

HONOURABLE SRI JUSTICE A. SHANKAR NARAYANA

M.A.C.M.A.No.1044 OF 2005

JUDGMENT:

The Oriental Insurance Company Limited-appellant herein is the second respondent in M.V.O.P.No.1097 of 2000 on the file of the Chairman, Motor Accidents Claims Tribunal-cum-IV Additional District Judge, Guntur. Aggrieved by the order dated 29.11.2004, whereby and whereunder the Tribunal awarded a sum of Rs.59,000/- as compensation with interest at 9% per annum for the injuries sustained by the petitioner while travelling in a tanker carrying acid, despite the First Information Report attributing rash and negligent driving to the driver of the acid tanker, preferred the instant appeal.

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

3. The facts in brief are that the petitioner belonging to Guntur claiming himself to be the cleaner of the acid tanker bearing registration No.AP-37-T-2855, owned by the third respondent on 10.05.2000 was proceeding from Kovvur to Vijayawada with acid filled in the tanker and when it reached Ananthapalli, since the driver of the lorry bearing No.AP-5-U-3073, owned by the first respondent drove it in a rash and negligent manner, which was coming in the opposite direction hit their tanker on account of which the tanker turned up side down causing injuries to the petitioner due to leakage of the acid, which spilled over him. Claiming that he was 19 years old earning Rs.3,000/- per month as cleaner of the lorry, he sought a total compensation of Rs.1,50,000/- by laying claim under Section 166 of the Motor Vehicles Act, 1988, against respondent Nos.1 to 3, who are the owner of the opposite lorry bearing No.AP-5-U-3073, its insurer and the owner of the acid tanker bearing No.AP-37-T-2855 respectively.

4. Before the Tribunal, the first respondent was set *ex parte*.

The second respondent-Insurance Company filed written statement requiring the petitioner to prove the material allegations levelled in the petition and also contended that the insurer of the third respondent's vehicle is also a necessary party. It is also specifically mentioned that the accident took place due to the rash and negligent driving of both the vehicles and, therefore, sought to dismiss the claim contending that the compensation sought is highly excessive.

5. The third respondent filed written statement stating therein that the driver of the first respondent is responsible for the accident and even according to the plea put forth by the petitioner, since no claim was made against her and also pleading that the petitioner was not an employee under her, sought to dismiss the claim petition against her.

6. The Tribunal framed the following issues.

- (1) Whether the accident occurred due to the rash and negligent driving of the driver of the lorry bearing No.AP-5-U-3073 by its driver or not?
- (2) Whether the petitioner is entitled for compensation, if so, from whom, for what?
- (3) To what relief?

7. During the enquiry, the petitioner, besides examining himself as P.W.1, has examined the doctor, who said to have treated him, as P.W.2 and marked Exs.A1 to A5 and Ex.X1, in order to substantiate the claim he laid. On behalf of the second respondent, no witness was examined and no documents were filed. The Tribunal made in paragraph No.4 of the order recorded that the third respondent was set *ex parte* subsequently.

8. The Tribunal, on issue No.1, adverting to the rival contentions referring to the evidence of P.W.1 and the decisions on which reliance was placed by the learned counsel for the second respondent in **New India Assurance Company Ltd., Divisional Office, Madras v. B.Malla Reddy And Others**^[1] and **Yennaboina**

Krishna Murthy v. V.Samrajyalaxmi And Others^[2], observing that the second respondent has not examined the concerned police who recorded the statement of P.W.1 to prove the contradiction and also observing that the FIR is not substantive piece of evidence and accepting that P.W.1 was semi-conscious when Ex.A1-complaint was lodged and acceding to the stand taken by the petitioner, attributing rash and negligent driving to the driver of the opposite lorry i.e., the lorry belonging to the first respondent, held issue No.1 in favour of the petitioner.

9. On issue No.2, the Tribunal fixing Rs.15,000/- per annum and adopting the multiplier provided in the II Schedule to Section 163-A of the Act and taking the age of the injured as 20 years applied multiplier '16' and taking 15% disability, as spoken to by P.W.2, worked out the loss of earning capacity at Rs.36,000/- besides granting Rs.10,000/- towards pain and suffering, Rs.13,000/- towards medicines, attendant charges and loss of income and thus, a total sum of Rs.59,000/- was awarded with interest at 9% per annum fastening liability on respondent Nos.1 and 2 while dismissing the claim against the third respondent.

10. The instant appeal is filed mainly contending in the grounds of appeal that the Tribunal did not properly appreciate the evidence of P.W.1, more particularly, the contents of FIR by overlooking the fact that the FIR was lodged by P.W.1 himself but when he laid claim petition, he turned around and attributed rash and negligent driving to the driver of the third respondent. It is also stated that there was collusion between the claimant and insured, which the Tribunal did not take notice and, therefore, sought to set aside the order passed by the Tribunal so far as the appellant is concerned.

11. Heard Sri K.Lakshmi Prasad, learned counsel for the appellant-Insurance Company.

12. Despite service of notice on respondent Nos.1 and 2, who are the claimant and owner of the lorry, none appears for them. So far

as the third respondent is concerned, the appeal was dismissed for default as per the orders of this Court dated 03.01.2012. The dismissal of appeal against the third respondent is of no consequence in resolving the controversy, also for the reason that the third respondent remained *ex parte* before the Tribunal at a subsequent stage and finally, claim petition was also dismissed against the third respondent by the Tribunal.

13. The question that arises for consideration in the instant appeal is whether the order under challenge is liable to be set aside.

14. Perused the order and the evidence on record, both, oral and documentary let in by the petitioner. It would be apt to refer to the observations made by the Tribunal in tendering the finding on issue No.1 contained in paragraph No.8, which is thus:

“It is held in the decision cited by the petitioner’s counsel that as the appellant (injured) contradicted the statement made in the FIR Ex.A1 and in the absence of any contra evidence on behalf of the respondent No.3 as to the manner and cause of the accident, the version put forth by the appellant/injured that the accident was occurred due to the rash and negligent driving of the driver of the third respondent has got to be accepted. In this case, P.W.1 stated before police as per the original of Ex.A1 that the accident occurred due to the rash and negligent driving of the driver of the lorry of R-3. The above statement of P.W.1 before the court is not contradicted by inviting the attention of P.W.1 to the contents of Ex.A1 as laid down under sec. 145 of the Evidence Act. The concerned police who recorded the statement of P.W.1 is not examined in this case to prove the above contradiction. Therefore, the above contradiction is not proved in according with law. It is settled principle of law that the F.I.R. is not a substantive piece of evidence. As per the version of P.W.1, it is to be held that the accident occurred due to the fault of the driver of the lorry of R-1. There is no evidence adduced on behalf of the respondents 1 and 2 contra to the evidence of P.W.1 that the accident occurred due to the fault of the driver of R-1. In the absence of any evidence adduced on behalf of R-1 and R-2, the evidence of P.W.1 is to be accepted as per the decision cited by the petitioner’s counsel. Therefore, I hold that the accident occurred due to the fault of driver of R-1, I am unable to accept the argument of R-2’s counsel that R-1 and R-2 are not liable as the accident occurred due to the

fault of the driver of lorry of R-3, as it is not based on evidence on record. For the above reasons, I am of the opinion that the accident occurred due to the rash and negligent driving of driver of R-1. This issue is thus answered.”

The entire extracted portion would show the approach of the Tribunal in arriving at such a finding. It is submitted by the learned counsel for the appellant that Ex.A1 was exhibited by the petitioner himself. It is not in dispute that P.W.1 admitted that he has lodged Ex.A1. It is, therefore, his submission that in view of the said admission and marking Ex.A1 by the petitioner himself, the Tribunal was not right in holding that merely because the procedure contemplated by the provisions of Section 145 of the Evidence Act was not resorted to burden of proof cannot be cast on the second and the first respondents. It is also his submission that the Tribunal in an attempt to justify its finding tendered on issue No.1, held that the petitioner must have been in semi-conscious state at the time of giving complaint without there being legally acceptable evidence to support the finding recorded by the Tribunal. It is also his submission that the Tribunal ought not to have cast burden on the second respondent to examine the concerned police, who recorded the statement of P.W.1, which finds place in Ex.A1.

15. There is substance in the submission made by the learned counsel for the appellant for the reason, the answers given by P.W.1 when examined would show that he stated to the police that due to the rash and negligent driving of the tanker driver, their tanker turned turtle resulting in burns on his back. However, he expressed his ignorance as to the police filing charge sheet against the driver of the lorry in which he was travelling. For a question in his cross-examination, whether he intends to examine the owner and driver of the lorry in which he was travelling to prove that he was working as cleaner in the said tanker and pertaining to lodging of first information report, he admitted that he gave first information report regarding the

accident to the police and also admitted that police examined him and recorded his statement. It is, therefore, abundantly clear that the police issued first information report basing on the report of P.W.1 and also the statement made to the investigating agency and it is not in dispute that the charge sheet was filed after collecting the evidence, in which the petitioner claims to be the cleaner of the lorry. It is clear that the admissions made by P.W.1 in his cross examination cannot be brushed aside, which the Tribunal has totally lost sight of and somehow, overlooked the said admissions without assigning any reasons. The reasoning adopted by the Tribunal that the second respondent did not invoke Section 145 of the Evidence Act to confront P.W.1 with the recitals in Ex.A1 is incorrect. The Tribunal has, somehow, overlooked the fact that P.W.1 himself exhibited Ex.A1, which contents stand adverse to his case in view of the categorical admissions made by him in his cross examination referred to in the above. In such an event, there was no obligation cast on the second respondent to confront the statement, Ex.A1 to P.W.1 by invoking the provisions of Section 145 of the Evidence Act. Therefore, the finding tendered on issue No.1 by the Tribunal is set aside holding that the accident occurred only due to the rash and negligent driving of the driver of the acid tanker, as per Ex.A1 contents occasioning injuries to the petitioner. Therefore, the finding recorded by the Tribunal that due to rash and negligent driving of the lorry driver owned by the first respondent for which the second respondent was insurer, certainly, suffers from legal infirmity warranting interference and accordingly, that finding is set aside.

16. Learned Counsel for the appellant also pointed out the approach of the Tribunal in determining compensation, which is unnecessary to probe into since the finding recorded by the Tribunal on issue No.1 is set aside.

17. Hence, the second respondent in the O.P., who is the appellant herein, is exonerated from its liability to pay compensation

as ordered by the Tribunal. The first respondent in the instant appeal has not chosen to represent the matter.

18. Since the petitioner sustained injuries when the tanker turned upside down due to the rash and negligent driving of the driver of the tanker, no liability can be fastened even on the first respondent, more particularly, in view of setting aside the finding on issue No.1.

19. Accordingly, the appeal is allowed setting aside the order and decree under challenge against respondent Nos.1 and 2. There shall be no order as to costs.

As a sequel thereto, Miscellaneous Applications, if any, pending in this appeal stand disposed of.

A. SHANKAR NARAYANA, J

March 19, 2015.

RRB

[\[1\]](#) 2002(6) ALD 137 (DB)

[\[2\]](#) 2002(2) Andhra Weekly Reporter 15