HON'BLE SRI JUSTICE GUDISEVA SHYAM PRASAD

M.A.C.M.A. No.538 of 2011

JUDGMENT:

This appeal is arising out of the Award and Decree dated 17.03.2009 passed in MVOP.No.99 of 2007 by the Chairman, Motor Vehicle Accident Claims Tribunal-cum-II Additional District Judge, Kurnool at Adoni (for short, the Tribunal), awarding compensation of Rs.1,49,804/- as against the claim of Rs.3,00,000/-.

2. Aggrieved by the impugned order, the appellant, who is the claimant, has preferred this appeal for enhancement of compensation.

3. The brief facts of the case are that on 17.06.2007, while the appellant was travelling as a pillion rider on a motorcycle belonging to his friend Boya Gajjela Pedda Naganna, at about 4.45 pm., when they reached near Gollaladoddi Anjaneya Swami Temple, an auto rickshaw trolley bearing No.AP21X 8333 driven in a rash and negligent manner at a high speed dashed their motorcycle on their rear side. In the said accident, the appellant was thrown on the road and received grievous injuries to his right leg knee and other parts of the body. The rider of the motorcycle Naganna and one Marenna who were travelling in the auto rickshaw trolley shifted the appellant to Government Hospital, Yemmiganur for treatment. A case in Crime No.40/2007 under Section 378 IPC was registered against the driver of the auto rickshaw trolley. According to the appellant, the accident occurred due to the rash and negligent driving of the driver of the auto rickshaw trolley, and therefore, he

claimed complenstaion of Rs.3 lakhs against respondent No.1, the owner and respondent No.2, the insurer of the auto rickshaw trolley.

4. Respondent No.1 remained *ex parte*, and respondent No.2 filed counter before the Tribunal stating that auto rickshaw trolley was not involved in the accident and the rider of the motorcycle was not holding a valid driving licence. It is alleged that when the vehicle skid on the road, the appellant fell down and received injuries, and in order to claim the compensation, he attributed negligence to the driver of the auto rickshaw trolley. It is also denied the age, avocation, income and the nature of injuries sustained by the appellant in the accident.

5. Permission under Section 170 of the Motor Vehicles Act, 1988 (for short, the Act) has been obtained by the insurer from the Tribunal. The Tribunal, on consideration of the evidence of witnesses P.Ws.1 to 3, and the documents Exs.A.1 to A.9, and examining respondent Nos.1 and 2, and marking Exs.B.1 on behalf of the respondents, has held issue No.1 that the accident occurred due to the rash and negligent driving of the driver of the auto rickshaw trolley of respondent No.1. It further held that the claimant is entitled for compensation of Rs.1,49,804/- against respondent No.1 and exonerated the liability of respondent No.2.

6. Aggrieved by the orders passed by the Tribunal, this appeal has been preferred by the claimant challenging the exoneration of

the liability of respondent No.2 and also sought for enhancement of compensation.

7. Heard the arguments of learned counsel for the appellant Sri Butta Vijaya Bhaskar and learned counsel for respondent No.2 Sri T.Mahender Rao.

8. This is a case of accident occurred out of use of a motorcycle in a public place. The Tribunal held that the driver of the auto rickshaw trolley had driven it in a rash and negligent manner and was responsible for the accident. However, the Tribunal has exonerated the liability of respondent No.2, the insurer, on the ground that the driver of auto rickshaw trolley was possessing a driving licence to drive non-transport light motor vehicles, whereas Ex.B.1 insurance policy shows that the vehicle insured was a commercial vehicle. On this ground, the Tribunal came to the conclusion that there is violation of terms and conditions of insurance policy, as the driver of the crime vehicle was not possessing the licence to drive the commercial vehicle. In the light of the decision reported in **S.Iyyapan v. United India Insurance Co. Ltd.[1],** a person who possessed a driving licence to drive non-transport light motor vehicle and drives a transport vehicle, the insurance company cannot evade its liability on the said breach of condition. The Hon'ble Supreme Court in **United India Insurance v. Lehru[2], National Insurance v. Ramkali[3]** and

[1] (2013) 7 SCC 62
[2] AIR 2003 SC 1992
[3] (2004) 1 SCC 565

National Insurance v. Savitri Devi[4]**,** held that the insurance company cannot escape its liability to third parties. It may however in such cases recover the compensation paid by it from the insured.

9. Learned counsel for the appellant submitted that the compensation awarded by the Tribunal is inadequate and the Tribunal has not considered to award compensation under other heads like loss of past and future earnings, etc.

10. The appellant has claimed Rs.1,70,000/- towards compensation for partial permanent disability. Ex.A.5 is the original disability certificate issued by the Medical Board, Kurnool. P.W.3 Dr.B.Chandranna is one of the members of the Medical Board, who issued Ex.A.5. As per the testimony of P.W.3, the appellant appeared before the Medical Board on 19.12.2007 and he was examined clinically and radiologically, and was found to have suffered an old commuted supra condylar fracture of right femur, with DCP (Dynamic Compression Plate) plate and screws in position and he got shortening about 2½" of right lower limb. The doctor certified that the injured has limitations of flexion movements of about 100 degrees and he is walking with limp and that he is not able to sit and squat properly. In this regard, the testimony of P.W.2 reveals that the patient was advised not to lift heavy weights and advised follow-up treatment, and also opined that he has post traumatic stiffness of the right knee by which he gets pain, while walking long distances. According to him, the appellant has suffered disability of 20%. On considering all these

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[4] (2004) 1 SCC 596

symptoms and suffering, he has assessed the disability at 45% of partial permanent in nature. The Tribunal, on consideration of the evidence of witnesses P.Ws.2 and 3, has arrived at the conclusion that in view of the discrepancy of the percentage of disability stated by the Medical Officers, has fixed 20% of partial permanent disability for awarding compensation.

11. I am of the considered view that P.W.2 Dr.M.Vijay Kumar Reddy has treated the injured and issued Ex.A.2 wound certificate, Ex.A.6 - discharge summary, and Ex.X.1 - case sheet. According to him, the appellant sustained injuries of commuted supra condylar fracture right femur compound III B with loss of bone fragments. In Ex.A.2, he mentioned the injuries that "lacerated injury of 8 X 3 cms bony deep situated horizontally above to the right knee joint, deformity also seen to the lower 1/3rd of the thigh".

12. From the testimony of P.W.2, it reveals that the claimant has suffered with the injury stated supra and had undergone treatment for a long period in the hospital. The Tribunal however came to the conclusion that injury was not grievous one, and awarded Rs.10,000/- for the said injury. Therefore, keeping in view the nature of injury suffered, and nature of treatment taken by the appellant, he is entitled for a compensation of Rs.25,000/- towards pain and suffering.

13. The approach of the Tribunal in considering the disability does not appear to be on a rationale basis. The appreciation of the evidence of P.W.2 and P.W.3 by the Tribunal also does not appear

to be acceptable on sound reasoning. The Medical Officer was one of the member of the medical board for assessing the disability, and according to him, the medical board has assessed the disability as 45% and issued Ex.A.5. Ignoring the same, the Tribunal has taken into consideration the certificate issued by P.W.2, who was not a member of the medical board, and who assessed the disability at 20% as against the assessment of disability made by a member of the medical board at 45%. Therefore, Ex.A.5 is proved by cogent evidence of P.W.3 with regard to the disability at 45% suffered by the injured. Therefore, the disability at 45% has to be taken into consideration instead of disability at 20% taken into consideration by the Tribunal.

14. The Tribunal has taken the annual income of the appellant as Rs.27,000/-, and applied applying the multiplier of 16 for his age of 35 years, and taken into consideration 25% of partial permanent disability and assessed the loss of earnings at Rs.86,400/-. In the light of the evidence of P.W.3, the disability of 45% is to be taken into consideration and not 20%. On calculation, the appellant is entitled for compensation of Rs.1,94,400/-. Therefore, the amount of Rs.86,400/- awarded by the Tribunal towards partial permanent disability is enhanced to Rs.1,94,400/-.

15. The appellant claimed an amount of Rs.80,000/- towards medical expenditures. The Tribunal, on consideration of the evidence of P.W.2, has taken the bills Exs.A.7 and A.8 as genuine bills, and awarded Rs.50,404/-. Therefore, I do not see any valid ground to interfere with the finding of the Tribunal in this regard.

16. The petitioner has claimed Rs.10,000/- towards expenditure for transport, but the Tribunal has awarded only Rs.3,000/- which appears to be on lower side. Therefore, an amount of Rs.10,000/- is awarded towards expenditure for transport.

17. The petitioner has claimed an amount of Rs.20,000/- towards future medical expenditure, and the Tribunal has rejected the claim without considering the nature of injuries suffered by him. In fact, having undergone such a severe injury and disability of 45%, the appellant is entitled for award of future medical expenditure of Rs.20,000/-. In view of foregoing reasons, the compensation awarded by the Tribunal is modified as shown in the following tabular format.

Sl.No.	Name of Head	Compensation Awarded by Tribunal	Compensation Awarded by this Court
01.	Pain and suffering	Rs.10,000/-	Rs.25,000/-
02.	Expenditure on medicine	Rs.50,404/-	Rs.50,404/-
03.	Transport and attendant charges	Rs.3,000/-	Rs.10,000/-
04.	Partial permanent disability	Rs.86,400/-	Rs.1,94,400/-
05.	Future medical expenditure	--	Rs.20,000/-
	TOTAL	**Rs.1,49,804/-**	**Rs.2,99,804/-**

18. Keeping in view the ration in the case of **Oriental Insurance Co. Ltd. v. Nanjappan[5],** the insurer is directed to pay at the first instance and recover the same from the owner of the vehicle. On consideration of the arguments, and the evidence, this Court is of

[5] AIR 2004 SC 1630

the considered view that this is a fit case where pay and recovery can be ordered by enhancing the compensation awarded by the Tribunal.

19. In the result, the appeal is partly allowed modifying the award passed by the Tribunal enhancing the compensation from Rs.1,49,804/- to Rs.2,99,804/- with interest @ 7.5% per annum from the date of petition till realisation. The award of the Tribunal, insofar as exonerating the liability of the insurer, respondent No.2, is set aside, directing respondent No.2 to pay the compensation amount at the first instance and recover the same from the owner of the vehicle, respondent No.1, by following the guidelines in the case of **Nanjappan** (5 supra). Respondent No.2 is directed to deposit the amount within two months from the date of receipt of a copy of this order. On such deposit, the appellant is permitted to withdraw the entire amount. Miscellaneous petitions pending, if any, shall stand closed. No order as to costs.

GUDISEVA SHYAM PRASAD, J.

Date: 14.07.2017
TJMR