

HONOURABLE Dr. JUSTICE B.SIVA SANKARA RAO

M.A.C.M.A No.710 OF 2010

JUDGMENT:

The sole injured claimant of the accident dated 23.09.2006 while in the course of employment under the 1st respondent of the lorry bearing No.AP 16 TV 1109 insured with 2nd respondent, maintained M.V.O.P. No.315 of 2016 on the file of Motor Accidents Claims Tribunal—cum—II Additional District Judge, East Godavari District at Amalapuram (for short 'the Tribunal') under Sections 166 and 163-A of Motor Vehicles Act, 1988 (for short 'M.V Act') for a compensation of Rs.6,00,000/- against owner and insurer of said lorry bearing No.AP 16 TV 1109 and owner and insurer of opposite coming lorry bearing No.AP 16 W 9649, with averments that on 23.09.2006 while the injured claimant was proceeding as a driver of the lorry of 1st respondent, when he reached near Punjabi Hotel, Borrapalem, the lorry bearing No.AP 16 W 9649 of 3rd respondent insured with 4th respondent coming in opposite direction from Rajahmundry while proceeding towards Jaggampeta in a rash and negligent manner and dashed, as a result of which, the front portion of the lorry driven by the injured was fully damaged and he sustained multiple injuries and undergone treatment as an inpatient in G.S.L Hospital, Rajahmundry, for more than 50 days including by conducting two operations and there is a permanent disability by almost bedridden totally and became unfit to drive any vehicle and thereby, entitled to the claim of compensation.

2) It is while under contest by respondent Nos.2 and 4 from the 1st respondent and 3rd respondent remained ex parte, in the course of enquiry, he breathed the last on 09.07.2007. His wife and two minor sons—petitioners 2 to 4 came on record as his legal representatives and additional counters filed by them for the allegation of death was

happened due to injuries sustained in the accident by indicating the same for no proof. From the evidence of PWs.1 to 3 including Dr Ramesh Chandra V—PW.3 and no oral evidence adduced from the respondents, but for marking Ex.B1—policy of the vehicle of 1st respondent, Ex.B2 policy of the vehicle of 3rd respondent exhibited and from Exs.A1 to A13 including of discharge summary issued by PW.3 with a bunch of prescriptions, X-rays, case sheet, MVI report, and charge sheet, besides FIR, the Tribunal held that the injuries no way show the causative effect to death but for the claim as a death case and besides the claim against the owner and insurer, while in the course of employment, from his negligence, there is no evidence of any disability he suffered including to consider either under Schedule –II of M.V Act or Section 41 of Workmen Compensation Act (for short ‘W.C. Act’) and ultimately dismissed the claim. Impugning the same, the present appeal is maintained by the claimants.

3) Heard learned counsel for the claimants vis-à-vis learned standing counsel for insurers—respondents 2 and 4 of the two vehicles and perused the material on record.

4) The factual matrix shows that the injured claimant maintained the claim for the injuries sustained in the course of employment and during pendency of the claim petition, he breathed the lost and he could not establish much less by other claims of his death occurred so because of the direct consequences of the injuries to make a death claim, in the absence of which, the entitlement of compensation, if any, for the injuries sustained and the loss of amount incurred by the estate of the deceased.

5) The principle of '*actio personalis moritur cum persona*' has no strict application to the accidental claims is the settled law, apart from that there is a succession of estate of the deceased, who maintained the actionable claim by the legal representatives. The petitioners, including for the nature of injuries sustained by the deceased and not for mere loss of estate of the amount incurred by the estate of the deceased to compensate.

6) Having regard to the above, the amount to be assessed is for the injuries sustained, including for pain and sufferance, medical expenses, attendant and transport charges, extra nourishment etc., as claimed by party, since succeeded to continue and to get by his legal representatives in this regard. So far as the alleged negligence of the injured (herein after called as deceased) in the course of employment is concerned, his negligence is not criteria for his entitlement to the compensation under Workmen Compensation Act, the claim is confined to Section 163-A of M.V Act, though, originally made under Section 166 of M.V Act. Thus, the claim to consider is under Section 163-A of M.V.Act.

7) The evidence on record shows, from the very claim petition averments that there is a total disability and total impairment and, if any, pursue his avocation of driving almost confined to be adopted. The claim petition did not come up for enquiry during the life time of PW.1 or his wife of the injured since died. The factum of the vehicle badly damaged itself shows that there is head on collision. There is no evidence adduced by both sides among the owners or the insurers and once there is a head on collision and charge sheet shows against the third respondent driver, it can be sufficiently said that there is equal contribution, but for to say any claim under Section 163-A of M.V.Act is

also answered by this Court on 17.10.2014 in M.A.C.M.A. No.2072 of 2011 by referring to the Three Judge Bench expression of the Apex Court in **Deepal Girishbhai Soni and Ors. v. United India Insurance Co. Ltd., Baroda**¹ at page 405 para 57 in answering reference of the correctness of the earlier expression in **Oriental Insurance Co. Ltd. Vs Hansrajbhai V. Kodala**², irrespective of what is answered in **National Insurance Corporation Ltd., Vs Sinitha**³, since not referred by the Two Judge Bench, the earlier Three Judge Bench expression and from the matter is pending with the Apex Court at reference to answer the correctness of **Sinitha** (supra).

8) In view of the earlier expression of the Apex Court in **Deepal Girish Bai** (supra), it is not possible to decide and define the contribution and also in **Khenyei vs New India Assurance Company Limited**⁴ held among the joint tortfeasors, the Tribunal nothing decided irrespective of what Section 168 of M.V Act enables but for to fix liability against any of them for others to pay and to claim by filing execution petition for the contribution from the other vehicle owner and insurer, as the case may be.

9) Coming back to the facts, as to what is the entitlement by the claimants (supra), Ex.A4—discharge summaries for the treatment twice including from the evidence of PW.3—Dr.Ramesh Chandra.V that there was debridgement of lacerated wound and primary suturing done and fixation ilizanor over the right leg was done on 31.10.2006, that is covered by discharge summary on 24.11.2006 of the accidental injuries

¹ [(2004) 5 SCC 385 : AIR 2004 SC 2107]

² 2001 (5) SCC 175

³ (2012) 2 SCC 356

⁴ 2015 (9) SCC 273

dated 23.09.2006, which shows that the deceased was inpatient for two months therefrom.

10) The claim petition averments itself show two operations conducted and there is an advice for two more operations to be conducted. No doubt, the same were not done in his life time. By the second Discharge summary dated 03.02.2007, he was able to sit, stand with the help of walker. Even therefrom, it is suffice to say, there is a mere permanent disability practically for his avocation as driver for total impairment as driver since his age shown as 42 years in the claim petition.

11) As per the expression of the Apex Court in **Kishan Gopal vs Lala**⁵ as the claim made under Section 163-A of M.V Act, in the absence of proof of earnings at Rs.15,000/- p.a. fixed in the Schedule-II of the Act should be read as Rs.30,000/- p.a. much less for such disability to his avocation even taken as total impairment with 100% functional disability, if the same is taken from his age, the multiplier applicable is '15' as per Schedule-II of the Act.

12) There is no presumption of percentage of disability and it is not even stated from the second discharge summary that he can recover and the disability, if any, is only partial in nature, thereby the Court is inevitably constrained to do some exercise in the factual scenario in appreciating the evidence available on record only, since it impacts on the life of a injured including functional disability of his source of earning and if taken the same atleast as 40% permanent disability from his age, the multiplier applicable is '15' and as per **Kishan Gopal** (supra), the minimum earnings is taken at Rs.30,000/- p.a., the loss of dependency comes to Rs.1,80,000/- (Rs.30,000/- X 40% X 15). Apart

⁵ 2014 (1) SCC 244

from it, even Rs.20,000/- awarded towards medical expenses, attendant charges which includes Rs.15,000/- maximum for the medical expenses provided under Schedule-II and for the total loss of earnings for the period of treatment, Rs.2,00,000/- is the just compensation.

13) Accordingly and in the result, the appeal is allowed while setting aside the impugned order dated 19.12.2008 passed in M.V.O.P. No.315 of 2006 on the file of MACT-cum-II Additional District Judge, East Godavari District, granted compensation of Rs.2,00,000/- with interest at 7.5% per annum from the date of appeal till realisation. The respondents 1 and 2 are directed to pay the compensation and left open to recover the contribution from respondents 3 and 4 by filing execution petition. However, it is for the Tribunal to determine the negligence in relation to the vehicle of 3rd respondent insured with 4th respondent. No order as to costs.

14) Consequently, Miscellaneous petitions, if any pending in this appeal, shall stand closed.

Dr. B. SIVA SANKARA RAO, J

Dt.05.01.2017
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