

HONOURABLE SRI JUSTICE N. BALAYOGI

M.A.C.M.A. No.1469 of 2009

JUDGMENT:

1. The appellant-United India Insurance Company Limited, aggrieved by the Award and Decree dated 27.10.2006 passed in O.P.No.427 of 2003 by the learned Chairman, Motor Accident Claims Tribunal-cum-Principal District Judge, Kadapa, preferred this appeal for the following among other grounds that there is no negligence on the part of auto bearing No. AP 04U 5619 and the accident was due to negligence on the part of driver of the lorry bearing No.AP 21U 4556 and that the Tribunal erred in contributing 50% of the rash and negligence to the driver of auto bearing No. AP 04 U 5619.

2. It is further contended that the fourth respondent—Owner of the auto is liable as the deceased was a gratuitous passenger traveling in the goods auto carrier at the time of accident and as no premium was paid covering the rescue of passengers being carried in the goods vehicle, the appellant-Insurance Company is not liable to pay any compensation.

3. It is submitted that the Tribunal without discussing and considering the evidence and material available on record, erroneously directed the appellant-United India Insurance Company to pay compensation.

4. It is further contended that the Tribunal erred in applying the multiplier '13' considering the age of the deceased as 50 years as on the date of accident and also erred in awarding Rs.1,56,000/- towards compensation and Rs.15,000/- towards the compensation for loss of consortium to the wife of the deceased and Rs.15,000/- towards compensation for loss of estate, funeral expenses, transportation charges and mental agony.

5. On the other hand, respondents 1 to 3 herein/Claimants contended that auto bearing No. AP 04U 5619 is not a goods carriage as on the date of the deceased travelling in the said auto as passenger; that there is 'head on collusion' and therefore the appellant-United Insurance Company and respondents 4 to 6 herein are liable to pay the compensation. The order of the Tribunal is legal, valid and do not suffer from any legal infirmity.

6. The facts of the case in brief are follows:

On 02.03.2003 at about 4.15 PM the accident occurred involving auto bearing number AP.04 U 5619 and a mini lorry bearing No. AP 21 U 4556. At the time of accident, the deceased, P.W.2 and another were travelling as passengers in the auto bearing No.AP 04 U 5619. Due to the injuries suffered in the accident, the deceased—Mogili Balaiah succumbed to injuries.

7. Admittedly P.W. 1 is not an eye witness to the accident. P.W.2 is the eye witness who was also a co-passenger at the time of accident in the auto bearing number AP 04 U 5619. His evidence is of much material to decide the rash and negligence and also manner in which the accident occurred.

8. The Tribunal discussed the evidence of P.W.2 elaborately read with documentary evidence under Exs.A.1 to A4 and came to the conclusion that the accident was due to 'head on collision' and negligence was attributed in the ratio of 50% : 50% on the part of drivers of both Auto bearing No. AP 04 U 5619 and mini lorry bearing No. AP 21U 4556.

9. The consistent evidence of P.W.2 is that on 2.3.2003 at about 3.30 PM at Khajipet, he and three persons boarded the auto bearing No. AP 04 U 5619. At Dumpalagattu bus stop, two persons alighted from the auto and the deceased -Mogili Balaiah of his village boarded the auto. P.W.2 during the cross examination deposed that there are two other passengers in the auto besides the deceased and P.W.2 at the time of accident and denied the suggestion that there were about 7 or 8 persons.

10. Ex.A.1 is the complaint lodged by P.W.2. Though in the cross-examination P.W.2 stated that he do not know who gave report to the police and do not remember whether he had stated in

the report that due to negligence on the part of the driver of the auto bearing No. AP 04 U 5619, the accident occurred. A reading of Ex. A.1 clearly goes to suggest that in the FIR, P.W.2 stated that the lorry “

which means that the accident occurred due to ‘head on collusion’ of both auto and mini lorry. The manner in which the accident occurred was specifically stated in the Ex.A.1. It was also stated in the charge sheet Ex. A.4 that the auto driver drove the auto with high speed and lost control and similarly the driver of the lorry without blowing horn drove in high speed, in rash and negligent manner and the accident was due to ‘head on collusion’. The Investigating Officer in Ex. A.4 specifically stated that the auto and mini lorry dashed against each other. Though the appellant cross examined P.W.2 at length, could not elicit any favourable information.

11. The evidence of P.W.1 corroborated with the oral evidence of P.W.2 and supported by documentary evidence of EXs.A.1 to A4 well established that the accident occurred on 02.03.2003 at about 4.15 P.M. According to Exs.A.1–FIR, Ex.A.4–Charge sheet and Ex.A.3–Post Mortem Certificate, death of the deceased-Mogili Balaiah was on 2.3.2003 at about 5.45 PM. After conducting post-mortem, the doctor opined that the cause for death was due to injuries to vital organs and shock. Accordingly there is nexus between the accident and the death of the deceased–M.Balaiah.

12. With regard to the age of the deceased, admittedly no document in proof of age of the deceased was filed. In the complaint as well as in the evidence of P.W.1, it was specifically stated that the deceased-Balaiah was 50 years as on the date of death. In Exs.A.1 to A.4, the age of the deceased was mentioned as 50 years. In the absence of any proof and also any rebuttal evidence from the side of the respondents, there is nothing to suggest regarding the age of the deceased than what has been stated in the documentary evidence. The Tribunal well found basing on the evidence of P.W.1 supported by Exs.A.1 to A.4 that the deceased was aged about 50 years as on the date of accident.

13. The main contention of the appellant is that there is no negligence on the part of the driver of the auto and only due to rash and negligent driving of mini lorry, the accident occurred. To substantiate the said contention, the appellant-Insurance Company did not produce any evidence either oral or documentary. The evidence of P.Ws.1 and 2 inspires the confidence and is unimpeachable and is corroborated by Exs. A.1 and A.2 which established that the accident occurred was 'head on collision' and due to the contributory negligence of drivers of both auto and mini lorry in equal proportions. R.W.1 was the Assistant Director of appellant-United Insurance Company, who is not the eye witness to the accident. His evidence has no help to

decide the manner in which the accident occurred and who is responsible for the cause of accident.

14. In the absence of any such rebuttal evidence, and having no independent evidence produced by the respondents, I find that the Tribunal appreciated both oral and documentary evidence available on record in proper perspective, and on marshalling the facts and by application of its mind to the facts of the case, came to the conclusion that there is contributory negligence on the part of both the drivers of auto bearing No.AP 04U 5619 and mini lorry bearing No. AP 21U 4556 in the equal ratio of 50%: 50%.

15. Further the contention of the appellant-United Insurance Company is that the auto is the goods carriage and in support of its contention, it mainly relied on Ex. B.1-policy. The consistent evidence of P.W.2 is that three persons boarded the auto at Khazipet bus stand and that at Dumpalagattu bus stop, two persons alighted from auto and the deceased boarded the said auto. The Investigating officer in Ex. A.4—charge sheet and P.W.2 in Ex. A.1-FIR clearly stated that it is the auto carrying passengers. Whereas the appellant-Insurance Company simply relied on Ex. B.1-policy in which head note reads that 'Certificate of Insurance of Goods Carrying (3-wh and Pedal Cycles) Public Carriers'. The policy is a packaged policy. No where in Ex. B.1-policy, it is stated that the policy was issued for goods carriage vehicle. The Tribunal in its Award at Para 12 well discussed the

probabilities and considered Ex. B.1 policy and came to the conclusion that as per Ex. B.1-policy which was issued by the appellant-Insurance Company in respect of auto, it was mentioned in the head note *that 'Certificate of Insurance of Goods Carrying (3-wh and Pedal Cycles) Public Carriers'*. But, no where in other part of the insurance policy it is described that it is an insurance policy issued in respect of the goods carriage. The title of the document Ex. B.1-policy which is mentioned above is not indicating clearly that it is a certificate of insurance issued in respect of the goods carrying vehicle only. The words 'public' carrier' herein has not been stricked off. Considering these circumstances and the other material on record, the given vehicle was not appearing to be a goods vehicle.

16. Further it is contended that the principle laid down in the case of *National Insurance Company Vs. Baljit Kaur and others* (2004 ACJ 428), and, *New India Assurance Company Limited Vs. Santhi Devi and others* (2006 ACJ 1501) relied on by the learned Counsel for the appellant-Insurance Company are not applicable to the facts of the case. That apart, in the written statement filed by the appellant-Insurance Company, there is no plea that Ex. B.,1 policy was issued for goods carrier and the deceased was a gratuitous passenger in the auto at the time of accident. Even there is no suggestion either to P.W.1 or P.W.2 with regard to the contention that Ex. B.1 policy was issued to the goods carriage and deceased was the gratuitous passengers in the auto at the time of accident. In the absence of plea or issue

before the Tribunal, now it is not open to the appellant for the first time to take such plea that Ex.B.1 policy was issued for a goods carrier auto bearing No. AP 04 U 5619 and the deceased was a gratuitous passenger in the said auto at the time of accident.

17. The appellant is not permitted to take plea at the appeal stage for the first time that the auto bearing No. AP 04 U 5619 is a goods carriage. Considering Ex. B.1 which was issued to the said auto and more particularly in the absence of any rebuttal evidence to prove the nature of the vehicle, to which, Registration Certificate of the said vehicle is the relevant document, which has not been produced, it can be said that there is no sufficient evidence on record to show that the given auto has been a goods vehicle. There is nothing to suggest that the appellant has taken any plea or filed its application to summon RC of the said auto by issuing any notice to the fourth respondent—owner of the auto.

18. Further the contention of the appellant is that the Tribunal erroneously applied the multiplier '13' which is incorrect. As already discussed hereinabove, the deceased was aged 50 years and he was a skilled labourer as per the finding arrived at by the Tribunal. As per the decisions of the Apex Court in KERALA STATE TRANSPORT COMPANY Vs. SUSAMMA THOMAS {(1994)2 SCC 176}, U.P.S.R.T.C. Vs. TRILOK CHANDRA {(1996) 4 SCC 362}, NEW INDIA ASSURANCE Co.Ltd. Vs. CHARLIE {(2005) 10 SCC 720}, and having

considered the age of the deceased as 50 years, the relevant multiplier applicable to the age of the deceased is '13'. Accordingly, I find that the Tribunal applied correctly the multiplier taking into consideration the oral testimony of P.W.1 in the absence of any other rebuttal evidence and assessed the compensation accordingly.

19. In the facts and circumstances discussed hereinabove, I find that the Tribunal well considered both oral and documentary evidence on record including the evidence of R.W.1 and came to the conclusion that the accident occurred due to 'head on collision' involving contributory negligence in equal proportions on the part of both the drivers of auto bearing No.AP 04 U 5619 and mini lorry bearing No. AP 21 U 4556 and accordingly fixed the liability warranting interference.

20. Considering the totality of the facts and circumstances of the case, both oral and documentary evidence and contentions advanced by learned Counsel on either side, I find that the Award dated 27.10.2006 passed in O.P.No. 427 of 2003 by the learned Chairman, Motor Accident Claims Tribunal-cum-Principal District Judge, Kadapa is legal, valid and does not suffer from any legal infirmity.

21. In the result, the appeal is dismissed with costs while confirming the Award and decree dated 27.10.2006 passed in

O.P.No. 427 of 2003 by the learned Chairman, Motor Accident Claims Tribunal-cum-Principal District Judge, Kadapa.

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

JUSTICE N. BALAYOGI

DATED 12th JUNE, 2017.
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