

209.

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

FAO No.5460 of 2012 (O&M)

Date of decision:05.04.2016

Anu Bhanvara

... Appellant

versus

Sohan Lal and others

.... Respondents

II. FAO No.5461 of 2012 (O&M)

Rohit Kumar

... Appellant

versus

Sohan Lal and others

.... Respondents

CORAM: HON'BLE MR. JUSTICE K. KANNAN

Present: Mr.Vikram Bali, Advocate,
for the appellant.

Mr. Deepak Sharma, Advocate,
for respondents 1 and 2.

Mr. Punit Jain, Advocate,
for Mr. M.B. Jain, Advocate,
for respondent No.3.

1. Whether reporters of local papers may be allowed to see the judgment ? No.
2. To be referred to the reporters or not ? No.
3. Whether the judgment should be reported in the digest ?No.

K.Kannan, J. (Oral)

1. Both the appeals relate to an accident that took place on 21.03.2010. The accident resulted in amputation of wrist of the boy aged 15 years which is the subject matter of appeal in FAO No.5460

of 2012. The privation of the wrist which was assessed as resulting in 55% disability. The applicant in FAO No.5461 of 2012 was Rohit, boy aged 18 years, studying in school who suffered amputation of a hand below elbow that was assessed as resulting in 70% disability. The doctor was examined in both the cases to speak about the extent of disability that has been caused.

2. The petitions were, however, dismissed on a finding that in the FIR registered by the uncle of the claimant in FAO No.5460 of 2012 was also incidentally father of the claimant in FAO No.5461 of 2012 that when they were travelling in the first respondent's jeep, a vehicle coming from the opposite direction, whose particulars are not known, was being driven in a rash and negligent manner and dashed against the vehicle in which they were travelling. The police investigation did not yield to identifying the vehicle which was coming from the opposite direction. The claimants therefore made a claim against the owner, insurer and the driver of the vehicle in which they were themselves travelling. The Tribunal held that the negligence had not been proved and, therefore, the claim could not be entertained. As far as the claimant in FAO No.5461 of 2012, there was an additional reasoning adopted by the Tribunal that in the MLR, it had been recorded that he was travelling in a car and even the identity of the vehicle in which he was stated to be travelling had not been established.

3. The accident to my mind is a typical situation of a *res ipsa loquitur* where the scope of proving negligence is literally minimum. No person travels in a vehicle to get killed or suffer serious deprivation. If two vehicles are involved in a collision or any passenger in a vehicle is hurt, I would understand this to be a result of composite negligence of two drivers. If the initial statement before the police was that yet another vehicle was responsible for the accident, I will tone it down to mean that yet another vehicle is predominantly responsible. In no case of collision, one could rule out the responsibility of a driver whose passengers were hurt. It will be a contradiction in terms to suggest that a careful driving resulted in injuries to his passengers. The accident was explained by the owner of the vehicle as resulting in a situation when the goods which the vehicle had carried had been dropped off and it was a festival time when several persons had brought themselves on the jeep who were but gratuitous passengers. The two persons who were injured were literally hanging out with their hands protruding and that it was only the vehicle coming from the opposite direction which was responsible and no part of negligence was even recorded in the FIR. According to him, the dismissal of the petition was, therefore, justified.

4. I reject the argument of the counsel for the respondents for the only reason that the driver had been irresponsible by

allowing for persons to hang out of the vehicle. The driver of a vehicle must at all times conduct himself in such a way that no passenger exposes himself to any serious risk without being appropriately offloaded from the vehicle or strict instructions from the driver to keep their arms inside so that no untoward incident took place. If the driver had not exercised that caution that ultimately resulted in serious injuries to two young persons who have lost a portion of their arms, the driver of the vehicle must be seen to be responsible and make the owner vicariously responsible therefor. I, therefore, set aside the finding of the court below and hold that it was a case of composite negligence and the claim could not have been dismissed.

5. As far as the claimants are concerned, they were entitled to proceed against anyone of the tort-feasors and the respective claims ought to have been allowed for a proper assessment of damages. The Insurance Company was rightfully exonerated, for, the vehicle was insured as a goods vehicle and the injuries that had been caused to the passengers were not required to be covered except in situation provided under Section 147 of the Motor Vehicles Act itself. Such entitlement to proceed against the insurer will arise only for an owner travelling along with goods or a driver or conductor who were not to be gratuitous passenger or a person travelling for hire.

6. In the manner of assessment, the Tribunal has provided for ₹5,26,800/- although it was dismissing the claim which has included ₹3,76,000/- as the cost of artificial limb that may have to be purchased for making his hand reasonably functional. It has provided for ₹1 lakh towards prospect of marriage. Apart from the assessment relating to the cost of artificial limb, the other heads of claims have not been properly addressed. An assessment of ₹1 lakh for loss of prospect of marriage seems unusual. I will rework of the compensation and tabulate the various heads as follows:-

Date of accident: 21.03.2010			
Age: 15			
Period of hospitalization:			
Occupation & income :			
	Heads of Claim	Tribunal	High Court
Sr. No.		Amount ₹	Amount ₹
1.	Loss of income from to		
2.	Medical expenses:		
i)	Medicines		5,000
ii)	Hospital charges		
iii)	Attendant charges		2,500
iv	Special diet		2,500
v	Transportation		2,000
3.	Pain & suffering		50,000
4.	Disability (55%) & compensation	50,000	55,000
5.	Income as assessed by the Tribunal (a)		15,000
6.	% loss of earning capacity (b)		8,250
7.	Multiplier (c)		15
8.	Loss of earning capacity (axbxc)		1,23,750
9.	Reduction in life expectancy		
10.	Loss of prospect of marriage	1,00,000	25,000
11.	Medical expenses	3,76,000	3,76,000
	Total	5,26,800	6,41,750

There shall be compensation of ₹6,41,750/- and the right of

enforcement shall be available for the claimant/appellant against the owner and driver in which they were travelling.

7. As regards the claim in FAO No.5461 of 2012, he was a person aged 18 years and his arm below elbow was amputated. The mode of assessment at ₹5,78,800/- is faulty except for the cost of artificial limb provided by the Tribunal. I will rework the compensation on legally acceptable parameters and tabulate the various heads of claims as under:-

Date of accident: 21.03.2010			
Age: 18			
Period of hospitalization:			
Occupation & income :			
	Heads of Claim	Tribunal	High Court
Sr. No.		Amount ₹	Amount ₹
1.	Loss of income from to		
2.	Medical expenses:		
i)	Medicines		5,000
ii)	Hospital charges		
iii)	Attendant charges		2,500
iv	Special diet		2,500
v	Transportation		2,000
3.	Pain & suffering		50,000
4.	Disability (70%) & compensation	50,000	70,000
5.	Income as assessed by the Tribunal (a)	54,000	15,000
6.	% loss of earning capacity (b)		10,500
7.	Multiplier (c)		18
8.	Loss of earning capacity (axbxc)		1,89,000
9.	Reduction in life expectancy		
10.	Loss of prospect of marriage		25,000
11.	Artificial limb	3,90,000	3,90,000
	Total	5,78,800	7,36,000

The total compensation shall be ₹7,36,000/- payable against the owner and driver. I have reduced the assessment already made but

since the petition ultimately resulted in dismissal, I have reworked the compensation taking into account the decision of the Supreme Court in **Jai Parkash Versus M/s National Insurance Company and others-2010(2) SCC 607** to consider the loss of earning capacity on the basis of his disability by taking the income notionally at ₹15,000/- against ₹54,000/- as taken by the Tribunal. I have increased the component of pain and suffering and the loss of amenities for life to depend on the percentage of disability and I have provided with the entire amount as suggested by the doctor for the cost of an artificial limb.

8. The amounts determined in both the cases will also attract interest at 9% from the date of petition till date of payment. The counsel says that the Insurance Company shall be made to pay and recover from the owner and the driver. The counsel refers me to the decision in **M/s National Insurance Company Limited Versus Baljit Kaur and others-2004(2) SCC 1** to allow for recovery in such a manner. What is possible by the Supreme Court to do under its jurisdiction under Article 142 cannot be invoked by any other court. The principle of pay and recover would be available only in a situation where the Insurance Company is liable in the first place under the terms of policy but if it is able to establish violation of terms of policy which is anyone of the grounds which is available under Section 149. By operation of the proviso to clause 4 of

Section 149 and clause 5 of Section 149, the Insurance Company could be made to make the payment and recover the same. This was the principle established by the interpretation of Section 149(4)(5) in *New India Assurance Company Versus Kamla-(2001) 4 SCC 342* and affirmed in *National Insurance Company Limited Versus Swaran Singh- (2004) 3 SCC 297* and in several other cases that followed the same. There has been no reference to the provisions of Section 149 of Motor Vehicles Act and the principle of pay and recover of what the Supreme Court was prepared to extend whether the Insurance Company had already been made liable cannot be applied mindlessly without making reference to the statutory provisions. The argument advanced by the appellant is therefore misplaced and I am afraid I am not able to apply the decision stated before me. In this case, it is not an issue of violation of terms of policy. It was an issue of whether the policy of insurance could be extended to persons who did not qualify as persons entitled to claim under Section 147 for whom the insurance was compulsory. The passenger in a goods vehicle is not required to be covered for risk under Section 147 of the Motor Vehicles Act. There is no attempt at any point of time that it was a policy cover for the passengers in a goods vehicle. The principle of pay and recover cannot be done otherwise than through the resort to the provisions of Section 149(4)(5) of Motor Vehicles Act and if such provisions cannot be invoked,

then the question of making the insurer payable in the first place does not also arise. The appeals against the insurer are dismissed.

9. Both the appeals are allowed to the above extent with right of enforcement available only against the driver and owner of the jeep in which the claimants were travelling.

(K.KANNAN)
JUDGE

05.04.2016
sanjeev