

HONOURABLE SRI JUSTICE N. BALAYOGI

M.A.C.M.A. No. 95 of 2008

JUDGMENT:

1. The appellant/National Insurance Company Limited aggrieved by the Award and decree dated 08.03.2007 in OP.No.267 of 2004 on the file of learned Chairman, Motor Vehicle Accident Claims Tribunal-cum- V Additional District Judge, FTC, Ananthapur preferred this appeal mainly contending that the accident occurred on account of composite negligence of drivers of both the auto and lorry; that the claim petition is bad for non joinder of proper and necessary parties as the owner and insurer of the auto were not added as parties to the claim petition and that the driver of the offending lorry was not having valid and effective driving licence as on the date of the accident as per the evidence of RW.2 and Ex.B.2 and hence there is violation of the terms and conditions of the policy, as such, the appellant/Insurance company is not liable to pay compensation.

2. It is contended that the Tribunal erred in assessing the monthly income of the deceased and adopting the multiplier '15'. It is further contended that the order 'pay and recovery' is bad under law and that in view of the evidence of P.W.2 the doctor who treated the deceased immediately after the accident, the Tribunal ought not to have relied on the evidence of P.W.3.

3. The claim of the first respondent/claimant in brief is as follows: On 09.11.2003 while the first respondent/claimant and his son returning to home in auto and when the said auto reached GLV Petrol bunk, Vijayanagara colony, Bangalore-Ananthapur road, due to rash and negligent driving of the lorry bearing No.AP 02 T.9135 by its driver, came in opposite direction in rash and negligent manner and dashed the auto. In the said accident, the first respondent/claimant sustained injuries and lost consciousness. He was shifted to Government Hospital, Ananthapur for treatment whereat he was inpatient for one month and spent Rs.10,000/- towards medical expenses. He became permanent disabled.

4. Before the Tribunal, the second respondent-owner of the offending lorry remained *ex parte*. The appellant/Insurance Company filed the counter contesting the claim petition and contended that the first respondent/claimant did not suffer any permanent disability and he sustained only an injury to his right elbow as he protruded his hand out of auto negligently.

5. Upon considering the rival contentions, the Tribunal framed the following issues for settlement:

1. Whether the accident occurred on 09,11,2003 due to rash and negligent driving of the lorry bearing No.AP.02T.9135 by its driver came in opposite direction and dashed the auto and caused the injuries to the petitioner ?

2. Whether the petitioner is entitled to compensation, if so to what amount and from which respondent ?
3. Whether the driver of the crime vehicle had valid driving licence, fitness certificate, RC and permit at the time of accident or not ?
4. To what relief ?

6. In order to prove the claim, on behalf of the first respondent/claimant, PWs.1 to 3 were examined and Exs. A.1 to A.6 and Exs.X.1 and X.2 were got marked. On behalf of the appellant/Insurance Company, RWs.1 and 2 were examined and Exs. B.1 and B.2 were got marked.

7. The Tribunal having considered the rival contentions and evidence on record, held that the accident occurred due to the rash and negligent driving of the driver of the offending lorry bearing No. AP.02T.9135. On assessing the compensation, the Tribunal awarded Rs.1,04,000/- directing the appellant/Insurance Company and second respondent-owner of the offending lorry to pay the same jointly and severally within 30 days from the date of order, with interest at 7.5% per annum from the date of petition till realization.

8. Now the point that arises for determination is *whether the accident was due to the contributory negligence on the part of the drivers of the auto and lorry?*

9. Learned Counsel for the appellant/Insurance Company contends that the accident occurred due to the composite negligence of both the drivers of auto and lorry; whereas learned counsel for the first respondent contends that the accident occurred purely on account of negligence of the driver of the lorry bearing No. AP.02T.9135.

10. The first respondent/claimant was examined himself as PW.1. His clinching evidence is that on 9.11.2003 while he along with his son A.Nagarjuna returning to home in an auto, at about 3.00 PM when the auto reached GLV Petrol Bunk, Vijaya Nagar colony on Bangalore-Ananthapur road, the lorry bearing No. AP.02T.9135 having driven in rash and negligent manner, at high speed, came in opposite direction and lost control and dashed the said auto on its right side. To substantiate rash and negligence, he filed Ex.A.1 Certified copy of FIR, Ex. A.3 Certified copy of charge sheet and Ex.A.6 certified copy of judgment in CC.No.52 of 2004. Ex.A.1 is the earliest report presented on 09.11.2003 at about 7.30 PM immediately after the accident where in there is a clear assertion that while on the way to home in the auto, the lorry bearing No. AP.02T.9135 came in opposite direction in rash and negligent manner at high speed and dashed the auto in which they were travelling. The Investigating Officer, after thorough investigation filed charge sheet Ex.A.3 against the driver of the lorry bearing No. AP.02T9135 finding that on 09.11.2003 while P.W.1 along with his son travelling in the auto

and when the said auto reached GLV Petrol bunk, Vijayanagar Colony, Ananthapur-Bangalore road, the lorry bearing No. AP 02T.9135 came in opposite direction in rash and negligent manner at high speed and dashed the auto on its right side.

11. The evidence of P.W.1 supported by Exs. A.1 and 3 well established that the driver of the lorry bearing No. AP.02T.9135 drove it in rash and negligent manner and at high speed, came in opposite direction and dashed the auto at 11.30 AM on 09.11.2003. The said accident was due to rash and negligence on the part of the said lorry driver.

12. When the claimant proved rash and negligence on the part of the crime lorry, the burden shifts to the appellant/Insurance Company (second respondent in OP) to prove that the accident was due to composite negligence of drivers of auto and lorry by producing convincing oral and documentary evidence to rebut the evidence of P.W.1 and documentary evidence at Exs. A.1 and A.3.

13. R.W.1 is the Senior Assistant in the appellant/Insurance Company. Admittedly he is not the direct witness to the accident. So any amount of evidence of R.W.1 to the effect of rash and negligence is only hear say evidence and cannot be relied on. The other witness examined was R.W.2, who was working as Assistant Regional Transport Officer at Bellary.

He is also not the eye witness to the accident. Therefore, absolutely there is no direct material witness on record produced by the appellant/Insurance Company to rebut the oral evidence of P.W.1 and documentary evidence Exs. A.1 and A.3. The relevant and material witnesses are the drivers of the auto and lorry and passengers travelled in the auto or the neighbouring people. It is not the case of the appellant that in spite of best efforts they could not secure witnesses.

14. Ex.A.6 is the certified copy of judgment in CC.No.52 of 2004 passed by the learned Additional Judicial Magistrate of First Class, Ananthapur wherein the driver of the lorry bearing No. AP.02T.9135 admitted the offence and thereby he was convicted under Section 252 Cr.P.C. and sentenced to pay a fine of Rs.800/- Since Ex.A.6 is the certified copy of the judgment, it is admissible in evidence. Accordingly the Tribunal while considering the evidence of P.W.1 supported by Exs.A.1 to A.3 and A.6 came to the right conclusion that the accident was due to the rash and negligent driving of the driver of lorry bearing No.AP.02T.9135. The said finding of the Tribunal is valid , legal and does not warrant interference.

15. Further the contention of the appellant is that the claim petition bad for non joinder of the necessary parties. In view of the clear finding that the accident was due to the rash and negligent driving of the driver of the lorry bearing No.AP.02T 9135

and in the absence of any rebuttal evidence in regard thereto, I am of the considered opinion that the owner and insurer of the auto in which the first respondent/claimant travelled, are not the proper and necessary parties and the claim can be adjudicated even in their absence.

16. Further the contention of the appellant is that the Tribunal erred in ordering 'pay and recover' and also assessing the monthly income of P.W.1 at Rs.2,000/- per month. The consistent evidence of P.W.1 is that he sustained major injury in the accident. To prove the injuries, he examined the doctor in the Government Medical College, Ananthapur as P.W.2, whose evidence is that P.W.1 admitted in the Government hospital on 9.11.2002. He sustained injury to right elbow. The case sheet maintained by the hospital is marked as Ex.X.1. Ex.X.2 is X-rays four in number. The X rays shows fracture of lower end of right humerus. He got discharged on 8.12.2002.

17. P.W.3 was the Civil Assistant Surgeon in Government Medical College. He examined P.W.1 on 23.2.2006 along with other members of the Medical Board and issued Ex.A.4 Disability certificate wherein the disability of P.W.1 was estimated at 30% permanent to the right upper limb. He further deposed that it is very difficult for P.W.1 to bend his elbow like a normal person and he cannot lift the weights. He further deposed that the

disability of 30% is for the hand and the disability to the whole body would be 13 to 15%.

18. The Tribunal considered the medical evidence of P.Ws.2 and 3 and Exs. X.1 and X.2 and Ex. A.4 that the disability suffered by the first respondent/claimant is 30% and that the disability to the whole body is 13 to 15%.

19. The evidence of P.W.1 is that he was aged 45 years. In the claim petition, his income was shown as Rs.150/- per day as coolie. The Tribunal relied on the decision in P. YASODAMMA Vs. BUCCHIREDDI (2006 ACJ 414) wherein the income of the claimant was Rs.3000/- as he was a labour. However the Tribunal taking the real fact that the petitioner belongs to Ananthapur district which is drought area and it is difficult to get coolie work throughout the year, thereby took the income of P.W.1 at Rs.2000/- per month instead of Rs.150/- per day as stated by him. The Tribunal having taken the disability at 15%, age of P.W.1 at 45 years as deposed by P.Ws 2 and 3 and stated in Exs.A3 and A.4, and by applying multiplier '15' awarded compensation of Rs.54,000/- towards loss of income. Added to it, the Tribunal awarded Rs.15,000/- towards grievous injury, Rs.10,000/- towards pain and suffering, Rs.15,000/- towards medical expenses, attendant charges including transport expenses. Thus in all the Tribunal awarded Rs.1,04,000/- and directed the second

respondent and the appellant/insurance company to pay the same jointly and severally.

20. With regard to the driver not possessing valid and effective driving licence, there is evidence of RW.2 who was working as RTO, Bellary and he confronted Ex.B.2 driving licence issued by their office. As per Ex.B.2 the driving licence for non-transport vehicle was valid up to 1.8.2005. R.W.3 produced register before the Tribunal and compared Ex.B.2 with that register. As per the record produced by RW.2, there is no renewal of heavy goods vehicle driving licence of the driver of the crime lorry. The Tribunal considered the evidence of RW.2 and Ex.B.2 and find that though the driving licence was not renewed, the appellant/Insurance Company is at liberty to recover from the second respondent by filing a execution petition on the ground that the driver of the crime lorry did not renew his driving licence within time.

21. Having considered the oral and documentary evidence produced by the first respondent/claimant and the appellant/insurance Company, I am of the considered opinion that the accident was due to the rash and negligent driving of the driver of the crime lorry bearing No. AP.02T.9135. The appellant/Insurance Company failed to adduce any evidence to prove that the accident occurred on account of composite negligence of drivers of both the vehicles i.e. auto and lorry.

Though the driver of the crime lorry did not possess valid driving licence as on the date of accident as there was no renewal of the same after 1.8.2003, in such circumstances, the Tribunal ordered 'pay and recover'. The said finding is legal, valid and do not warrant interference.

22. Accordingly the appeal fails and is dismissed with costs confirming the Award and decree dated 08.03.2007 in OP.No.267 of 2006 on the file of learned Chairman, Motor Vehicle Accident Claims Tribunal-cum- V Additional District Judge, FTC, Ananthapur.

23. The appellant/Insurance Company is directed to deposit the compensation as awarded by the Tribunal, deducting the amount already paid/deposited, within thirty days from the date of receipt of a copy of this judgment.

24. On such deposit, the first respondent/claimant is permitted to withdraw the same.

25. Miscellaneous petitions pending consideration if any in the appeal shall stand closed in consequence.

JUSTICE N. BALAYOGI

DATED 22nd December, 2017.
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