

THE HON'BLE SRI JUSTICE T. SUNIL CHOWDARY

M.A.C.M.A. No.620 OF 2009

JUDGMENT:

_____ This appeal is preferred by the second respondent – Insurance Company assailing the judgment and award, dated 13.06.2008 passed in M.V.O.P.No.556 of 2005 on the file of the Chairman, Motor Accidents Claims Tribunal-cum-III Additional District Judge, Tirupati (for short, 'the Tribunal')

2. _____ For the sake of convenience, the parties are hereinafter referred to as they are arrayed in the O.P. before the Tribunal.

3. _____ The facts leading to filing of the present appeal are briefly as follows:

_____ The petitioner filed the petition claiming compensation of Rs.6,00,000/- towards injuries sustained by him. The case of the petitioner is that on 31.05.2004 at about 5:30 PM, when the petitioner reached near old check post, Renigunta on his motorcycle bearing No.AP-03-M-6118, the driver of the Lorry bearing No.AP-21-T-5191 (hereinafter referred to as 'the crime vehicle') had driven the same in a rash and negligent manner and dashed against the motorcycle from opposite direction. Due to accident, the petitioner sustained fractures and grievous injuries on various parts of the body and took treatment in Tirupati for long time and spent huge amount. The Station House Officer, Renigunta registered a case in Crime No.74 of 2004 under Sections 338 and 279 I.P.C. against the driver of the crime vehicle. At the time of accident, the petitioner was aged about 38 years and used to earn Rs.6,000/- per month while dealing with the selling and purchasing of the second hand vehicles. Hence, the petition.

4. _____ The first respondent remained *ex-parte*. The second respondent _____ filed counter denying the material averments *inter alia* contending that the driver of the crime vehicle as well as the petitioner were not having valid and effective driving licence. The second

respondent also denied the income of the petitioner.

5. Basing on the above pleadings, the Tribunal framed the following issues for trial:

1. Whether the pleaded accident occurred and if so was it due to fault of the driver of lorry of first respondent bearing No.AP 21 T 5191?
2. Whether the lorry in question belongs to R.1 and stood insured with R.2 by the date of accident and if so whether the policy covers the risk of the petitioner?
3. Whether the petitioner suffered injuries in the said accident and entitled to compensation and if so, to what amount, from which of the respondents?
4. To what relief?

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6. During the course of trial, on behalf of the petitioner P.Ws.1 to 3 were examined and Exs.A.1 to A.12 and Exs.X.1 and X.2 were marked. On behalf of the second respondent, no oral evidence was adduced and Ex.B.1 – Policy was marked.

7. Basing on the material available on record, the Tribunal arrived at a conclusion that the accident occurred due to rash and negligent driving of the driver of the crime vehicle and partly allowed the petition by awarding compensation of Rs.4,52,908/-.

8. Feeling aggrieved by the judgment and award of the Tribunal, the second respondent – Insurance Company filed the present appeal.

9. The contention of Smt. S.A.V.Ratnam, the learned Standing Counsel for the second respondent, is two fold. 1. The petitioner also contributed to cause the accident and that aspect is not rightly considered by the Tribunal. 2. The quantum of compensation awarded under the head of future operation is not supported by any material.

10. Per contra, Sri G.Sundareshan, representing Sri P.Govind Reddy, the learned counsel for the petitioner, submitted that the Tribunal considered various aspects and awarded just and reasonable compensation. He further submitted that there was no rashness or negligence on the part of the petitioner to cause the accident.

11. Now the points that fall for consideration in this appeal are:

“1. Whether there is any contributory negligence on the part of the petitioner to cause accident or not?”

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2. Whether the compensation awarded under various heads by the Tribunal is just and reasonable or not?”

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12. **Point No.1:**

To substantiate the argument, the learned Standing Counsel has drawn my attention to the following judgments:

1. **Md.Iqbal v. Susheela Agarwal**^[1], wherein it was held as under:

“usually in a case of a head on collision, both the vehicles involved in the accident would be responsible for the accident as even if one of the drivers is careful the accident can be averted.”

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2. **Municipal Corporation of Greater Bombay vs. Laxman Iyer**^[2], wherein in para -7 it was held as under:

“At this juncture, it is necessary to refer to the “doctrine of last opportunity”. The said doctrine is said to have emanated from the principle enunciated in Davies v. Mann ((1842) 10 M&W 546 : 152 ER 588) which has often been explained as amounting to a rule that when both parties are careless the party which has the last opportunity of avoiding the results of the other's carelessness is alone liable. However, according to Lord Denning it is not a principle of law, but a test of causation. (See Davies v. Swan Motor Co. (Swansea) Ltd. ((1949) 2 KB 291 : (1949 1 All ER 620 (CA))) Though in some decisions, the doctrine has been applied by courts, after the decisions of the House of Lords in Volute ((1922) 1 AC 129 : (1921) 1 All ER Rep 193 (HL) sub nom Admiralty Commrs. V. Volute (Owners)) and Swadling v. Cooper (1931 AC 1 : 1930 All ER Rep 257 : 100 LJ KB 97 : 143 LT 732 (HL)), it is no longer to be applied. The sample test is, what was the cause or what were the causes of the damage. The act or omission amounting to want of ordinary care or in defiance of duty or obligation on the part of the complaining party which conjointly with the other party's negligence was the proximate cause of the accident,

renders it one to be the result of contributory negligence.”

Let me consider the facts of the case on hand in the light of the principle enunciated in the cases cited supra.

13. In order to prove the negligence on the part of the driver of the crime vehicle, the petitioner examined himself as PW.1 and got marked Exs.A.1, A.2 and A.5. As seen from the testimony of PW.1, the accident occurred due to rash and negligent driving of the driver of the crime vehicle. PW.1 being an interested witness, possibility of distortion of the facts in order to claim compensation cannot be ruled out. It is the duty of the Tribunal or the Court to scrutinise the testimony of the witnesses meticulously so as to ascertain the truth. The *factum* of accident is not denied by the second respondent. The only contention of the learned counsel for the second respondent is that the petitioner is also equally contributed to cause the accident. It is a settled principle of law that the pleadings form bed rock in civil suit or motor vehicle accidents claim petition. I have carefully scanned the counter filed by the second respondent. The second respondent simply denied the manner of the accident. The second respondent has not taken a specific plea in the counter that the petitioner also equally responsible to cause the accident. Any amount of evidence without pleading is of no use. It is needless to say that no one is entitled to urge the factual aspects for the first time, at the stage of appeal without proper factual back ground. For one reason or other, the second respondent has not taken the plea that there is a contributory negligence on the part of the petitioner to cause the accident. In the cross-examination of PW.1, nothing is elicited to shake his testimony so far as the manner of the accident is concerned. As per the recitals of Ex.A.1, C.C. of F.I.R. and Ex.A.2, charge sheet, the accident occurred due to the rash and negligent driving of the driver of the crime vehicle. The oral testimony of PW.1 is fully supported by the recitals of Ex.A.1, C.C. of F.I.R., and Ex.A.2, charge

sheet. A perusal of Ex.A.5, C.C. of Calendar and Judgment in C.C.No.253 of 2004 clearly manifest that the driver of the crime vehicle admitted his fault before the criminal Court. The trial Court convicted and sentenced the driver of the crime vehicle to pay a fine of Rs.1,000/- each count in default S.I. for one month for the offences under Sections 279 and 338 I.P.C. and Rs.100/- each in default S.I. for 15 days for the offence under Section 134 (a) and (b) read with 187 of the Motor Vehicles Act, 1988. The stand taken by PW.1 is supported by the driver of the crime vehicle. If really there was negligence on the part of the petitioner, what prevented the second respondent to examine the eye witness or any other person to establish the negligence, if any, on the part of the petitioner. For one reason or other, the second respondent did not choose to adduce oral or documentary evidence to demolish the case of the petitioner. As observed earlier, there is no pleading in the counter that the petitioner is also equally responsible to cause the accident in question. There is no evidence much less cogent and convincing evidence to establish the negligence, if any, on the part of the petitioner. At the appeal stage, the Court cannot assume or presume the things without any material.

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14. Viewed from any angle, the submission made by the learned counsel for the second respondent has no legs to stand. In the light of the foregoing discussion, I have no hesitation to hold that the accident occurred due to the rash and negligent driving of the driver of the crime vehicle only.

15. Point No.2:

A perusal of the record reveals that the Tribunal granted compensation under the following heads:

<u>1. Loss of income</u>	<u>Rs.1,35,000/-</u>
<u>2. Permanent disability</u>	<u>Rs. 20,000/-</u>
<u>3. Pain and suffering</u>	<u>Rs. 64,000/-</u>
<u>4. For medicines and treatment</u>	<u>Rs. 53,908/-</u>

5. For future operation	Rs.1,80,000/-
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Total	Rs.4,52,908/-
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16. The contention of the learned counsel for the second respondent is that the Tribunal awarded the compensation under the head future operation without any material. To prove the injuries, the petitioner examined PW.3, Orthopaedic Surgeon. In the chief examination, PW.3 in unequivocal terms deposed that the petitioner requires an amount of Rs.1,80,000/- for future operation. I have carefully scanned the cross-examination of PW.3. No suggestion was put to this witness that the petitioner did not require any amount for future operation or treatment. If really the petitioner did not require any future operation, what prevented the second respondent – Insurance Company to disprove the same? A perusal of Ex.A.7, discharge summary and treatment record clearly reveals that the doctors advised the petitioner to undergo another operation. It is a known fact that one has to spent huge amount to undergo operation. Basing on the material available on record and taking into consideration the ground realities, the Tribunal awarded an amount of Rs.1,80,000/- towards future operation and treatment of the petitioner. Therefore, the amount of compensation awarded under this head is just and reasonable. The Tribunal has meticulously scrutinised various documents filed by the petitioner and awarded the compensation. The compensation awarded by the Tribunal under various is fair, just and reasonable.

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17. Viewed from factual or legal aspects, there are no grounds much less valid grounds to interfere with the well considered judgment and award passed by the Tribunal.

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18. Accordingly, the Appeal is dismissed. There shall be no order as to costs.

19. Consequently, Miscellaneous Petitions, if any, pending in this

Appeal shall stand closed.

T.SUNIL CHOWDARY, J

22nd January, 2015

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[1] 2005 (2) ALD (NOC 111)

[2] (2003) 8 SCC 731