss of earning from the date of accident till the date of trial if any. But once if there is consideration and grant of compensation of the pecuniary losses under the category of loss of earning along with compensation for non-pecuniary losses, the Full Bench has made it clear that there need not be any consideration for grant of compensation for permanent disability. Therefore, the loss of earning capacity, apparently seems to have been equated to the permanent disability with independent consideration for awarding compensation for non-pecuniary losses.

10. In view of the said Full Bench decision, there is every justification in the claim of the appellant for independent consideration of the appellant's claim for non-pecuniary losses sustained by him. Therefore, to that extent, the award of the Tribunal is liable to be interfered with.

11. As far as the individual items of claims under the head non-pecuniary losses are concerned, the same are made by way of pain and suffering to an extent of Rs.15,000/-. The evidence available on record in the form of Exs.P1, P5 and P6 along with the evidence of P.Ws. 1 and 2 make it clear that the appellant had suffered a fracture in his wrist which had resulted in a partial permanent disablement to an extent of 25% The Doctor's evidence as well as P.W.1 himself makes it clear that the said injury has been causing agony to the appellant, more so, when his avocation is as a Load Man. Therefore, for the claim of compensation under the head 'pain and suffering', the appellant is entitled for a compensation which can be quantified at a sum of Rs.5,000/-.

12. As far as the other claims namely damage of clothes, medical expenses, extra nourishment and transportation to hospital are concerned, I find that there is absolutely no evidence at all for the medical expenses incurred and the damage of clothes. Therefore, I do not find any scope for granting any relief on that score.

13. As far as the claim based on transportation to hospital and extra nourishment is concerned, having regard to the nature of the injuries sustained by the appellant, which has resulted in a partial permanent disablement, irrespective of any evidence, it can be held that the appellant would have definitely incurred considerable expenditure for taking treatment by going to the hospital for certain length of time and the injury would have certainly required the appellant to take some extra nourishment to enable him to sustain himself and for the injury to get cured. Therefore, on the above two heads, it will be well in order that the appellant is awarded atleast a sum of Rs.3,000/-.

14. As far as the loss of earning during the pendency of the O.P. is concerned, the learned counsel for the appellant contended that he was working as a Load Man for a Company called Alpha Agencies and that he was being paid a sum of Rs.2,000/- per month. But in the cross examination, the appellant made it clear that he was not in the services of the said Company and that only if and when there was loading/unloading work, his services used to be availed. The appellant also stated that as on the date of his examination in the Court, he was earning a sum of Rs.50/- per day. Therefore, though there is no acceptable material evidence to show that the appellant was getting any specific amount of wages in a regular employment, it is common knowledge that as a load man, the appellant would have atleast earned a sum of Rs.50/- per day had he not met with the unfortunate accident on 12.03.1998. Therefore, the claim of the appellant for the period of three months claimed in his application can be worked out on the basis of Rs.50/- per day in which event, the appellant would have easily earned not less than Rs.1,250/- per month, on the basis that he would have worked atleast for 25 days in a month. On that basis, the loss of earning can be safely arrived at a sum of Rs.3,750/- for three months.

15. As far as the contention of the appellant that for the appellant's partial permanent disablement, the Tribunal should have applied the multiplier theory and ought not to have awarded the compensation on a notional basis of Rs.1,000/- is concerned, reliance was placed upon by the counsel for the appellant on the Division Bench decisions of this Court reported in 2003 ACJ 1298 and 2005(1)CTC 38 (cited supra).

16. In the decision reported in 2003 ACJ 1298, the Division Bench, in the case of a claimant who was a tailor by avocation and who sustained a compound fracture of her right leg held that on a moderate estimate 10 can be adopted as a multiplier by reckoning 45% as the disability as per Ex.P.6 marked therein and as proved by P.W.3. The Division Bench held that a compound fracture in the right leg to a person who was a tailor by profession would be a debilitating one, since most of the sewing machines are pedal operated. Accordingly, as against an ad hoc compensation of Rs.55,100/- awarded by the Tribunal, the Division Bench worked out the compensation for permanent disability by applying the multiplier theory and by recalculating the compensation.

17. In the other decision reported in 2005(1)CTC 38, the Division Bench held as under in paragraph Nos.10 and 11:

> "10. In estimating the financial or pecuniary loss, the Court must first form an opinion from the evidence and probabilities in the case, of the nature and extent of the loss. While estimating the loss of earnings, the Court must first decide what the claimant would have earned if the accident had not happened, allowing for any future increase or decrease in the rate of earnings. It is also necessary for the Court to decide how long the loss will continue, whether there is incapacity for life or for a shorter period. The Court should also make an estimate of the amount, if any, which the claimant could still earn in future, notwithstanding disabilties sustained by him in the accident. Further, in a case where the claimant claims medical and nursing expenses, the Court must find as a fact what expenses have already been incurred and must estimate from the evidence the expenses which will be incurred in future. Future promotions, increments, revisions of pay are in the domain of many imponderables and the Court should bear them in mind while assessing future loss of income. While estimating future loss of income, the Court can take into account the future prospects of the injured or the deceased of earning more income by way of promotions or otherwise.
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> 11. The following principles emerge from the above discussion:

(a) In all case of injury or permanent disablement "multiplier method" cannot be mechanically applied to ascertain the future loss of income or earning power.

(b) It depends upon various factors such as nature and extent of disablement, avocation of the injured and whether it would affect his employment or earning power etc., and if so, to what extent?

(C)(1) If there is categorical evidence that because of the injury and consequential disability, the injured lost his employment or avocation completely and has to be idle till the rest of his life, in that event loss of income or earning may be ascertained by applying "multiplier method" as provided under Second Schedule to the Motor Vehicles Act, 1988.

(2) Even if so there is no need to adopt the same period as that of fatal cases as provided under the Schedule. If there is no amputation and if there is evidence to show that there is likelihood of reduction or improvement in future years, lesser period may be adopted for ascertainment of loss of income.

(d) Mainly it depends upon the avocation or profession or nature of employment being attended by the injured at the time of accident."

Therefore, even going by the later Division Bench judgment reported in 2005(1)CTC 38, wherein it has been held that the multiplier method cannot be mechanically adopted in all cases of injury or permanent disablement to ascertain the future loss of income or earning power, the Division Bench had laid down specifically to consider the evidence and find out as to whether the case of the injury and consequential disability the injured lost his employment or avocation completely and has to be idle till the rest of his life. The Division Bench held that in such cases, the loss of income or earning may be ascertained by applying multiplier method as provided under the Second Schedule.

18. In the light of the said Division Bench decision in having held that even in the case of injury not falling under claim filed under Section 163-A, the multiplier method can be applied and in the absence of any specific bar on the provisions of the Motor Vehicles Act as rightly contended by the learned counsel for the appellant, there should be no impediment for the Tribunal to apply the multiplier method to such cases, Bound as I am by the Division Bench decision, it will have to be held that there will be no bar for applying the multiplier method even in respect of a claim where the injured only sustained partial permanent disablement. However, as held by the Division Bench, such an application of multiplier method cannot be mechanically made. But that Courts will have to be circumspect in applying the said method as indicated by the Division Bench itself. If there is categorical evidence to the effect that because of the injury and consequential disability, the injured lost his employment or avocation completely and had to remain idle till the rest of his life,

the application of multiplier method can be made. Therefore, applying the said ratio to the facts of this case, from the evidence available on record, even according to the appellant, after the accident though he was not able to carry on his avocation of loading/unloading work for a period of three months, subsequently he was able to carry on his work and thereby, he could earn a sum of Rs.50/- per day, it is also evident that he was continuing his avocation of load man with the concern called Alpha Agencies as and when he was provided with the opportunities. Therefore, this is not a case where it can be held that the appellant was completely disabled from carrying on or continuing his avocation of loading work after the accident for the rest of his life. Therefore, I do not find any scope to apply the multiplier theory to the facts of this case, though the claim fell under Section 166 of the Motor Vehicles Act.

19. As far as the compensation awarded for the partial permanent disablement ascertained at 25% is concerned, though the learned counsel would contend that there cannot be a fixed formula of Rs.1,000/- per percentage for arriving at a compensation payable on that head, in this context, I wish to be guided by a Division Bench decision of this Court reported in 2005(5)CTC pg745 [Bhagavathy M. vs. Thiruvalluvar Transport Corporation Limited], wherein the Division Bench was considering the case where the injured sustained a disability which was ascertained at 60%, the compensation on that head came to be awarded only in a sum of Rs.60,000/-. The Division Bench has held that for 60% disability, as per the formula basis, the award should be Rs.60,000/- meaning thereby for every percentage of disability, the compensation should be calculated at a sum of Rs.1,000/-. Therefore, following the Division Bench decision, it will have to be held that for the permanent disability of 25% assessed by the Tribunal, the appellant is entitled for a sum of Rs.25,000/-.

20. Accordingly, the award of the Tribunal at Rs.25,000/- is modified and the compensation is awarded under the following heads:

a) Partial permanent disability of 25%	- Rs.25,000/-
b) Pain and suffering	- Rs. 5,000/-
c) Transportation to hospital	- Rs. 3,000/-
d) Loss of earning	- Rs. 3,750/-
Total	- Rs.36,750/-

21. The second respondent is liable to pay the compensation of Rs.36,750/- (Rupees thirty six thousand and seven hundred and fifty only) as above. It is stated that the second respondent had deposited the compensation as awarded by the Tribunal. Therefore, the second respondent is directed to pay the balance sum with 12% interest from the date of the claim petition till the date of deposit to the appellant within a period of one month from the date of receipt of a copy of this judgment.

22. The appeal is disposed of on the above terms. No costs.

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

gms

To

1. The Motor Accidents Claims Tribunal
The VI Judge, Small Causes Court, Chennai.

2. The Registrar,
Court of Small Causes,
Chenani.

1 cc To Mr.R.Ravichandran, Advocate, SR.51679.
1 cc To Mr.Anand & Surya, Advocate, SR.51311.

BV(CO)
RVL 20.12.2006