

HON'BLE SRI JUSTICE A. SHANKAR NARAYANA

M.A.C.M.A. No.1373 OF 2009

JUDGMENT:

Respondent No.3 - M/s. New India Assurance Company Limited, represented by its Divisional Manager, Kakinada in M.V.O.P. No.649 of 2004 on the file of the Chairman, Motor Accidents Claims Tribunal - cum - III Additional District Judge, Kakinada (for short 'the Tribunal'), is the present appellant.

2. Aggrieved over the order and decree, dated 29-03-2007, in the said MVOP, whereby and where-under a sum of Rs.69,000/- was granted to the petitioner as compensation for the injuries he sustained in a road accident that occurred due to collision of two lorries by fastening liability on respondent Nos.1 to 3 i.e., driver, owner and insurer, the instant appeal is preferred by respondent No.3 - insurer under Section 173 of the Motor Vehicles Act, 1988 (for short 'the Act') on the ground that the Tribunal did not properly appreciate the evidence on record, more particularly, Ex.A-1, and went wrong in fastening liability only on respondent Nos.1 to 3 exonerating respondent Nos.4 and 5, who are driver-cum-owner and insurer of the other lorry, though, did contribute to the accident.

3. Respondent Nos.2, 3 and the appellant herein, who are driver, owner and insurer of lorry bearing registration No.AP 36V 3410, respectively, are respondent Nos.1 to 3, respectively, while respondent No.1 is the petitioner and respondent Nos.4 and 5, who are driver-cum-owner and insurer of another lorry bearing registration No.AEL 789, respectively, are respondent Nos.4 and 5, respectively, in the MVOP before the Tribunal.

4. For the sake of convenience, the parties are hereinafter referred to as they were arrayed in the MVOP.

5. The facts would show that the petitioner was working as a cleaner on the lorry bearing registration No.AEL 789 owned by respondent No.4, insured with respondent No.5.

i) On the intervening night of 27/28-08-2003, the petitioner and respondent No.4 started from Kakinada with sugar load to West Bengal and when they reached near Allupeta Junction at about 1.00 a.m. i.e., early hours of 28-08-2003, respondent No.4 stopped the lorry on road margin without switching of the engine and went to attend calls of nature and while the petitioner was sitting in the cabin, a lorry bearing registration No.AP 36V 3410 coming in opposite direction

driven by respondent No.1 in a rash and negligent manner hit the lorry in which the petitioner was sitting, due to which, both the lorries were damaged and he sustained grievous injuries.

ii) The petitioner was treated in K.G. Hospital at Visakhapatnam, and even in Government General Hospital, Kakinada and, therefore, he laid the claim seeking Rs.1,50,000/- under Section 166 of the Act read with Rule 455 of the Andhra Pradesh Motor Vehicles Rules, 1989, as compensation against respondent Nos.1 to 5, amongst whom, respondent Nos.1 to 3 are concerned with lorry bearing No.AP 36V 3410, whereas respondent Nos.4 and 5, who are the driver-cum-owner and insurer, are concerned with lorry bearing registration No.AEL 789.

5. Respondent Nos.1 and 2 remained *ex parte* before the Tribunal. Respondent No.4, though, made his appearance, did not choose to file counter.

6. Respondent No.3 strongly opposed the claim by filing a detailed counter, mainly contending that due to gross negligence on respondent No.4, driver-cum-owner of the lorry bearing registration No.AEL 789, the accident had taken place and, therefore, sought to dismiss the claim petition against it.

i) Subsequently, an additional counter was filed by it stating therein that in fact, respondent No.4, allowed the petitioner to drive the lorry at the relevant time who did not possess a valid driving license, and on account of that negligence, the accident had taken place. When the police concerned, filed charge sheet, offences were clutched against respondent Nos.1 and 4 and also the petitioner for the offence under Section 338 IPC, besides levelling offences punishable under Sections 180 and 181 of the Act with reference to the petitioner's driving license as he did not possess driving license.

7. Respondent No.5 also filed counter opposing the claim, mostly supporting the case of the petitioner.

8. Basing on the said pleadings, the Tribunal has framed three issues.

9. During inquiry, the petitioner examined himself as PW.1 and the doctor, who treated him, as PW.2 and marked Exs.A-1 to A-5 and Ex.X-1. On behalf of the respondents, no oral evidence was let in either by respondent No.3 or by respondent No.5, but marked Exs.B-1 to B-4, which are attested copies of Motor Vehicles Inspector's report and charge sheet; and policies issued by respondent Nos.3 and 5, respectively.

10. The Tribunal on appreciation of evidence on issue No.1, mainly observing that result of the criminal case was not forthcoming as no document was filed by respondent No.3 though, charge sheet was filed against three persons, somehow, expressed the view that the accident was the result of rash and negligent driving of respondent No.1 alone despite referring that the petitioner was also clutched for the offences mentioned in the charge sheet. Of course, the findings on issue Nos.2 and 3 are unnecessary to refer to, in view of the main ground urged in the present appeal. The liability that was fastened on respondent No.3 is, now under challenge in the instant appeal, mainly on the ground that the Tribunal, somehow, failed to see that in case of two vehicles involved in the accident and even assuming that the petitioner as a cleaner, owner-cum-employer and his insurer are also liable to the extent of the Workmen Compensation limits.

i) It is stated that the Tribunal, somehow, overlooked the fact that the petitioner was also charge sheeted by the police, and for his default, he cannot blame the appellant or his insured. Thus, the appellant herein complained that the Tribunal went wrong in fixing the entire liability on the appellant and its insured and, therefore, sought to allow the appeal.

11. Heard Sri Kota Subba Rao, learned standing counsel for the appellant herein. No representation for respondent No.1. Though, service of notice was completed on respondent Nos.3 to 5, none appears for them. It appears that respondent No.2 is not a necessary party as recorded in the cause title of the grounds of memorandum of appeal.

12. The submission of the learned counsel for the appellant is, that when the petitioner also was charge sheeted not only for the offence punishable under Section 338 IPC, but also for contravention which is omission to hold a valid driving license while actually driving the vehicle at the time when the accident had taken place as established through the contents of charge sheet marked as Ex.B-2 on behalf of the respondents, the Tribunal was not right in mulcting liability on the Insurance Company - Respondent No.3 alone with its insured leaving the other vehicle, which, the petitioner was actually driving, besides the regular driver of the lorry also being clutched for the offence punishable under Section 338 IPC.

13. Perused the order and the material on record, both, oral and documentary.

14. The reasons assigned in arriving at the finding on issue No.1 by the Tribunal read thus:

“.... So, by looking into the evidence of P.W.1 and also from the contents of Ex.B2 it is understood that at the time of accident the petitioner was said to be driving the vehicle, but still the contents of the charge sheet show that it was R3 alone was responsible for the accident. There is no such evidence coming forth either from the side of the petitioner or from the side of R3 to show what was the result of the criminal case filed against the petitioner herein, R1 and also against R4. So, without there being any evidence as to the result of the criminal case filed against these three persons, from the documents available on record and from the evidence of P.W.1 it could only be understood that the accident was the result of rash and negligent way of driving on the part of R1 alone. Even though it is alleged that the petitioner was driving the vehicle AEL 789 without having valid driving licence, still R1 was shown to be responsible for the accident. So, the 1st issue is answered with the finding that the accident was the result of alleged rash and negligent way of driving on the part of the driver of the lorry AP36V 3410 i.e., 1st Respondent herein.”

15. In the present context, the contents in paragraph No.2 of the charge sheet - Ex.B-2 since are of vital significance, the same are extracted which read thus:

“ On 27/28-8-2003 night A.3 drove the lorry AEL 789 from Visakhapatnam to Srikakulam side on NH.5 road and mistakenly took a turn at Rajapulova towards Vizianagaram side as the road widening works are in progress. After proceeding some distances, A.3 recognised that he was driving the lorry towards Vizianagaram instead of Srikakulam. A.3 stopped the lorry and asked A.2 (the cleaner and unlicensed man) to drive back towards Rajapulova junction while A.2 was driving

the lorry AEL 789 towards Rajapulova junction to go to Srikakulam and on reaching near Allupeta road junction, A.1 who also mistakenly took a turn towards Vizianagaram, drove the lorry AP.36 V 3410 rashly and negligently by coming to his right side and dashed against the lorry AEL 789 which was going in the opposite direction. The right side front portion of both the lorries got badly damaged. A.1 and A.2 who were driving both the vehicles received grievous injuries.”

16. It is, no doubt true, that the investigating officer, who conducted investigation, was not examined. But, certainly, when no objection was raised by the petitioner at the time of marking the charge sheet as Ex.B-2 on consent, it cannot be said that the contents therein cannot be looked into and accepted. A careful perusal of the fact-situation narrated in Ex.B-2 would reflect that the petitioner deliberately designed the story, that the regular driver alighted the vehicle on the road margin to attend calls of nature, and that he was sitting in the cabin and at that juncture, the other lorry came in opposite direction driven by respondent No.1 in a rash and negligent manner and hit his lorry, only with a view to see that the regular driver of that vehicle would get acquittal in the criminal case and insurer would get exemption from payment of compensation. When the investigation clearly reveals that the regular driver having noticed that he was driving the lorry in opposite direction i.e., towards Vizianagaram instead of Srikakulam, stopped it and then entrusted the

driving seat to accused No.2, who is no other than the petitioner in the instant case, and he started driving back towards Rajapulova junction, at which time, the accident had taken place. Strangely, the Tribunal overlooked this fact despite Ex.B-2 being marked and assigned certain reasons, which are not convincing and not in accordance with the evidentiary rule. Therefore, that finding recorded by the Tribunal holding that only due to rash and negligent driving of the driver of the lorry bearing registration No.AP 36V 3410, the accident had occurred, that too, on the mere ground that respondent No.3 has not filed a copy of judgment in calendar case to know the result of the case. Thus, that finding appears to be in deviation of appreciation of evidence and, therefore, the same is set aside.

17. Further question that follows is, whether liability can be fastened on the owner of lorry bearing registration No.AEL 789 and its insurer i.e., respondent Nos.4 and 5? In view of the aforesaid discussion, certainly, it has to be construed that there was direct collision, as could be gathered from Ex.B-2 and, therefore, certainly, the liability of respondent Nos.4 and 5 in the original petition cannot be exempted.

18. It is, no doubt, true a question arises, in such circumstances, whether the petitioner can be awarded

compensation? But, in view of the argument advanced by the learned counsel for the appellant that it is confined to the extent of fastening liability only on the Insurance Company, insured and the driver of the lorry bearing registration No.AP 36V 3410. The appeal is limited to that extent in examining the said aspect alone, and in view of the aforesaid reasoning, certainly, the driver, owner and insurer of the lorry bearing registration No.AP 36V 3410 are also liable to pay compensation to the extent of 50% as the driver-cum-owner of the lorry No.AEL 789 had contributed to the accident to the extent of 50% as it is a direct collision, but not as sought to be projected by the petitioner in his claim petition. Accordingly, the order and decree are liable to be modified.

19. In the result, the appeal is allowed in part, and the order and decree, dated 29-08-2007, in M.V.O.P. No.649 of 2004, passed by the Tribunal are modified directing the appellant - respondent No.3 in MVOP to make 50% of the compensation awarded by the Tribunal and respondent Nos.4 and 5 are directed to pay other 50% of the compensation awarded by the Tribunal including the interest and costs proportionately as ordered by the Tribunal. 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

August 02, 2016.

Mgr