

HONOURABLE SRI JUSTICE N. BALAYOGI

M.A.C.M.A. No. 41 of 2008

JUDGMENT:

1. The appellant/claimant aggrieved by the Award and decree dated 07.03.2007 in OP.No.1175 of 2004 on the file of learned Chairman, Motor Vehicle Accident Claims Tribunal-cum-Il Additional District Judge, Nizamabad, preferred this appeal.

2. The case of the appellant/claimant is that on 23.05.2003 at about 7.30 PM while he was travelling in the auto bearing No.AP.25U 3298, and when the said auto reached the outskirts of Nagepoor village, the driver drove it in rash and negligent manner at high speed and dashed against two persons who were attending repair work of their scooter by the side of the road and thereafter the said auto went off the road and turned turtle, due to which, himself and other inmates of the auto sustained injuries. The appellant/claimant sustained fracture of both bones of left fore arm, fracture of both bones of right leg, fracture of skull, fracture of ribs and injuries to head and other parts of the body.

3. Immediately after the accident, the appellant/claimant was shifted to the Government Hospital, Nizamabad, whereat he was treated and referred to Hyderabad for better treatment. However, the appellant/claimant was admitted in the private hospital, at Nizamabad and underwent operation and incurred

expenditure of Rs.1,50,000/- towards treatment, medicines and extra nourishment. Still he is taking treatment.

4. The appellant/claimant was aged 20 years as on the date of accident, was hale and healthy and was doing vegetable business & agriculture and earning Rs.10,000/- to Rs.12,000/- per month. On account of the injuries suffered in the accident, he became disabled and not able to do any work.

5. Before the Tribunal, the second respondent/Insurance Company contested the claim by filing counter affidavit, stating that the driver of the auto was not having valid and driving licence as on the date of the accident. The policy does not cover the passengers travelling in the auto, as such, it (Insurance Company) is absolved from its liability. It was further contended that as per the record, at the time of accident, the said vehicle was carrying more passengers than the seating capacity in violation of the terms and conditions of the policy.

6. Based on the rival contentions, the Tribunal framed the following issues for settlement.

1. Whether the accident was due to rash and negligent driving of the auto bearing No.AP 25U 3298 by its driver?
2. Whether the petitioner is entitled for any compensation ? If so, to what just amount and from which of the respondent ?
3. To what relief.

7. In order to prove the claim, on behalf of the appellant/claimant, P.Ws. 1 and 2 were examined and Exs. A.1 to

A.3 and Ex.C.1 were got marked. On behalf of the respondents, neither oral nor documentary evidence was adduced.

8. On appreciation of the evidence on record, the Tribunal found that the accident occurred due to the rash and negligent driving of the driver of auto bearing No.AP 25U 3298. On assessing the compensation payable to the appellant/claimant, the Tribunal awarded a sum of Rs.35,000/- with interest at 7.5% per annum from the date of petition till the date of realization, holding that respondents are jointly and severally liable to pay the compensation.

9. It is contended by the learned Counsel for the appellant/claimant that approaching the medical board for obtaining disability certificate is not mandatory. The doctor cannot be branded as stock witness without issuing notice/hearing. The Tribunal also erred in not considering the huge expenditure incurred by the appellant/claimant towards medicines and treatment. The Tribunal committed error in fixing the proper income and it did not award compensation under all the heads, present and future.

10. Now the point that arises for determination is, *whether the Tribunal committed any error in not considering the disability certificate under Ex.C.1 disbelieving the evidence of PW.2, and whether the petitioner is entitled to compensation as claimed for.*

11. The appellant/claimant is not disputing the rashness and negligence on the part of the driver of auto bearing No.AP 25 U 3298. The appellant/claimant himself was examined as P.W.1 and filed Ex.A.1 certified copy of FIR, Exs.A.2 certified copy of charge sheet and Ex.A.3 wounds certificate. The consistent evidence of P.W.1 is that three years prior to the deposition, at about 7.30 PM while he was travelling in the auto from Basar to Nizamabad and when the said auto reached Naipur village, the driver drove the auto in rash and negligent manner, at high speed and dashed to a scooter which was parked on the side of the road for repairing purpose and later went off the road and turned turtle. Ex.A.1 is the FIR wherein the complainant clearly asserted that the auto turned turtle due to the rash and negligent driving of the driver. In Ex.A.2 charge sheet, the Investigating Officer clearly asserted that the driver drove the auto in rash and negligent manner with high speed and is responsible for the accident. The Insurance Company having cross examined P.W.1 could not elicit favourable material to disbelieve the evidence of P.W.1 and Exs. A.1 and A.2.

12. The Tribunal thus having considered the oral evidence of PW.1 and documentary evidence at Exs.A.1 and A.2 came to the right conclusion that the driver of the auto bearing No.AP25U 3298 drove the same in rash and negligent manner at

high speed and dashed the scooter parked on the side of the road for repairing purpose, and went off the road and turned turtle.

13. In the case of G.GNANAM @ GNANAMOORTHY Vs. METROPOLITAN TRANSPORT CORPORATION {(2009)2 SCC 71}, while observing *'the High Court with utmost respect should not have disbelieved the evidence of a doctor of a government hospital on the supposition that he has been issuing certificates fixing 'permanent disability which was not proportionate to the injury'. Even no such suggestion has been given to him. That was never the case of the respondent. In his cross examination, he categorically stated that he is a specialist surgeon and not an orthopaedician and he had assessed the disability correctly. Except putting a suggestion to him that there was a possibility of 5% error in assessing the disability between doctor to doctor no other question was put to him'*, the Apex Court consequently held therein that the appellant therein was not guilty of any contributory negligence.

14. In the case on hand, the evidence of P.W.1 is that at the time of accident, he was travelling in the auto and the driver of which drove it with high speed, in rash and negligent manner and hit the stationed scooter on the side of the road, later went off the road and turned turtle. P.W.2 was the Civil Assistant Surgeon in the Government Hospital, at Nizamabad. He dealt orthopedic cases and on 12.09.2006 he examined P.W.1 who was 21 years,

clinically and physically and also verified his previous medical records and found that three years old fracture of both bones left fore arm and fracture of both bones (R) leg malunited with restriction of left forearm pronation and supination and sorting of (R) leg and limp, and assessed disability at 30% permanent partial and issued Ex.C.1 disability certificate. During the cross examination, P.W.2 admitted that he did not treat the petitioner in the hospital. There is a Medical Board in District Headquarters Hospital, at Nizamabad for issuing disability certificates. He was not the member of such Medical Board, however issued the disability certificate Ex.C.1 in his personal capacity. During the cross examination, he admitted that the injuries mentioned in Ex.A.3 are not corresponding to the injuries mentioned in Ex.C.1 and denied the suggestion that the petitioner does not have any shortening of leg and limping.

15. No doubt it is true that the person who treated the injured is the proper person to speak about the disability. P.W.2 was the Orthopedic surgeon who also worked as Civil Assistant Surgeon in Government Hospital, Nizamabad. During the cross examination he admitted that the injuries mentioned in Ex.A.3 are not corresponding to the injuries mentioned in Ex.C.1. The Tribunal having considered the above facts and believing Ex.A.3 came to the conclusion that the petitioner sustained fracture of both bones of left fore arm, fracture of both bones of right leg and

abrasion over right leg and took treatment in the Government Hospital, at Nizamabad.

16. The evidence of P.W.1 is that due to the injuries he became permanent disabled and not able to attend agricultural work and unable to do vegetable business and thereby his future earnings are affected. As already discussed above, P.W.2 is not a person who treated P.W.1 in Government hospital, Nizamabad. He only examined P.W.1 three years prior to the accident and assessed the disability at 30% and issued Ex.C.1 disability certificate. As accepted by P.W.2, he did not obtain x-ray film at the time of examining and issuing Ex.C.1 disability certificate. Even as per evidence of P.W.2, there is medical board at District Headquarters Hospital, Nizamabad which is the proper authority to issue disability certificate. Even P.W.2 could not be the member of such medical board. There is no explanation in the evidence of P.W.1 the reason as to why he did not approach the medical board at District Headquarters Hospital, Nizamabad to get assessed the disability or consult the doctor who treated in the Government Hospital, Nizamabad. The Tribunal having considered the evidence of P.W.2, the doctor who examined P.W.1 in Nizamabad, who was not a member of such medical board and in the absence of any reasons for not approaching the medical board at District Headquarters Hospital, Nizamabad, I find there is substance in the finding of the Tribunal in disbelieving the evidence of P.W.2 and Ex.C.1 disability certificate issued by him.

17. Ex.B.1 is the policy which was in force from 25.09.2002 to 24.09.2003 and the accident as per the evidence of P.W.1 supported by Exs. A.1 and A.2 took place on 23.05.2003, by which date, Ex.B.1 policy was in force. Though the second respondent took a plea that at the time of accident the crime auto was carrying more persons than the seating capacity in violation of the terms and conditions of the policy, it did not produce any oral or documentary evidence in support of its plea. More over Ex.A.2 charge sheet shows that besides PW.1 four more passengers including the petitioner sustained injuries in the accident. As per Ex.B.1 seating capacity of the auto was three persons. At the time of accident, six persons were traveling in the said auto which is in violation of the terms and conditions of the policy. Absolutely there is no evidence either oral or documentary to establish that because of overloading, the driver of the offending auto lost control over it and caused the accident. In the absence of any such evidence that because of overloading the accident occurred, I am of the considered opinion on the finding of the Tribunal that the accident was due to over loading of passengers than permitted capacity and thereby it violates the terms and conditions of the policy is legal, valid and does not suffer from any legal infirmities.

18. Undisputedly, as per the oral evidence of P.W.1 coupled with wound certificate, Ex.A.3, it is clear that the

appellant/claimant/P.W.1 sustained two fracture injuries to left fore arm, right leg and abrasion over right leg 12 cm x 5 cm. Considering the said injuries, the Tribunal awarded Rs.35,000/- in lumpsum, which does not be the just compensation and hence the same has to be modified. Further I find that by virtue of Ex.B.1 policy and as the second respondent failed to establish that the accident was due to the over loading of auto, respondents 1 and 2 are liable to pay the compensation jointly and severally.

19. Considering the nature of injuries, awarding compensation at Rs.35,000/- for each fracture injury (Rs.35,000 x 2 = Rs.70,000), Rs.5,000/- for simple injury besides Rs.6,000/- towards medical expenses, Rs.10,000/- towards pain and suffering, Rs.2,000/- towards transport expenses and Rs.5,000/- towards extra nourishment is just and reasonable. Thus, in total, the appellant/claimant is entitled to Rs.98,000/-.

20. In the result, the appeal is partly allowed, with costs, setting aside and modifying the award and decree dated 07.03.2007 in OP.No.1175 of 2004 on the file of learned Chairman, Motor Vehicle Accident Claims Tribunal-cum-II Additional District Judge, Nizamabad. Consequently, the appellant/claimant is entitled to receive Rs.98,000/- with interest at 7.5% per annum from the date of petition i.e.04.09.2004 till the date of deposit.

21. Respondents 1 and 2 are jointly and severally liable to pay the compensation, within a period of thirty days from the date of receipt of a copy of judgment, deducting the amount if any already paid or deposited.

22. On such deposit, the appellant/claimant is permitted to withdraw the same.

23. Advocate fee is fixed at Rs.2,000/-

24. 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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