

THE HON'BLE MR JUSTICE N.BALAYOGI

M.A.C.M.A. Nos.473 and 5418 of 2008

COMMON JUDGMENT:

Both the appeals arose out of the order and decree dated 24.09.2007 in O.P.No.3111 of 2005 on the file of the XII Additional Chief Judge, City Civil Court at Hyderabad (Fast Track Court).

M.A.C.M.A. No.473 of 2008 :

The appellant - 2nd respondent preferred this appeal, besides other grounds, on the ground that the Tribunal, having held that the accident occurred due to rash and negligent driving of the driver of the DCM cargo van, committed error in directing the appellant, which is insurer of the bus, to deposit 50% out of the total compensation and recover the same from the first respondent in O.P. on the mere presumption of contributory negligence.

It is further contended that the Tribunal erred in presuming contributory negligence merely because there is no exact evidence contrary to its findings and that the driver of the DCM cargo van is negligent on the basis of the very statement of the claimant during 161 Cr.P.C. examination and also the charge-sheet.

The further contention of the appellant – 2nd respondent before the Tribunal was that both the drivers of the bus and DCM cargo van were not having valid and subsisting driving licences at the time of the

accident. The claimant was traveling as an unauthorized passenger in a goods vehicle, hence the liability is not covered.

M.A.C.M.A. No.5418 of 2008 :

The appellant – 4th respondent preferred this appeal, besides other grounds, on the ground that the Tribunal erred in directing the appellant to deposit 50% of the compensation and recover the same from the third respondent in O.P., in view of the finding that the claimant is gratuitous passenger. The order is self-contradictory to its own findings and against the principles of law.

The claim petition is filed under Section 166 of the Motor Vehicles Act claiming compensation of Rs.5,00,000/-. The claim in brief is as follows :

On 11.1.2005 the claimant had been to Bhainsa of Adilabad District for selling the cotton and on 13.1.2005 while he was returning to Hyderabad in DCM cargo van bearing No. AP 15 U 0435 and when reached near Bhiknoor on NH 7, one private bus belonging to the 1st respondent in O.P. came in high speed in opposite direction at 2.30 AM, driven in a rash and negligent manner, and dashed the DCM cargo van. As a result, the driver of the van, cleaner and the claimant sustained grievous injuries.

Having considered pleadings of both parties, following issues are settled for trial before the Tribunal :

- (1) Whether the accident resulting in injuries to the 1st petitioner occurred owing to rash and negligent driving of the driver of the bus bearing No. AP 23 X 1372?
- (2) Whether the petitioner is entitled for compensation, if so to what amount and from whom?
- (3) To what relief?

In support of the claimant, P.Ws.1 and 2 were examined and Exs.A1 and A10 were got marked. On behalf of respondents, R.W.1 was examined and Exs.B1 to B4 were got marked.

The contention of the appellant in M.A.C.M.A. No.473 of 2008 is that there cannot be any presumption with regard to contributory negligence having come to the conclusion that the accident was due to rash and negligent driving of the driver of the DCM cargo van, which belongs to 3rd respondent in O.P., whereas the contention of the appellant in M.A.C.M.A. No.5418 of 2008 is that the Tribunal erred in directing it to deposit 50% of the amount awarded in view of the clear finding that the claimant is a gratuitous passenger in DCM van.

From the above contentions of both the Insurance companies – (i) insurer of the bus bearing No.TN 23 X 1372 and (ii) insurer of the DCM van bearing No.AP 15 U 0435, the points that arise for consideration are –

- (1) Whether there is any negligence / contributory negligence; and
- (2) Whether the presence of claimant in DCM cargo van bearing No.AP 15 U 0435 is as a owner of the goods or as a gratuitous passenger.

The first point is concerned, the evidence of P.W.1 is that the accident occurred due to rash and negligent driving by the driver of a private bus bearing No. TN 23 X 1372. When coming to the documentary evidence, under Ex.A4/F.I.R. and Ex.A6/charge-sheet, which goes to suggest that the driver of the bus bearing No.TN 23 X 1372 by name Madugulawar Shyam presented a report before Bhiknoor Police on 14.1.2005 at 5.00 hours with regard to the accident at 2.30 AM on the even date against the driver of DCM cargo van bearing No.AP 15 U 0435 to which the 3rd respondent is the owner and 4th respondent is the insurer. In the Ex.A4/F.I.R. it is specifically mentioned that on 13/14-1-2005 at 2.30 AM, the bus after crossing Bhiknoor Police Station, when proceeding on N.H.7 road, a DCM cargo van bearing No.AP 15 U 0435 came in opposite direction, driven with high speed and in a rash and negligent manner and dashed against the GSR Travels Bus. The Investigating Officer, after thorough investigation, filed the charge-sheet against Sreenu, driver of the DCM cargo van bearing No.AP 15 U 0435 finding that the said driver drove the DCM cargo van with high speed in a rash and negligent manner and dashed against the opposite coming GSR Travels Bus bearing No.TN 23 X 1372 and the accident is due to rash and negligent driving of the driver of the DCM cargo van.

Though P.W.1 in the chief stated that the accident was due to rash and negligent driving of the driver of the private bus bearing No.TN 23 X 1372, his evidence was shaken during cross-examination,

wherein he admits that Ex.A4 is the copy of the F.I.R. and Ex.A6 is the certified copy of the charge-sheet. It is further admitted that in Ex.A4/F.I.R. it is mentioned that the accident occurred due to rash and negligent driving of the driver of the DCM cargo van in which he was traveling and further admits that the Police, after thorough investigation, filed Ex.A6/charge-sheet against the driver of the DCM van. For the question put by counsel for the 2nd respondent to P.W.1, he gave the evasive answer saying 'I do not know whether in the police record my statement was recorded or I was examined by the Police.' In clear terms he deposed that he has not given any statement or report to the concerned police stating that the accident occurred due to rash and negligent driving of the driver of the 1st respondent's vehicle (bus bearing No. TN 23 X 1372) but not due to the rash and negligent driving of the DCM cargo van. There is one suggestion to P.W.1, though denied, that the Police examined him and other witnesses and recorded their statements and after completion of the investigation, filed charge-sheet against the driver of the DCM cargo van and now he was deposing falsehood.

R.W.1 is the Administrative Officer of the 4th respondent, who filed certified copies of statements recorded by the Police during the course of investigation in crime No.7 of 2005 pertains to A.Ramesh Reddy – P.W.1 and S.Vishnu, cleaner of the DCM cargo van No.AP 15 U 0435 which are marked as Exs.B3 and B4 respectively.

The settled law is that Section 161 Cr.P.C. statements of witnesses can be used to corroborate or contradict the statement of the maker, because the statements recorded by Police during investigation do not contain the signature of the maker. The 4th respondent rightly obtained the certified copies of the statements of P.W.1 and cleaner of the DCM cargo van and the suggestion to P.W.1 during cross examination and marked as Exs.B3 and B4. P.W.1 during cross-examination denied in Ex.B3 there was a statement that in the outskirts of Bhiknoor on N.H.7 road at about 2.30 PM on 13/14-1-2005 while he was traveling along with his friend in DCM cargo van No.AP 15 U 0435, the driver of the DCM cargo van drove it with high speed in a rash and negligent manner and dashed the GSR Travels Bus No.TN 23 X 1372 and the accident is due to rash and negligence of the driver of the DCM cargo van.

Besides Ex.B3/Section 161 Cr.P.C. statement of P.W.1 and the suggestion to P.W.1 during cross examination, still there is the evidence under Ex.A10/Discharge Card of Sai Sanjeevini Hospital wherein against the column – ‘History’ it is noted as ‘RTA while traveling in DCM hit opposite private bus’. It is the first information, when P.W.1 admitted in the Hospital, furnished by him. According to which, it is the DCM cargo van, in which he was traveling, hit the opposite private bus i.e., bus bearing No.TN 23 X 1372.

On Issue No.1, the Tribunal, while discussing the evidence of P.W.1 and the averments of the claim petition, stated that as per the

averments of the petition and chief-affidavit, on 13.1.2005, while the claimant was returning to Hyderabad in DCM cargo Van along with the driver and cleaner and when they reached near Bikhnoor, the driver of the bus came in a rash and negligent manner and hit the DCM cargo van. Ultimately, on Issue No.1, the finding of the Tribunal is that the Police filed charge-sheet after thorough investigation against the driver of the 1st respondent's vehicle alleging that the accident occurred due to rash and negligent driving of the 1st respondent's vehicle and hence this issue was declared in favour of the claimant and against the respondents. The finding and conclusion on Issue No.1 is that the accident was due to rash and negligent driving of the driver of the 1st respondent's vehicle bearing No.TN 23 X 1372 to which the 1st respondent is the owner and 2nd respondent is the insurer.

Ex.A4/F.I.R. and Ex.A6/charge-sheet go to suggest that the driver of the bus bearing No.TN 23 X 1372 presented the complaint against the driver of DCM cargo van bearing No.AP 15 U 0435 which was registered as F.I.R./Ex.A4 and the Investigating Officer, after thorough investigation, filed charge-sheet/Ex.A6 against the driver of DCM cargo van bearing No.AP 15 U 0435 finding that the accident occurred due to rash and negligent driving of the driver of DCM cargo van bearing No.AP 15 U 0435. There is no discussion by the Tribunal about the suggestions to P.W.1 and also about F.I.R./Ex.A4 and charge-sheet/Ex.A6 and the information furnished by P.W.1 at the time of admission in the Sai Sanjeevini Hospital that the DCM van hit the

bus, but the Tribunal came to the erroneous conclusion that the Police filed charge-sheet after thorough investigation against the driver of the 1st respondent's vehicle alleging that the accident occurred due to rash and negligent driving of the 1st respondent's vehicle i.e., bus bearing No. TN 23 X 1372.

Such finding referring to Ex.A4/F.I.R. and Ex.A6/charge-sheet which are against the driver of DCM cargo van and conclusion that the accident was due to rash and negligent driving of the driver of the 1st respondent's vehicle i.e., bus bearing No.TN 23 X 1372 is perverse.

The Tribunal in the impugned judgment at page 14 held that there is no iota of evidence on record to show that the accident was occurred due to rash and negligent driving of the driver of the 1st respondent's vehicle. In contra, as per the charge-sheet and admission of the P.W.1 before the Investigating Officer, the accident was occurred due to rash and negligent driving of the driver of the 3rd respondent's vehicle. A reading of the Ex.A4/F.I.R., Ex.A6/charge-sheet, the contradictory portion of 161 statement of P.W.3 under Ex.B3 and the entry in the discharge card which are earliest reports, there is a complaint against the driver of the DCM cargo van and accordingly the Investigating Officer, after thorough investigation, filed charge-sheet under Ex.A6 against the driver of the DCM cargo van. In the 161 statement before the Investigating Officer, P.W.1 also stated that the accident was occurred due to rash and negligent driving of the driver of

the DCM cargo van, which clearly establish that the accident was due to rash and negligent driving of the driver of the DCM cargo van.

However, the Tribunal gave perverse findings. The Tribunal is not certain who is at fault. The Tribunal, at one stage, while finding that the accident was occurred due to rash and negligent driving of the driver of the bus, at another stage gave finding that the accident was occurred due to rash and negligent driving of the driver of the DCM cargo van and finally concluded that the accident was due to collision, hence, respondents 1 and 3 are jointly and severally liable to pay compensation. Such findings are not based on oral and documentary evidence and supported by any law and it is neither the plea of the insurance companies nor the evidence.

When there is no contributory negligence, the liability of both the owners does not arise. Accordingly, I find that the finding of the Tribunal that the accident was due to collision of two vehicles is without any evidence, either oral or documentary, or without any discussion on the issue and is contradicting the finding on issue No.1 that the accident was due to rash and negligent driving of the driver of the GSR Travels Bus bearing No.TN 23 X 1372.

With regard to issue whether the presence of claimant in DCM cargo van at the relevant time of accident was as a owner of goods or as a gratuitous passenger, on this aspect, the Tribunal discussed the evidence at length and marshalling the facts came to the conclusion that Exs.A1 and A2 are not proved as contemplated under law. None

concerned with Exs.A1 and A2 are examined. P.W.1 in the evidence stated that Ex.A1 is the cotton sale bill and Ex.A2 is the passbook and Ex.A3 is the copy of the Pahani for the year 2005-2006. During examination in chief P.W.1 stated that he is an agriculturist and he used to collect cotton from small ryots and used to take a load of cotton to Guntur and other places for sale. On 11.1.2005, he had been to Bhainsa of Adilabad District with cotton in DCM cargo van No.AP 15 U 0435. During cross-examination, he admitted that he has not filed any document to show that he is doing cotton business. He does not know who signed on Ex.A1 on behalf of the purchaser of the cotton. Absolutely, there is no evidence to show that he received the amount mentioned in Ex.A1. He further admits that he has not filed Income Tax Assessment and Sales Tax Returns to show that he was doing cotton business and getting amount. He further admits that according to Ex.A3, he is cultivating the lands. Further, P.W.1 admits that he has not filed any documentary proof to show that on the date of accident he engaged the DCM to transport the cotton and paid the amount to the owner of the DCM van as a rent. In Ex.B3, Section 161 Cr.P.C. statement, P.W.1 stated that he boarded the DCM cargo van along with his friend to travel Hyderabad. Ex.B3 is contradictory about his presence in the DCM cargo van as owner of the cotton. On this aspect, the Tribunal, having considered Exs.A1 and A2 read with evidence of P.W.1, came to the conclusion that there is no evidence as to who issued Exs.A1 and A2. The non-examination of the person who issued

Exs.A1 and A2 is fatal to the case. Except oral evidence of P.W.1, there is no documentary proof to show that he is doing cotton business.

As per Ex.B3, which is contradictory with P.W.1, that on that day P.W.1 was traveling in DCM cargo van along with driver and cleaner, but it is not mentioned/stated whether he has engaged the DCM cargo van for the purpose of his cotton business and he was traveling as the owner of the goods. Except oral evidence of P.W.1, there is no evidence filed to show that he engaged DCM cargo van for cotton business and traveled along with the goods. P.W.1 ought to have examined the owner of DCM cargo van or any person of subject to the effect that he engaged DCM cargo van for carrying his cotton goods. The Tribunal ultimately held that P.W.1's presence on the DCM cargo van at the time of accident was as gratuitous passenger. Since P.W.1 was traveling in the DCM van as gratuitous passenger, the insurance company is absolved his liability.

In view of elaborate discussions above and having considered the oral and documentary evidence on record, I am of the considered view that the presence of the claimant on DCM cargo van at the time of the accident was as a gratuitous passenger, which does not cover by Ex.B2 policy, thereby the 3rd respondent violated the terms and conditions of the Ex.B2 policy. The 3rd respondent being the owner of the DCM cargo van bearing No.AP 15 U 0435 vicariously liable for the acts of his driver and he has to pay the compensation. The accident is due to rash and negligent driving of the driver of the DCM cargo van

bearing No.AP 15 U 0435. Absolutely there is no evidence of any contributory negligence on the part of both the drivers. The accident is exclusively due to rash and negligent driving of the driver of the DCM cargo van bearing No.AP 15 U 0435 to which the 3rd respondent is the owner.

Therefore, the findings of the Tribunal that the accident was due to collision and respondents 1 and 3 in O.P. who are the owners of GSR Travels Bus bearing No.TN 23 X 1372 and DCM cargo van bearing No.AP 15 U 0435 respectively are jointly and severally liable and that respondents 2 and 4 in O.P. shall deposit 50% each out of the total compensation amount are erroneous, illegal and are not supported by any oral or documentary evidence. Accordingly, the findings of the trial court are illegal, false and are suffering from legal infirmities warranting interference by this Court.

For the facts discussed above, it is clear that the accident was occurred due to rash and negligent driving of the driver of the DCM cargo van bearing No.AP 15 U 0435. Since the claimant is the gratuitous passenger, the 3rd respondent is vicariously liable for the acts of his driver and as there is violation of terms and conditions of Ex.B2/Policy, the 3rd respondent is liable to pay the compensation as awarded by the Tribunal.

Since the claimant-P.W.1 is an agriculturist and a poor person and 4th respondent being the insurer under Ex.B2 which is in force by the date of accident and since the Motor Vehicles Act is beneficial

legislation, the 4th respondent has to pay the compensation as awarded by the Tribunal and recover the same as if the award is a decree itself against the 3rd respondent.

For the reasons stated above, MACMA No.473 of 2008 is allowed. No order as to costs.

Whereas, MACMA No.5418 of 2008, filed by the 4th respondent in O.P., is dismissed while setting aside and modifying the award dated 24.9.2007 in O.P. No.3111 of 2005 passed by the Tribunal, and finding that the 3rd respondent is liable to pay compensation of Rs.1,00,000/- and the 4th respondent is directed to deposit the Award of Rs.1,00,000/- into Court after adjusting the amount already paid within one month from the date of receipt of a copy of the order, thereafter the 4th respondent can recover the same by filing executive petition against the 3rd respondent without filing any suit and thereafter the claimant is permitted to withdraw the entire amount together with proportionate costs and interest thereon. No order as to costs.

The Advocate fee is fixed at Rs.2,000/- in each M.A. C.M.A.

JUSTICE N. BALAYOGI

September, 2017.

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