

**THE HON'BLE MR JUSTICE N.BALAYOGI**

**M.A.C.M.A. No.288 of 2008**

**and**

**M.A.C.M.A. No.3568 of 2009**

**COMMON JUDGMENT:**

Both the appeals arose out of the order and decree dated 13.11.2007 in O.P.No.2622 of 2005 on the file of the X Additional Chief Judge, City Civil Court at Hyderabad (Fast Track Court).

**M.A.C.M.A. No.288 of 2008 :**

2. This appeal is filed by the claimant on the ground that the Tribunal has wrongly granted less compensation for loss of income; transportation and interest, without considering the evidence.

3. It is further contended that the Tribunal failed to grant compensation towards extra-nourishment; pain and suffering; medical bills, hospitalization bills - Exs.A5 and A6 and also failed to consider the evidence of the Doctor - P.W.4 about the disability and did not grant any compensation on that head.

**M.A.C.M.A. No.3568 of 2009 :**

4. The contention of the appellant/Respondent No.2 – Insurance Company is that the Tribunal failed to give a finding as to the driving licence possessed by the driver of the offending vehicle at the time of accident in spite of specific plea of the appellant.

5. It is further contended that the Tribunal has erroneously awarded Rs.40,000/- towards damages caused to the motor cycle, when it was purchased for Rs.32,990/-, without deducting the depreciation. Hence, grant of Rs.40,000/- is illegal and the same is liable to be set aside. The compensation awarded is excessive, exorbitant and unjust.

6. The claim of the claimant in brief is that on 21.3.2005 while the claimant was proceeding from Attapur towards Mehdipatnam side on his Bajaj CT 100 motor cycle bearing No.AP 28 BB 2142 at about 12.30 PM, one lorry (oil tanker) bearing No. MH 16 Q 767, which came behind the motorcycle at high speed in a rash and negligent manner, dashed the motor cycle and due to which, he fell down on the road and sustained grievous injuries.

7. The claimant was shifted to nearby hospital i.e., Hyderabad Hospital, where he spent nearly Rs.25,000/- for his treatment.

8. The 2<sup>nd</sup> respondent before the Tribunal filed counter contending that the accident occurred due to the contributory negligence of the petitioner by non-observing the traffic on the road resulting the accident. The petitioner has to prove that the driver possessed valid and effective driving licence and negligence on the part of the driver. If the Court ultimately comes to a conclusion to award compensation, the interest should be less than 9%.

9. The Tribunal, having considered the rival contentions of the claimant and the insurance company, settled the following issues for trial :

1. Whether the accident took place on 21.03.2005 at about 12.30 hours due to rash and negligent driving of lorry (Oil tanker) bearing No.MH 16 Q 767 by its driver?
2. Whether the petitioner is entitled to claim compensation from the respondents? If so, to what amount and from whom?
3. To what relief?

10. In support of the claimant, P.Ws.1 to 4 were examined and Exs.A1 to A24 were got marked. On behalf of respondents, none were examined and no document was marked.

11. The claimant filed evidence affidavit reiterating the same averments of the petition stating that on 21.3.2005 while he was proceeding on his Bajaj CT 100 motorcycle bearing No.AP 28 BB 2142 and reached near petrol bunk at Rethibowli, the lorry bearing No.MH 16 Q 767 came his behind with rash and negligent manner and dashed the motorcycle. To substantiate and prove the rash and negligence, he filed Ex.A1 – certified copy of the F.I.R. and Ex.A2 – certified copy of the charge-sheet and Ex.A3 – MLC report.

12. The complaint, which is the earliest report dated 21.3.2005, which is the statement of P.W.1 himself, was recorded by PC 3297 of Langar Police Station at 5.30 PM on 21.3.2005, whereas the accident was occurred on 12.30 PM. In the said complaint, P.W.1 specifically stated that while he was proceeding on Bajaj CT 100 bearing No.AP 28 BB 2142 and when he reached near Rethibowli petrol bunk, one lorry bearing No. MH 16 Q 767 coming from the same direction dashed to the motorcycle on which he was traveling. The Investigating Officer, after

thorough investigation, filed the charge-sheet against the driver of the lorry Pradeep Kumar Srivastav finding that the driver of the lorry bearing No.MH 16 Q 767 dashed the motorcycle with high speed and in a rash and negligent manner and caused the accident. Ex.A3 is the MLC report, at the time of admission in the Hospital, where it was reported that the claimant was hit by a truck while traveling on a two wheeler.

13. The evidence of P.W.1 supported by Exs.A1 to A3 well established that the accident caused by the driver of the lorry (oil tanker) bearing No.MH 16 Q 767. When the claimant proved rash and negligence on the part of the driver of the lorry (oil tanker) bearing No.MH 16 Q 767, burden shifts to the 2<sup>nd</sup> respondent, who took the plea that there is contributory negligence on the part of P.W.1, to produce oral and documentary evidence and rebut the evidence of P.W.1 and Exs.A1 and A2. It is not the case of the 2<sup>nd</sup> respondent that the driver of the offending lorry was not available for examination. The driver of the offending lorry is the proper person to speak about the manner in which the accident occurred. For the best reasons known to the insurance company, no steps have been taken to examine the driver of the said lorry. It is also not the case of the 2<sup>nd</sup> respondent that the lorry was having any mechanical defect at the time of the alleged accident.

14. Further, it is the mandatory obligation on the part of the insurance company to issue notice to the owner of the offending lorry calling to produce copy of the insurance policy, R.C. of the lorry, driving licence of the driver, copy of the F.I.R. and other particulars. The

contention of the 2<sup>nd</sup> respondent in the counter is silent whether it has issued any such notice to the owner of the lorry. In the absence of any such evidence and proof, I have no hesitation to hold that the 2<sup>nd</sup> respondent failed to discharge his mandatory obligation by issuing any such notice.

15. It is pertinent to note that the Tribunal, having considered the ocular evidence of P.W.1 and documentary evidence of Exs.A1 and A2 and the circumstances, came to a right conclusion that the accident has occurred only due to rash and negligence on the part of the driver of the lorry. The 2<sup>nd</sup> respondent failed to establish any contributory negligence on the part of P.W.1. So, such findings of the tribunal are legal, valid and tenable.

16. With regard to disability, there is only evidence of P.W.1, whose evidence is that he sustained injury to right ankle and diagnosed fracture of right medial malleoli of right leg. He also sustained injury to the left knee and bleeding injuries all over the body. He took treatment in the Hospital up to 24.3.2005 where POP slab was applied. He was advised to take 6 weeks bed rest at the time of discharge. Subsequently, also he took treatment in ARK Hospital, Kukatpally as outpatient and spent Rs.25,000/- for treatment, but till date he has not fully recovered. He is still suffering pain in the right leg and right ankle which is causing trouble in driving a two wheeler, which is very much essential to carry out his profession as Sales Officer, as it requires continuous traveling on motorcycle.

17. P.W.1 was cross-examined at length, where he stated that he took the vehicle from his friend; he has possessed driving licence, but it was lost and even then, he has not applied for any duplicate licence.

18. The Doctor, who treated P.W.1, is examined as P.W.4, whose evidence is that he is working as an Orthopaedic consultant in Hyderabad for the past six years. P.W.1 admitted in their hospital on 21.3.2005 with injuries sustained in RTA. He had injury to right ankle and was diagnosed with Right medial malleoli of right leg. He was treated conservatively and discharged on 24.3.2007 with an advice for six weeks rest and to use medicines. An injury sustained by him is grievous in nature. Ex.A3 is the MLC report issued by Hyderabad Hospital in favour of P.W.1, which supports the evidence of P.Ws.1 and 4 that P.W.1 admitted in the Hospital on 21.3.2005 at 1 PM. The injury noted in Ex.A3 is complaint of pain in right ankle joint and x-ray for the ankle was taken. Ex.A4 is the medical certificate issued by Hyderabad Hospital on 22.3.2005 which supports Ex.A3 that on 21.3.2005 at 1.00 PM P.W.1 was admitted in the Hospital and his admission was informed to the Police. P.W.1 sustained injury to right ankle and diagnosed with fracture of right medial malleoli of right leg. He was discharged with an advice of six weeks bed rest. Ex.A5 is the bill for Rs.3,000/- at the time of admission. Exs.A6 and A7 prescriptions are prescribed by the hospitals which are confronted to P.W.4. P.W.4 was also confronted with Exs.A3 to A5 and A8 which were issued by their hospital and Ex.A17 – xrays were taken on the advice of Doctors. It is further

confronted under Ex.A5 that petitioner paid entire bill to the hospital and discharged on 24.3.2005 as per Ex.A22 – discharge card.

19. Before entering into witness box, P.W.4 examined P.W.1 and reported that still P.W.1 is complaining pain in the right ankle joint and examination found movements are normal except restriction of right ankle joint to some extent due to which P.W.1 has disability to an extent of 10%, which is permanent. During cross-examination, P.W.4 stated that P.W.1 sustained only one injury and he was hospitalized for four days. At the time of discharge, P.W.1 was stable and his general condition was good and no operation was conducted in their hospital. He denied the suggestion that all the documents are fabricated and issued only to help P.W.1 to get compensation.

20. The Tribunal, having considered the entire evidence of P.W.1 supported by medical evidence of P.W.4 and Exs.A3 to A7, A8 and A17, came to the right conclusion that P.W.1 sustained one grievous injury on the left knee joint. He took treatment in Hyderabad Hospital from 21.3.2005 to 24.3.2005 about 4 days and POP was applied. He was treated conservatively and no operation was conducted. At the time of discharge as per Ex.A22 – discharge card his general condition was good and he was only advised six weeks bed rest. There are no complications. As per Ex.A3 and A4 P.W.1 only sustained fracture injury to right malleoli of right leg. Exs.A6 and A7 prescriptions go to suggest that medicines were purchased on the prescription of P.W.4 and an amount of Rs.3,000/- was paid under Ex.A5 and an amount of Rs.3,846/- was paid

under Ex.A6, both of which comes to Rs.6,846/-, which was the medical expenses. Though P.W.1 in the evidence stated that he spent nearly Rs.25,000/- for his treatment, but he only produced medical bills for Rs.6,846/- and for which he is entitled.

21. With regard to loss of income, Ex.A16 is the salary certificate issued by the Sark Synergy Services under whom the petitioner was working as Sales Officer. P.W.2 is the person who issued Ex.A16 and he categorically stated that the petitioner/P.W.1 was working in their organization as Sales Officer from October 2004. He was paid Rs.10,100/- towards net salary for the month of February, 2005 which is the previous month of the accident. It is also evident from the evidence of P.W.2 that Ex.A19 dated 5.10.2004 is the offer letter issued by the Sark Synergy Services offering post of Sales Officer to P.W.1, according to which, the probation period will be six months, after which appointment letter will be issued. Ex.A20 is the leave certificate issued by the Sark Synergy Services. P.W.1 was on sick leave from 22.3.2005 to 20.7.2005.

22. The 2<sup>nd</sup> respondent contends that Exs.A16, A19 and A20 are issued three months after the accident.

23. The Tribunal considered the consistent evidence of P.W.2 and also the earliest complaint pleading that P.W.1 was earning Rs.10,000/- per month which is supported by Ex.A16 – salary certificate, according to which, net salary of the claimant was Rs.10,100/-. Though Exs.A16, A19 and A20 are issued three months after the accident, they

are copies of letters which were issued earlier. The Tribunal is perfectly right in considering the cross-examination of P.W.2 that though P.W.2 was cross-examined at length, nothing was elicited to disbelieve his evidence. In the absence of any serious challenge of the evidence of P.W.2 by the 2<sup>nd</sup> respondent, the Tribunal was of the opinion that Exs.A16, A19 and A20 can be taken into consideration and considered the income of P.W.1 at Rs.10,100/- per month.

24. The consistent evidence of P.W.1 was that he was completely on bed rest for four months. As per the evidence of P.W.2 and Ex.A20 the petitioner applied for sick leave from 22.3.2005 to 20.7.2005 i.e., the next day of the accident, which is not rebutted by the 2<sup>nd</sup> respondent by adducing any evidence, except a formal suggestion that to help P.W.1 the documents are created. That being so, the Tribunal took the same into consideration and came to the conclusion that the petitioner was in bed rest for four months and considered Rs.10,100/- as the net salary as per Ex.A16 and rightly awarded Rs.40,400/- towards loss of income which does not warrant any interference.

25. Now, coming to the aspect of disability, the claimant claims that disability is at 10%. The evidence of P.W.4 is that as per clinical examination, the disability is 10%. Before entering into the witness box on the same day P.W.4 clinically examined P.W.1 and according to him P.W.1 was complaining pain in the right ankle joint. On examination, P.W.4 found movements are normal except restriction of right ankle joint to some extent, due to which P.W.1 has disability to

an extent of 10%. The claimant has not filed any disability certificate in proof of such disability. In the absence of any disability certificate and also plea that he sustained disability at 10% in the petition and as per the evidence of P.W.4, he was hale and healthy at the time of discharge and he was in good condition and as the plea of disability at 10% is not supported by any x-ray or other evidence, the Tribunal has rightly rejected the plea of disability.

26. With regard to damage to the vehicle, the evidence of P.W.1 is that the motorcycle belongs to his friend, who is examined as P.W.3, who categorically stated that he is the owner of motorcycle bearing No.AP 28 BB 2142 and he purchased the same in the year 2004 from Bajaj Authorised Dealer for a sum of Rs.32,990/- by obtaining finance loan from HDFC bank and P.W.1 is his friend, as such, he allowed P.W.1 to ride the motorcycle which met with an accident and the vehicle was totally damaged. The motorcycle was surveyed by T.V.Sambasiva Rao, Surveyor and loss assessor. As per the survey report under Ex.A12, under the request of the owner of the vehicle bearing No.AP 28 BB 2142, he assessed the loss of the vehicle at Rs.39,394.58. As per Ex.A10 – cash receipt, he paid Rs.12,539/- to MGB Bajaj. Ex.A9 is the sale invoice dated 21.10.2004 for Rs.32,990/-. Whereas, the Tribunal has awarded Rs.40,000/- towards damages for the vehicle. Though P.W.1 is not the owner of the motorcycle, P.W.3, who is the real owner, deposed and filed surveyor report for damages and also furnished sale invoice of purchase of motorcycle. Though the value of vehicle as per Ex.A9 is Rs.32,990/-, the damage caused to the vehicle was assessed at

Rs.39,394.58, so I do not find any exaggeration in awarding Rs.40,000/- towards damages of the vehicle to the owner P.W.3.

27. The Tribunal awarded Rs.10,000/- towards compensation for the fracture injury and Rs.5,000/- towards pain and suffering, Rs.1,000/- towards extra-nourishment and Rs.1,000/- towards transportation, which are very meager amounts and require modification. P.W.1 sustained fracture of right medial malleoli of right leg for which he took treatment conservatively and still complaining pain in right ankle joint. Therefore, the claimant is hereby granted Rs.30,000/- towards fracture injury and Rs.2,200/- towards transportation as per Ex.A21 and Rs.6,000/- towards extra nourishment and Rs.10,000/- towards pain and suffering.

28. Thus the claimant is entitled to the amounts under the below heads :

|                   |   |                |
|-------------------|---|----------------|
| Medical Bills     | : | Rs. 6,846.00   |
| Loss of Income    | : | Rs. 40,400.00  |
| Damage to Vehicle | : | Rs. 40,000.00  |
| Fracture Injury   | : | Rs. 30,000.00  |
| Pain & Suffering  | : | Rs. 10,000.00  |
| Extra-Nourishment | : | Rs. 6,000.00   |
| Transport Charges | : | Rs. 2,200.00   |
|                   |   | -----          |
|                   |   | Rs.1,35,446.00 |
|                   |   | -----          |

29. Therefore, the Award is modified and the petitioner/claimant is entitled to Rs.1,35,446/-. Since the vehicle is insured with the 2<sup>nd</sup>

respondent - insurance company, the respondents 1 and 2 are jointly and severally liable to pay the compensation.

30. Accordingly, the appeal filed by the claimant in M.A.C.M.A. No.288 of 2008 is partly allowed with costs, while setting aside and modifying the order and decree dated 13.11.2007 in O.P.No.2622 of 2005 on the file of the X Additional Chief Judge, City Civil Court at Hyderabad (Fast Track Court) and passed the modified award for Rs.1,35,446.00 against the respondents 1 and 2 jointly and severally with subsequent interest at 7.5% from the date of petition i.e., 15.11.2005 till the date of deposit or realization, which shall be deposited, after adjusting the amount, if any, already deposited or paid, within a period of 45 days from the date of receipt of a copy of the appeal judgment. On such deposit, the petitioner is permitted to withdraw the same.

31. Consequently, the appeal M.A.C.M.A. No.3568 of 2009 filed by the Insurance Company is dismissed.

32. Advocate fee is fixed at Rs.2000/- each in both appeals.

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JUSTICE N. BALAYOGI

29<sup>th</sup> December, 2017.

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