

THE HON'BLE SRI JUSTICE G.SHYAM PRASAD

M.A.C.M.A.NO.457 OF 2010

JUDGMENT

Aggrieved by the order and decree dated 7.4.2009 passed by the Motor Vehicles Accident Claims Tribunal (District Judge), Guntur in M.V.O.P.No.1264 of 2007, the Insurance Company - Bajaj Allianz General Insurance Co. Ltd., filed the present appeal.

2. The claimants 1 to 4 are the wife, son, mother and father respectively of the deceased. They filed claim petition under Sections 140 and 166 of the Motor Vehicles Act, 1988 claiming compensation of Rs.30,00,000/- for the death of one Kosuri Radha Krishna in a Tipper accident, which took place on 6.5.2007 at about 6.45 p.m., near Raghapur X Road on Gudihathmoor-Ulmoor road.

3. The facts as per the claim petition are that the on 6.5.2007 at about 6.45 p.m., when the deceased was proceeding on the motorcycle bearing No. AP 1G 1847, driven by one Kotipalli Venkata Reddy, as pillion rider, to Adilabad, near Raghapur X road, the Tipper of the 1st respondent bearing No. AP 09 U 6987, being driven by its driver at a high speed and in a rash and negligent manner, came from opposite direction towards wrong side and hit the motorcycle. As a result, the rider and pillion rider received grievous injuries and died on

the spot. It is alleged that accident occurred purely due to rash and negligent driving of the 2nd respondent, driver of the Tipper.

4. The further claim of the claimants is that at the time of accident, the deceased, a B.Sc., graduate in agriculture, was aged about 27 years, working as Field Officer in BIOSTADT India Limited and was earning an amount of Rs.2,35,008/- per annum and maintaining the claimants. By the time of accident, he was working in Adilabad Branch.

5. With his death, the 1st claimant lost consortium at a young age and all the claimants lost love and affection, care and financial support. His death caused mental agony and shock to them. Hence, they filed claim petition.

6. The respondents 1 to 3 before the Tribunal, who are the owner, driver and the insurance company, filed written statements and denying the averments made in the claim petition, contended that the accident occurred due to rash and negligent driving of the driver of the motor cycle on which the deceased was travelling as pillion rider, and that the petition is bad for non-joinder of the owner and insurer of the said motorcycle, therefore, sought for dismissal of the claim petition.

7. To prove their case, on behalf of the claimants, the wife of the deceased was examined as P.W.1, Home Guard, who witnessed

the accident, was examined as P.W.2 and Regional Sales Manager of BIOSTADT India Limited, in which the deceased was working, was examined as P.W.3. Exs.A-1 to A-19 were marked. On behalf of the respondents, the driver of the Tipper, who is the 1st respondent, examined as R.W.1 and an officer of the 3rd respondent – insurance company, was examined as R.W.2. Attested copy of the insurance policy was marked as Ex.B-1.

8. The Tribunal by framing appropriate issues and based on the evidence, held that the accident occurred due to rash and negligent driving of the driver of Tipper R.W.1. Considering the evidence on record, the Tribunal awarded Rs.22,40,000/- towards loss of income or dependency; Rs.15,000/- to 1st claimant, the wife of the deceased, towards loss of consortium; Rs.15,000/- towards loss of estate; Rs.10,000/- towards transportation charges of the dead body to the house and funeral expenses; and thus in all awarded Rs.22,80,000/- with interest at the rate of 7 per cent per annum from the date of the petition till realization. The Tribunal also issued directions, with regard to manner of deposit of and its withdrawal. All the respondents were made jointly and severally liable. Challenging the same, the insurance company filed the present appeal.

9. A Division Bench of this court while admitting this appeal on 22.03.2010, granted interim stay subject to depositing of half of the

amount awarded by the Tribunal and on such deposit, the respondents/claimants to the extent of major shareholders alone, were permitted to withdraw without furnishing any security.

10. Pending the appeal before this court, the 1st claimant, who is the wife of the deceased, died on 6.6.2014. The 2nd claimant is the son of the deceased and the 1st claimant. Vide order dated 12.9.2014, one Mr. Rampudi Mallikarjuna Rao, was appointed as guardian to represent the person and property of the 2nd claimant.

11. The learned counsel Sri K.S.N.Murthy appearing for the appellant – insurance company contends that there is contributory negligence on the part of the driver of the tipper and also the driver of the motor cycle. He stated that, the driver of the motorcycle had driven the motorcycle in high speed in a zigzag manner and dashed against the tipper. In support of this contention, the counsel has taken this court through the evidence of R.W.1, who was the driver of the crime vehicle at the time of accident. The learned counsel further contended that when the accident occurred due to composite negligence of drivers of both the vehicles, liability has to be on both the joint tortfeasors and the insurer of one of the vehicles, cannot entirely be made liable to pay the compensation. In support of this contention, the learned counsel placed reliance on the judgment of the

Apex Court in *KHENYEI v. NEW INDIA ASSURANCE CO., LTD*¹.

The learned counsel further contended that the owner and insurer of the motorcycle in the present case, are proper and necessary parties, as drivers of both the vehicles being joint tortfeasors, the claimants could have claimed compensation from owner and / or insurance company of either vehicle. Therefore, for non-joinder of necessary parties, i.e., insured and insurer of the motorcycle, the claim petition is bad and the same is liable to be dismissed on this ground alone. In support of this contention, the learned counsel relied on the judgment of the High Court of Calcutta in *NATIONAL INSURANCE CO. LTD. V. SANDIP ROUTH AND ANOTHER*². The learned counsel further contended that that the deceased joined duty on 25.5.2006 and his wife was alleged to have been given incentive of Rs.1,05,000/- under Ex.A-19 dated 6.5.2007 for the year 2007. He contended that provision for payment of the said incentive does not find place in his appointment letter Ex.A-16. Therefore, the Tribunal is not justified in taking the said amount, which was paid to the wife of the deceased after his death, into consideration while arriving at the loss of earnings and dependency. With these averments, he sought to set aside the impugned order.

¹ 2015 ACJ 1441

² 2016 ACJ 2052

12. The learned counsel Sri N.Subba Rao appearing for the claimants – respondents 1 to 4, supporting the impugned order sought for dismissal of the appeal.

13. Though notice was served on respondents 5 and 6 owners of crime vehicle – Tipper, none appeared on their behalf.

14. In view of the above rival contentions, the issues that arises for my consideration are :

1. Whether there is any contributory negligence on the part of the rider of the motorcycle?
2. Whether the claim petition is bad for non-joinder of owner and insurer of the motorcycle, on which the deceased was travelling?
3. Whether the Tribunal is justified in taking into account the incentive paid to the wife of the deceased at Rs.1,05,000/- for the year 2007, while arriving at the compensation under the head of loss of income or dependency?

15. The averments made in the claim petition with regard to cause of death, relationship of the claimants, which are noted above, needs no reiteration. In order to advert to the first issue raised by the learned counsel for the appellant, it is necessary to look into the evidence of P.W.2, who is an eyewitness to the incident. In his evidence, he categorically deposed that on the date of the accident, he noticed that deceased Radha Krishna was proceeding as pillion rider on the motor cycle bearing No. AP 1 G 1847 towards Gudihathmoor – Ulmoor side, and near Raghapur x road, the Tipper of the 1st respondent bearing No. AP 09U 6987, being driver by its driver at high speed and in a rash and negligent manner, came from opposite

direction towards wrong side and hit the motorcycle. He deposed that the tipper dragged the motorcycle to some distance and it resulted in instantaneous death of the deceased and the rider of the motorcycle. On the other hand, as per the evidence of R.W.1, who is the driver of the crime vehicle, accident occurred due to rash and negligent driving of the rider of the motorcycle.

16. To consider which of the testimony between the two witnesses i.e., P.W.2 and R.W.1, has to be preferred, and to see whether the finding of the Tribunal in this regard warrants any interference, it is necessary to look into the other evidence and the circumstances on record.

17. P.W.2 was working as a Home Guard and is an independent witness. As noted above, he categorically deposed that the accident occurred due to rash and negligent driving of the driver of the Tipper. Whereas R.W.1, the driver of the crime vehicle, is interested in the result of the case, as he is facing trial in the criminal case filed by the police against him under Section 304-A IPC, for the death of the deceased. The Tribunal found that the contents of Ex.A-1 FIR show that immediately after the accident, the driver of the vehicle i.e., R.W.1, ran away. If really accident had occurred due to rash and negligent driving of the rider of the motorcycle and that he was not at fault, there was no reason why he should run away and he ought to

have filed a complaint on that day or subsequently. He did not choose to do so. The police after investigation and examining the witnesses, filed charge sheet under Ex.A-5, only against R.W.1 alleging negligence on his part. Therefore, the Tribunal rightly disbelieving the self-serving testimony of R.W.1, and considering the independent evidence of P.W.2, who is a Home Guard and Exs.A-1 and A-5, which are copies of FIR and charge sheet, and the facts and circumstances of the case, categorically recorded finding of fact that the accident occurred due to rash and negligent driving of the driver of Tipper alone. This being finding of fact, based on appreciation of evidence, cannot be interfered with in this appeal, in the absence of any contra evidence.

18. In the decision relied on by the counsel for the appellant in Khenyei's case (1 supra), the Apex Court held that in case of accident due to composite negligence of drivers of both the vehicles, liability of joint tortfeasors is joint and several. The law laid down in the said judgment is unexceptionable based on the facts and circumstances of that case, as in that case, the accident occurred due to composite negligence of drivers of both the vehicles. In the present case, the accident occurred due to rash and negligent driving of the driver of Tipper alone, who is R.W.1. Hence, the law laid down in the said judgment, cannot be made applicable to the facts of the present case. The issue No.1 framed in this regard, is answered in the negative.

19. With regard to non-joinder of owner and insurer of the motor cycle is concerned, it is to be noticed that the rider of the motorcycle and the deceased, who was pillion rider, have met instantaneous death in the accident and the categorical finding of fact in this regard is that the accident occurred due to rash and negligent driving of the driver of the tipper alone and there is no composite negligence. The Apex Court in Khenyei's case (1 supra) held that if there is composite negligence, liability has to be apportioned between both the joint tortfeasers. At the cost of repetition, in the present case, the driver of tipper alone is found responsible for the accident and no claim is also made against the insured and the insurer of motorcycle. In such circumstances, they are neither necessary, nor proper parties to the claim petition. In the decision relied on by the counsel for the appellant in Sandip Routh case (2 supra), the Division Bench of the High Court of Calcutta, considering the circumstances where there was accident between Maruti van and autorickshaw and the allegation of rash and negligence driving, was made against the driver of the Maruti van and no claim is made against the owner and insurer of the autorickshaw, held that owner and the insurer of the auto rickshaw were neither necessary, nor proper parties in the absence of any claim against them. The relevant portion is as under:

“5. There is not a whisper of why the claim application was not maintainable in the form in which the same had been made. Since the claimant-respondent has claimed that accident had been

caused due to the fault of Maruti van insured by the appellant – insurer, which was being driven recklessly and at high speed and claimed compensation against the owner and insurer of the said Maruti van. The omission to mention the number of the autorickshaw or the name of its owner was inconsequential. It was immaterial whether the autorickshaw was insured at all. In any case, the owner and the insurer of the autorickshaw were neither necessary, nor proper parties, in the absence of any claim against them.”

20. In view of the above facts and circumstances, the contention of the counsel for the appellant that the claim petition is bad for non-joinder of necessary parties, cannot be countenanced and the same is rejected and the issue framed, is answered in the negative.

21. Coming to third issue, the insurance company is disputing the addition of Rs.1,05,000/- per annum to the income of the deceased for assessing loss of income, on the grounds that the same is not mentioned in the appointment letter Ex.A-16 and that it is paid as an ex gratia. As per the evidence of P.W.3, who is the authorized officer of the employer, the deceased was appointed on 25.5.2006 and was paid salary of Rs.10,834/- per month and under Ex.A-19, the wife of the deceased was paid an incentive of Rs.1,05,000/- per annum for the year 2007. The deceased is a graduate in B.Sc., agriculture and is working as Field Officer / Territory Execution since 25.5.2006 and by the time of his death, he completed one year. Therefore, considering his services, the company paid the incentive for the year 2007. Though it is sought to contend that the said amount was as ex-gratia, nothing could be elicited from the cross-examination of P.W.3 in this

regard, or any positive evidence was adduced to show that the employer was paying the ex gratia to the employees who die in accidents. Therefore, the Tribunal based of the evidence of P.W.3, has added the said amount to the income of the deceased and fixed the salary of the deceased at Rs.2,35,000/- per annum and by deducting 1/3rd towards his personal expenses, assessed the income of the deceased at Rs.1,40,000/- per annum and by applying appropriate multiplier of 16, vis-à-vis the age of the deceased, based on the judgment of the Apex court in BHAGWAN DAS vs. MOHD ARIF³, awarded an amount of Rs.22,40,000/- towards loss of income or dependency. The Tribunal also awarded amount under other heads, which in my considered view, warrants no interference. The third issue is answered in the affirmative.

22. For the foregoing reasons, the appeal is devoid of any merits and the same is dismissed, confirming the impugned judgment and decree in MVOP.NO.1264 OF 2007.

23. In the result appeal is dismissed. No order as to costs.

24. Miscellaneous petitions pending if any, shall stand closed.

G.SHYAM PRASAD,J

DATE: 10--03—2017

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³ 1987(2) ALT 137