

HON'BLE SRI JUSTICE A. SHANKAR NARAYANA

M.A.C.M.A. No.1382 OF 2009

JUDGMENT:

Respondent No.2 - M/s. New India Assurance Company Limited; aggrieved over the order and decree, dated 08-03-2007, in O.P. No.627 of 2001, passed by the learned Chairman, Motor Accident Claims Tribunal - cum - VI Additional District Judge (Fast Track Court), Mahabubnagar (for short 'the Tribunal'), whereby and where-under, a compensation of Rs.2,30,400/- was granted as against the claim of Rs.3,00,000/- laid under Section 166 of the Motor Vehicles Act, 1988 (for short 'the Act'); preferred the instant appeal under Section 173 of the Act, mainly on the grounds; (i) that respondent No.1 herein ventured in driving the motorcycle in the dark at midnight and run the risk voluntarily for which he alone can be blamed and the stationary vehicle's driver cannot be blamed, as there was total negligence on the part of respondent No.1; (ii) the Tribunal fixed the income of respondent No.1 herein at Rs.4,000/- without any basis and physical disability at 30% was based for calculating compensation without evaluating loss of earning capacity through the doctor and, thus, the said compensation granted by the Tribunal is excessive and arbitrary.

2. Respondent No.2 and the appellant herein, who are owner and insurer of tractor and trailer bearing registration Nos.AP 22T

1425 and 1426, respectively, are respondent Nos.1 and 2, respectively, while respondent No.1 is the petitioner in the OP before the Tribunal.

3. For the sake of convenience, the parties herein are referred to as they were arrayed in the claim petition.

4. Basic facts that needed for disposal of the present appeal are; that the petitioner along with his friend M. Anand Rao was returning to Mahabubnagar from Jadcherla on a motorcycle on 25-03-2001 between 1.30 p.m. and 2.00 a.m., early hours, and when they reached near T.B. Hospital, their motorcycle collided with an abandoned tractor bearing registration No.AP 22T 1426 parked on the road negligently without having parking lights and without making any precautionary measures.

i) The petitioner claims that since he could not see the abandoned trailer in the focus lights of vehicle which was coming from opposite direction, the accident took place and he received injuries, blood clotted in the visual nerve of the left eye and he lost his sight. He was shifted to Government Headquarters Hospital, Mahabubnagar for treatment. Stating that he was earning Rs.4,000/- per month and contributing his total earnings to his family and due to loss of eye-sight, he lost total earning capacity, claimed joint and several liability against respondent Nos.1 and 2 to pay Rs.3,00,000/- as compensation.

5. Respondent No.1, owner of the vehicle, remained *ex parte*.

6. Respondent No.2 filed its counter stating that due to gross negligence on the part of the person, who drove the motorcycle, the accident occurred and, as such, the insurer is not liable to pay any compensation. It is also stated that the claim is exaggerated one, and, therefore, sought to dismiss the claim petition.

7. Basing on the said pleadings, the Tribunal framed three issues about the responsibility for the accident.

8. During inquiry, the petitioner examined himself as PW.1, besides examining the doctor as PW.2 and another witness as PW.3 and marked Exs.A-1 to A-13. On behalf of respondent No.2, no witnesses were examined, but certified true copy of insurance policy was marked as Ex.B-1 on consent.

9. The Tribunal having analyzed the evidence of PW.1 supported by Ex.A-1, first information report, Ex.A-2, charge sheet and Exs.A-6 and A-7, which are alteration of charge memo and examination of accused under Section 251 Cr.P.C. in C.C. No.345 of 2001; and placing reliance on the decisions in **National Insurance Company Limited v. Abhay Singh Yadav and others**¹ and **Shashikala Swain and others v. Md. Khairuddin and another**², recorded a finding that the tractor and trailer were parked on the road

¹. (2006) ACC 104

². AIR 2000 Orissa 52

without taking any precautions and referring to Section 122 of the Act, which envisages that no person in charge of motor vehicle shall cause or allow the vehicle or any trailer to be abandoned or to remain at rest in public place in such position or in such condition or in such circumstances as to cause or likely to cause danger, obstruction or undue inconvenience to other users of the public place or passengers, held that due to negligence on the part of the driver of the tractor and trailer, the accident did occur, thus, attributed total negligence to him.

10. The Tribunal while referring to the original claim made by the petitioner for Rs.1,00,000/- towards compensation, stated that having amended the claim for Rs.3,00,000/- having found that he was referred to Sarojini Devi Hospital at Hyderabad and later he took treatment in L.V. Prasad Eye Institute and disability at 45% under Ex.A-13 and even examined the doctor as PW.2, who spoke about 10% disability and the petitioner lost vision of his left eye, which is supported by medical record. Taking the earnings at Rs.4,000/- per month being a tailor on the assumption that even a labourer getting Rs.3,000/- per month and taken disability at 30% though the Medical Board assessed the same at 45% and annual loss at Rs.14,400/-, applying multiplier '16' as the petitioner was 40 years old, arrived at Rs.2,30,400/-. Thus, the Tribunal granted the same with interest at 7.5% per annum thereon from the date of petition till realization.

11. Heard Sri Katta Laxmi Prasad, learned standing counsel for the appellant - insurer, and Sri N. Ashok Kumar, learned counsel for respondent No.1 - petitioner. Respondent No.2 herein - owner of the tractor, on whom, service was completed, but, still, has not entered his appearance.

12. The learned standing counsel for the appellant would submit that the accident did occur only on account of sheer negligence of the driver of the motorcycle as

- i) he was not supposed to ride at midnight;
- ii) he ought to have taken precaution to avert taking place of the accident;
- iii) when the glare from the mid-lock portion of the abandoned trailer reflected on the lights, the driver ought to have stopped the two wheeler and averted taking place of the accident.

and thus, the negligence can only be attributed to the driver of the motorcycle but not to the driver of the tractor and that the Tribunal, therefore, is not right in attributing total negligence to the driver of the tractor and in fact, the Tribunal ought to have taken contributory negligence, since rider contributed to the accident, as the circumstances mentioned in the above, clearly prove the contributory negligence to the driver of the motorcycle.

i) Further submission is, that the Tribunal was not right in taking Rs.4,000/- towards monthly earnings, though, the evidence is clear that only during peak seasons there would be tailoring work and earlier tailors used to be busy in view of the evidence of PW.3 and, therefore, ought to have taken notional income when no evidence is forthcoming by way of documentary proof. Even, the disability spoken to by PW.2 ought to have considered by the Tribunal which was at 10%, but the Tribunal has taken 30%.

ii) For all these reasons, it is his submission to modify the order and decree passed by the Tribunal as the compensation granted by the Tribunal is excessive and arbitrary.

13. Perused the order and the material, both, oral and documentary, let in by the parties.

14. A perusal of first information report and the final report filed by the Investigating Officer would show that the driver of the tractor and trailer was fetching murram load in the said tractor and trailer from Malleboinapally village to Yedira, and on the way when he reached T.B. Hospital in the limits of Appannapally village at about 19.30 hours (7.30 p.m.), the tractor started giving mechanical trouble and as such, the driver abandoned the trailer on the road by detaching it from the tractor and took the tractor to Jadcherla for repairs. Thus, the driver against whom charge sheet was filed, has

abandoned the trailer on the road negligently and failed to keep any parking lights or any stones around the trailer and did not even bother to keep the trailer on the road margin and left the trailer on the road in a dangerous position in a manner of causing obstruction to free flow of traffic.

i) When the fact-situation, thus, reflects, the submission of the learned standing counsel that PW.1 contributed to the accident is without any substance. In fact, the driver did not even keep the trailer on the road margin but abandoned the trailer at the spot where the tractor has given mechanical trouble. This apart, it is clear that the driver has not kept anything around the trailer or any signs indicating that the trailer was stationed at that spot on the road. Further, as mentioned in the final report, abandoning the trailer on the road is nothing but leaving it in a dangerous position causing obstruction to free flow of traffic.

Therefore, no negligence can be attributed to the motorcyclist. The so-called doctrine of 'loss of opportunity' cannot be applied to the fact-situation in the instant case. It is also not a case, where a moving vehicle was hit from behind so as to view that the vehicle which hit from behind has contributed to the accident. Hence, that submission is without merit and rejected.

15. Turning to the disability considered by the Tribunal at 30%, the evidence of Medical Officer examined as PW.2 shows that he was Chairman of District Medical Board for a period of four and half years i.e., from 1998 up to 12-06-2002, and under his supervision, Dr. Hymavathi, Civil Surgeon (Ophthalmology) examined PW.1 on 27-05-2002 and opined that PW.1 was partially blind due to post-traumatic optic Atrophy (left) eye and assessed the disability as 30%, and the disability has been permanent in nature and as a Chairman of the Medical Board, he has issued Ex.A-13, and because of the disability, PW.1 cannot do work, like tailoring as it involves seeing of minute things and he has even identified the signature of Dr. Hymavathi in Ex.A-13. When he was suggested by the learned standing counsel, he denied the suggestion that the disability of 30% given by the Board was excessive and that the disability would be only 10%.

i) Turning to the submission of the learned standing counsel above referred to, in the presence of categorical assertions made by PW.2 being very vague, as nothing useful to prove the stand of the Insurance Company was elicited, the disability taken by the Tribunal at 30% cannot at all be faulted.

16. Now, what remains is, the monthly earnings of PW.1 fixed by the Tribunal at Rs.4,000/-. The Tribunal has made an observation that even a labourer was earning Rs.3,000/- per month and PW.1

being a professional would be earning Rs.4,000/- per month by guess work, taken the income at Rs.4,000/-. PW.3's evidence would show that PW.1 was working under him. Thus, the profession of PW.1 cannot be doubted. Though, there is no tangible evidence to show that PW.1 was earning Rs.4,000/- per month, but PW.1 being a skilled worker cannot be equated to that of a labourer. In such an event, the monthly earnings at Rs.4,000/- fixed by the Tribunal cannot also be faulted though, it is based on hypothetical guess work.

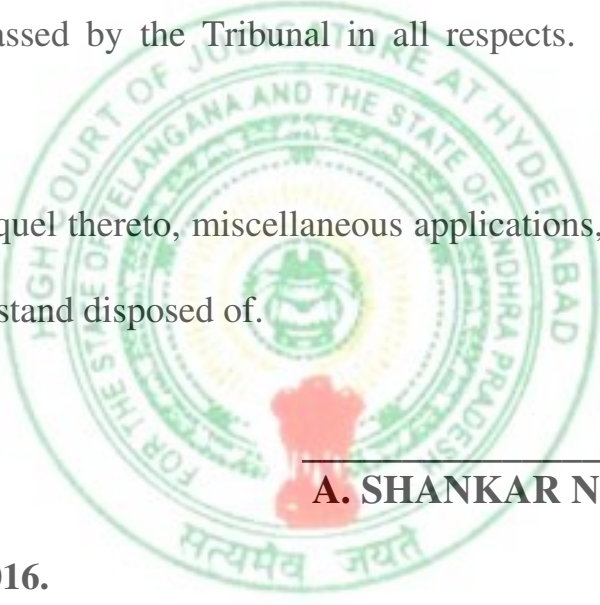
17. Even otherwise, what was granted by the Tribunal when seen was, only the loss of future earning capacity. In the ultimate analysis, it has to be remembered that PW.1 lost vision of his left eye with which he has to suffer throughout life. Further, the Tribunal has not granted any amounts under the relevant heads of 'special damages' that being towards pain and suffering no amount is granted; towards extra nourishment, no amount is granted; towards transport charges, medical expenses and attendant charges, no amounts at all were awarded by the Tribunal. Basing on mere circumstance that the petitioner originally laid claim for Rs.1,00,000/- only, and got amended the claim enhancing it to Rs.3,00,000/- is no ground to deprive the petitioner of the amount to which he is legitimately entitled when on determination the amount arrived at by the Tribunal is just and fair as mandated by the provisions of Section 166 of the

Act. Hence, there is absolutely no merit in the present appeal, consequently, the same is dismissed.

18. The interest granted by the Tribunal was at 7.5% per annum. Even, the same cannot be construed as excessive in view of the decision of the Hon'ble Supreme Court in **Rajesh and others v. Rajbir Singh and others**³.

19. In the result, the appeal is dismissed, confirming the order and decree passed by the Tribunal in all respects. No order as to costs.

As a sequel thereto, miscellaneous applications, if any, pending in the appeal, stand disposed of.



A. SHANKAR NARAYANA, J

August 16, 2016.
Mgr

³. 2013 ACJ 1403