THE HON'BLE SRI JUSTICE S.V. BHATT

M.A.C.M.A.No.1225 OF 2005

JUDGMENT:

The claimant in O.P.No.434 of 2001 on the file of the Motor Accidents Claims Tribunal-cum-VI Additional District Judge, Ranga Reddy District (Fast Track Court) at Vikarabad (for short "the Tribunal), is the appellant herein.

The appellant filed claim petition under Section 166 read with Section 455 of the Motor Vehicles Act, 1989 claiming compensation of Rs.3 lakhs for the injuries sustained by him in a road accident that occurred on 04.11.2000 at about 11.00 AM., at Manneguda, Ranga Reddy District and for the resultant amputation of right leg above thigh level. The Tribunal through the impugned Award dated 21.03.2001 dismissed O.P.No.434 of 2001. Hence, the appeal.

Heard Sri Viswarupa Chary, learned counsel for the appellant and Sri Kota Subba Rao, learned counsel for the insurer.

The circumstances relevant for the disposal of the appeal are as follows:

On 04.11.2000, at 11 A.M., the appellant, who allegedly worked as driver on lorry bearing No.ATR 2779, left Manneguda bus stand in order to go to Tandur. At NH 2/1 (M.S.), the lorry dashed a tree. The claimant sustained grievous injury to his head, multiple injuries all over the body and grievous fracture to his right leg.
The appellant underwent treatment at Government Hospital, Vikarabad and Osmania General Hospital, Hyderabad.
On account of severity of injury, the doctors amputated his right
leg above thigh level. The appellant claims to have incurred Rs.20,000/- towards medical treatment. The accident was registered in Cr.No.337 of 2000 of Vikarabad Police Station. The claimant, while claiming compensation, by reference to his avocation as driver, claims Rs.2,500/- per month towards salary and Rs.50/- per day towards batta. The compensation claimed is towards permanent partial disability to his right leg, injuries to his body, medical expenses incurred by him and for extra nourishment.

The 1st respondent, being the owner, avers that the appellant drove the vehicle in a rash and negligent manner, particularly without driving licence and without proper permission from the driver appointed by the 1st respondent. The 1st respondent avoids liability by reference to the alleged unilateral act of driving the vehicle without 1st respondent's permission or the regular driver's permission. On the quantum of compensation, it is alleged
that the compensation claim is excessive and that the claimant in spite of amputation is doing work and earning sufficient amount for his livelihood. Alternatively, it is contended that as there is a valid insurance policy (Ex.B-1) the 1st respondent prays for dismissal of the compensation claim against him.

The 2nd respondent denied the material allegations in the petition and calls upon the appellant to prove the accident, his age, occupation and health at the time of accident. The
2nd respondent denies existence of insurance coverage. The further pleadings in this behalf are not adverted to, for by the consent of all parties, Ex.B-1 was marked and, therefore, I proceed to consider the issue as if the 2nd respondent has covered the risk of subject vehicle. According to 2nd respondent, the accident happened due to gross negligence of the appellant himself. The liability to pay either
Rs.3 lakhs or any compensation for that matter is denied, for
2nd respondent did not admit that the vehicle was driven by a person with valid licence. The 2nd respondent prays for dismissal of the petition.

The Tribunal framed the following issues for trial:

(i) Whether the accident had occurred due to the rash and negligent driving of the driver of the lorry bearing No.ATR 2779?

(ii) Whether the vehicle involved in the accident is insured with the second respondent?

(iii) Whether the petitioner is entitled for compensation? If so, to what amount and against whom?

(iv) To what relief.

On behalf of claimant, P.Ws.1 to 3 were examined and Exs.A-1 to A-5 were marked. On behalf of respondents, no oral evidence was adduced, but Ex.B1 copy of the insurance policy was marked. Ex.X-1 is the disability certificate issued by P.W.2.

On issue No.2, the finding of the Tribunal is that Ex.B-1 the risk covers the risk of subject vehicle. The Tribunal has taken up for consideration issues 1 and 2 together and held that the petitioner failed to prove that the accident occurred due to some mechanical breakdown or the owner is negligent in properly maintaining the vehicle and that the owner failed to discharge his duty cast on him in maintaining the vehicle or has acted in a careless manner. The accident occurred due to the rash and negligent attitude of the claimant and the relevant finding on issues 1 and 3 reads as follows:

> "From the foregoing discussion, I find that the accident had occurred due to the rash and negligent driving of the lorry bearing No.ATR 2779 by the petitioner. I further find that the petitioner is not entitled to claim any compensation against respondents 1 and 2. These two issues are accordingly answered against the petitioner".

Learned counsel for the appellant contends that the Tribunal committed grave illegality while answering issues 1 and 3. According to the counsel for appellant, the admitted circumstances of the case are that the 1st respondent is the owner of the vehicle bearing No.ATR 2779. The appellant by avocation is a driver. The vehicle was admittedly proceeding on a long journey from Manneguda to Tanuku and dashed a tree. The appellant, as already noted, suffered permanent partial disability to his right leg and underwent treatment in hospital. According to him, the appellant has proved the accident involving motor vehicle, registration of crime, insurance of the vehicle with the 2nd respondent, injuries as well as amputation of right leg and that the appellant had discharged the initial burden cast on him. Therefore, according to counsel for appellant, the Tribunal committed a serious illegality by fastening the burden on the appellant to prove that the 1st respondent was not maintaining the vehicle in good condition and, therefore, it resulted in the accident. According to him, there is sufficient documentary evidence of permanent partial disability (Exs.A-3 and A-5) read with evidence of P.W.2. The Tribunal ought to have appreciated that the 1st respondent having filed counter to the claim petition did not enter the witness box and the plea of 1st respondent cannot be treated as evidence to reject the claim petition. Further, it is contended that the 2nd respondent cannot rely upon the averment of 1st respondent viz., that the appellant firstly drove the vehicle unauthorisedly and secondly at the time of accident, the appellant did not have a valid licence, but has to take all steps to prove its allegation that there is breach of conditions of policy.

The appellant relies upon a decision reported in **UNITED INDIA INSURANCE COMPANY LTD., KURNOOL v. MADIGA THAPPETA RAMAKKA AND OTHERS**[1] of this Court, wherein this Court while dealing with a similar situation has considered the mode and manner of discharge of burden by the insurance company and the relevant paragraphs read as follows:

> "6. The main thrust of the argument advanced by Sri S. Hanumaiah, learned counsel appearing for the appellants-Insurance company is that the 1st respondent is not holding a valid driving licence as on the date of accident thereby the 2nd respondent-owner has violated, the conditions of the policy and so the 3rd respondent-insurance company is not liable to pay the compensation. To prove this contention, the burden heavily lies on the insurance company. We have to see whether the Insurance Company has discharged the burden cast upon it. In this connection, relying upon the decisions of the Supreme Court, Madhya Pradesh and Madras High Courts reported in *Narcinva V. Kamat v. Alfredo Antonio Deo Martins, and Karan Singh v. Manoharlal, 1989 ACJ 177 and* New India Assurance Co. Ltd. v. C.B. Shankar, *1986 ACJ 82*, Sri C. Sadasiva Reddy, learned counsel appearing on behalf of the claimants in all the appeals vehemently contended that when the insurance company complains of a breach of the terms of contract, the burden is squarely on the insurance company to prove that the breach has been committed by the other party to the contract. According to the learned counsel Sri C.Sadasiva Reddy, the Insurance Company did not

discharge the burden cast upon it and so it cannot disown its liability to pay the compensation.

In **NARCINVA V. KAMAT V. ALFREDO ANTONIO MARTINS**, referred to above, while considering the burden of proof and liability of the insurance company, the Supreme Court observed as follows: ---

> "When the insurance company complains breach of the terms of contract, which would permit it to disown its liability under the contract of insurance, the burden is squarely on the insurance company to prove that the breach has been committed by the other party to the contract. The test in such a situation would be 'who would fail, if no such evidence is led'. With this principle of law in view the evidence has to be judged. Merely non-production of licence or non-examination of the driver of the vehicle is not enough nor any adverse inference can be drawn against the person holding that because of non-examination of the driver or non-production of the licence, the burden is discharged by a mere question in cross-examination nor the owner is under any obligation to furnish the evidence so as to enable the insurance company not to wriggle out its liability under the contract of insurance. However, the R.T.A., who issues the driving licence, keeps record of the licence issued and renewed by it and the insurance company could have got the evidence produced to substantiate its defence. Not only this, no enquiries were made by the insurance company from the R.T.A. concerned regarding the fact of issue of a driving licence to Manoharlal. Hence, it would not give rise to an adverse inference about respondent No.1 being an unauthorized driver."
>
> Following the above judgment of the Supreme Court, the High Court of Madhya Pradesh, Indore Bench in *Karan Singh v. Manoharlal*, 1989 ACJ 177, referred to above, observed that as the driver was not examined and as the insurance company did not call any record of the R.T.A. or any other evidence to establish that the driver had no driving licence, the insurance company has failed to discharge its burden by leading legal evidence. In *New India Assurance Co. Ltd. v. C.B. Shankar*, 1986 ACJ 821 (supra), referred to above, it was observed by the Madras High Court that in order to escape the liability, the insurance company is not only required to prove that the driver was not holding licence at the time of accident but also to prove that the driver was disqualified from holding or obtaining a licence or never had any licence at all.
>
> 8. Mere mention in the criminal court's judgment about the driver not having a licence, much less a valid driving licence is not sufficient. It is well established legal principle that the findings given in criminal court judgments cannot be taken aid and cannot be taken advantage in civil matters. As seen from the above pronouncements of the Supreme Court and other High Courts, the best method is to summon the driver to produce the driving licence, and also to take appropriate steps to examine him. If the driver and the owner of the offending vehicle remain *ex parte*, a duty is cast upon the court on the application of the insurance company to take appropriate steps to summon the driver and examine him. If the driver is summoned and if he has produced the driving licence it is sufficient. If he did not respond to the summons and did not appear nor did he produce the driving licence, an adverse inference can be drawn that he was not holding a valid driving licence. It is also the duty of the Insurance Company to summon the R.T.A. officials to produce the driving licence as the R.T.A. who issues the driving licence keeps record of the licence issued and renewed by it and the insurance company could have got the evidence produced to substantiate its defence. Either of the above two steps has not been taken by the insurance company. As already stated, if the driver, in spite of receipt of summons, has not been present and subjected himself for examination, the court is entitled to draw adverse inference. Whether a driver is having a valid driving licence or not is within the exclusive knowledge of the driver himself or at certain times the owner of the vehicle will be having that information as he is expected to know before he is taken as driver. The insurance company did not take any effective steps to discharge the burden. It is the case of the insurance company that one Adhinarayana Setty was appointed as investigating officer and he submitted his report Ex.B.6. Without examining the said Administrative Officer, his report, marked through another person, cannot be given due weight. The mere filing of the report of the Administrative Officer, without examining him, does not absolve the responsibility of the insurance company in discharging the burden. From the above discussion, I am of the opinion that the insurance company has not discharged its burden by leading legal evidence. Under the umbrella of Ex.B.1 policy it cannot take shelter and claim that it has discharged its burden cast upon it."

Sri Kota Subba Rao, learned counsel appearing for the 2nd respondent, submits that though the plea that the vehicle was driven by the appellant without licence was taken by the 1st respondent, still to show that there is no breach of policy conditions, the appellant failed to discharge the initial burden cast on him and that there is nothing on record to show that the appellant was a driver working with 1st respondent. Even assuming that the appellant was engaged as a temporary driver to accompany the vehicle with a regular driver, the compensation claimed for the injuries is excessive and exorbitant. The sum up of contentions of the counsel for the insurer are that - firstly he prays for dismissal of the appeal and secondly that the compensation of Rs.3 lakhs for injuries is on the higher side. The ratio of this Court in **UNITED INDIA INSURANCE CO. LTD., v. KORE LAXMI**[2] is not disputed and in appropriate cases, the compensation is worked out as laid down therein.

Now, the points for consideration are – Whether the accident is due to rash and negligent driving of the appellant and whether the appellant is entitled for award of compensation against respondents 1 and 2? and If so, to what extent.

The findings of fact recorded by the Tribunal are that the vehicle bearing No. ATR 2779 is insured with the 2nd respondent and the accident covers the period of insurance. The vehicle hit a road side tree in which the appellant suffered injuries. According to the Tribunal, the accident is on account of rash and negligent driving of the appellant and thereby the appellant being the driver of
this vehicle cannot claim compensation and relieve both the respondents from any liability.

At the outset, having carefully perused the definite case of appellant, his oral evidence as P.W.1, the supporting evidence of P.W.3, I have difficulty in accepting the findings recorded by the Tribunal on issues 1 and 3.

The case of appellant is that he was driving the vehicle at the time of accident and the vehicle hit a tree resulting in injuries.
Ex.A-1 FIR was given by one Shaik Sahid**.** From what is stated in
Ex.A-1, it cannot and could not be accepted as conclusive evidence on the factum of alleged rash and negligent driving by the appellant. The appellant is not the person who has given the complaint or admitted the alleged rash and negligent driving at the time of accident. Whether the accident happened on account of rash and negligent driving of appellant or not is an issue for decision by the Tribunal and for that purpose, the available evidence is of P.Ws.1 and 2. The summary of oral evidence is as follows:

P.W.1:

> "I am the petitioner. I was working as driver on the lorry bearing No.ATR 2779. On 4.11.2000 at about 11 AM, I started at Manneguda driving the lorry ATR 2779
> in order to go to Tanuku. When the lorry reached near Yenkepally village gate, it met with accident due to failure of brakes, with the result, the lorry dashes against a tree. Due to the accident, I sustained crush injury to my right leg, injury to head and other injuries over the body. I was shifted to Government Hospital, Vikarabad. After giving first aid I was referred to Osmania General Hospital, Hyderabad. Two days after I was admitted in Osmania General Hospital, Hyderabad. Two days after I was admitted in Osmania General Hospital, my right leg up to knee joint was amputated. About 12 days later, operation was conducted on my right leg and another portion of my right leg above the knee joint was amputated. I was in Osmania General Hospital as in patient for 36 days.
> I incurred an expenditure of Rs.30,000/- towards medicines and treatment. By the date of accident, I was earning wages of Rs.2,000/- per month. I also used to get Rs.50/- per day as batta while I was on duty. Now I am not able to drive heavy vehicle due to amputation of my right leg. I am also not able to do any other work to eke out my livelihood……."

P.W.2:

> "That I am working as Professor of Orthopaedic at Osmania General Hospital, Hyderabad since November, 2000. One Bheemaiah was admitted in O.G.H on 4.11.2000 with the following injuries:
>
> 1) Multiple crush injuries over right leg.
> 2) Deformity and swelling over right knee
> 3) Abrasion over the right side of forehead.
>
> He was treated as inpatient, he under went through knee disarticulation on 6.11.2000. And above knee revision amputation right side on 28.11.2000. He was discharged on 9.12.2000 with an advise to attend orthopaedic OP
> for follow up treatment. Ex.X1 is Orthopaedically Handicapped Certificate issued by the Medical Board of O.G.H. The permanent disability which was awarded in the Certificate was 70% (seventy percent). I am one of the signatory on Ex.X.1. The amputation level is through the level of middle third of right thigh. He has to walk either with the aid of an artificial limb or with the aid of a pair of crutches.
> It is true that the P.W.1 cannot attend hard manual labour. The P.W.1 cannot do driver job, due to loss of his right lower limb."

The evidence of P.W.3 reads thus:

> "I am a resident of Chowdarpally village. I am a lorry driver. I worked as driver on lorry bearing No.ATR 2779. One Ibrahim is the owner of the said lorry. One Bheemaiah (P.W.1) also working as driver along with me on the said lorry. On the date of accident, I completed my duty on the said lorry at about 10.30 A.M., and P.W.1 joined duty at Manneguda village. I came to know that about ½ an hour after P.W.1 joined duty, the lorry met with an accident at Yenkepally gate. P.W.1 was working on the said lorry as driver since two years prior to the accident".

On the contrary, the finding of fact recorded by the Tribunal is that the appellant failed to prove that the 1st respondent was not maintaining the vehicle properly or that the 1st respondent acted in a careless manner. This finding of the Tribunal suffers from a

subtle infirmity or illegality, for the Tribunal expects the

appellant to prove the negative, which is impermissible in law.

The 1st respondent owner who has putforward this case, as already noted, neither entered the witness box nor placed any documentary evidence. In my considered view, there is no material on record to return a finding that the accident is on account of self-inflicted rash and negligent driving of the appellant.

With the assistance of learned counsel appearing for the parties, I have carefully gone through the evidence on record and

I do not find sufficient material to accept the findings recorded by the Tribunal. The point is answered accordingly. Thereby, the next point for consideration is whether the appellant is entitled for any compensation or not?

The admitted circumstances are that the appellant suffered permanent partial disability of right leg. The appellant suffered amputation of right leg above thigh level. The medical evidence of P.W.2, coupled with Exs.X-1 and Ex.A-5, supports the claim on material particulars of amputation. The extent of permanent partial disability can be arrived at 70%. Assuming that the appellant was not a regular driver working with 1st respondent, from the material available on record, it is clear that the appellant was eking out his livelihood as driver and at material point of time driving the subject vehicle in the company of regular driver appointed on the vehicle. It cannot now be held that with amputation of right leg, he will have normal and gainful employment in the avocation he was doing after the accident. Further, the disability is certified as 70% and for all purposes he is physically handicapped. I have no difficulty in accepting the disability of 70%.

Assuming that the appellant may not be a regular employee, still it can be presumed and held that the appellant was in a position to earn at least Rs.2,500/- per month as driver. Accordingly, the compensation is fixed as follows:

Rs.2,500/-x60%x70%x216.91 = 2,27,755/-

The claimant is entitled to a sum of Rs.10,000/- towards transportation, medical expenses and extra nourishment. Accordingly, this Court is of the view that the claimant is entitled

to just and proper compensation of Rs.2,37,755/- (Rs. 2,27,755/- + Rs.10,000/-) . The point is answered accordingly.

The appeal is allowed by determining the compensation payable by the respondents at Rs.2,37,755/- with interest at

7.5% per annum from the date of petition till deposit. Respondents 1 and 2 are held jointly and severally liable to pay the above said compensation and they are directed to deposit the same before the Tribunal within a period of three months from the date of receipt of a copy of this judgment.

____

S.V.BHATT, J

Date: 18.12.2015

Lrkm

---

[1] (1995) ACJ 358

[2] 2005(1) ALD 111