

THE HON'BLE SRI JUSTICE N. BALAYOGI

MACMA No.1753 of 2010

JUDGMENT:

The appellant, who is the owner of the Tractor bearing No. AHP-9601, has preferred this appeal against the decree and order, dated 18.06.2010 in MVOP No. 836 of 2007, on the file of the Motor Accident Claims Tribunal-cum-IV Additional District Judge, Visakhapatnam, besides other grounds, on the ground that the Tribunal ought to have dismissed the claim of the petitioner, as the deceased was not the driver of the said vehicle and he never engaged the services of the deceased as driver, and as such he was not on duty as the driver of the tractor.

2. It is contended by the appellant that on the date of the accident, he kept his Tractor in front of his house and in the morning he noticed that it was not there, and when he was about to lodge a complaint with the police, he came to know about the accident. But, the Tribunal has wrongly concluded that the no such averment was found in the counter affidavit, and granted compensation to the claimant. Further, during the mid night of 05/06-03-2006 at about 2.00 a.m., there was no necessity for the appellant to ply his Tractor and this fact was not considered by the Tribunal. It is further contended that the Tractor was never hired to transport the passengers. It is also contended that the compensation assessed by the Tribunal is on higher side.

3. On the other hand, the respondent/claimant contended that her son, the deceased, was engaged by the appellant as driver to his Tractor and in the accident he sustained injuries and died on the spot, while he was on duty entrusted by the appellant/owner of the Tractor. It is further contended that as per the instructions of the appellant only, the

deceased was coming from Kotha Kottam village to K.D.Peta, and on the way he met with the accident between Kinchali and Balram Birdge at about 2.00 a.m., and died on the spot.

4. Before the Tribunal, the appellant/ owner of the Tractor filed his counter denying the averments in the petition and contending that the amount claimed is exorbitant and hypothetical, and the petition under Sec.166 of the Motor Vehicles Act is not maintainable.

5. Having considered both the pleadings, the Tribunal settled the following issues for trial:

“(1) Whether the deceased viz. Bheemreddy Veera Babu, died in the motor accident on 05/06.03.2006 due to the rash and negligent driving of the tractor bearing No.AHP-9601 driven by him (Deceased)?

(2) Whether the petitioner is entitled to compensation? If so, to what amount and from the respondent ?

(3) To what relief?

6. Now the point for consideration in the present appeal is whether the accident occurred while the deceased-driver was under the employment of the appellant/ owner, and whether the findings of the Tribunal are legal and valid.

7. It is pertinent to note that the appellant is not disputing the rash and negligent driving of the deceased, the ownership of the Tractor, and the accident occurred at about 2.00 a.m. of 06.03.2006. The only contention of the appellant/ owner of the vehicle is that the deceased was not his driver, and there is no necessity to him to ply his Tractor during mid night.

8. PW-1 is the mother of the deceased, and her clinching evidence is that on the intervening night of 05/ 06-03-2006, on the instructions of the appellant, the deceased while driving the Tractor of the appellant, at about 2.00 a.m., met with the accident and died on the spot. At that time, as per the instructions of the appellant, her son was coming from Kotha Kottam village to K.D.Peta and on the way he met with the accident and died on the spot.

9. PW-2 is a third party, who is an eye-witness to the accident. His evidence is that on 05/ 06-03-2006 night he was at his cashew tope to protect the crop and during early hours of 06.03.2006 at about 2.00 a.m., the Tractor bearing No.AHP-9601 fell turtle in between Kinchali and Balaram Birdge, by the side of his cashew tope; he rushed to the spot and found that the driver of the said Tractor died on the spot due to the injuries sustained in the accident. During the cross-examination, PW-2 clarified that he alone was present at the time of accident. Therefore, his evidence inspires confidence and supports the evidence of PW-1. Therefore, the evidence consistently proves that the Tractor, driven by the deceased, turned turtle at Kinchali and Balram Bridge, besides the cashew tope of PW-2.

10. RW-1 is none other than the appellant herein. RW-2 is a person who was present in the Tractor at the time of the accident, and was going to K.D.Peta. His evidence is that due to the negligent driving of the deceased, the Tractor turned turtle and fell in a small canal. He also fell down from the Tractor. The evidence of RW-1 is that the deceased is not his driver and he never worked under him and the accident was not occurred during the employment. His evidence is that, on the fateful

day of 05/06-03-2006, he kept his vehicle in front of his house and on the next day morning he found it was missing, and in spite of his best efforts he could not trace out the same, and preparing to lodge a complaint with the police, but in the meantime he was informed that his Tractor met with an accident at Balaram Birdge and in the said accident, the alleged Veerababu died on the spot. He further deposed that he has no necessity to ply his Tractor at mid night. He further stated that the Report and the FIR clearly show that the complainant, along with the driver and one Gudaparti Venkata Ramana were traveling in the Tractor to go to K.D.Peta. Further, the vehicle is meant for carrying goods, but not passengers and he never hired his vehicle to transport the passengers and that too on the mid night of 05/06-03-2006. During the cross-examination, RW-1 stated that he did not lodge any complaint with the police about missing of his tractor and denied his signature on the promissory note dated 08.03.2006. There is a well suggestion to RW-1 that the deceased was working as driver on his Tractor for the last two years, which was denied.

11. The main contention of the appellant is that on the fateful day, he kept his Tractor in front of his house and when he noticed that his vehicle was not there and when he was about lodge a complaint with the police, he was informed about the accident, but the Tribunal wrongly concluded that his version is not found in the counter affidavit filed by him. As already discussed above, in the counter there is no such plea. For the first time, in the evidence as RW-1, the appellant came up with a new version that he kept his vehicle in front of his house on the fateful day and on the next day morning he found that his tractor was not there

and in spite of his best efforts, he could not trace out the same; and when he prepared to give complaint to the police, he was informed that his vehicle was met with the accident at Balaram Bridge. During the cross-examination, the appellant admitted that no complaint was lodged by him with the police. Had really the Tractor was stolen by the deceased at mid night of 05/06-03-2006, RW-1 would have certainly lodged a complaint or at least plead the same thing in his counter filed before the Tribunal. But, surprisingly, he came with this new version by way of his evidence that he kept his tractor in front of his house and the same was missing.

12. In *Janak Dulari Devi v. Kapildeo Rai*¹ it has been held that '*evidence contrary to the pleadings cannot be relied on though such evidence however cogent but contrary to the pleadings cannot be relied on that purpose*'. The same view has been reiterated in the *Kashi Nath (Dead) through LRs. V. Jaganath*² wherein it has been held that '*when there is variance in the evidence and pleadings, such evidence cannot be relied on and adverse inference to be drawn when pleadings and evidence are self-contradictory.*'

13. In the case on hand also, there is no such plea in the counter that the appellant/ owner of the offending vehicle kept his tractor in front of his house and when he noticed that the same was missing and about to lodge a complaint with the police, he was informed about the accident, and as such the he has not complained the matter to the police. However, during his evidence, the appellant could able to develop such theory as defense. In view of the above settled principles of law, such

¹ (2011) 6 SCC 555

² (2003) 8 SCC 740

later evidence cannot be relied on and an adverse inference is to be drawn against the appellant, as there is no such pleading in the counter initially, and the evidence as RW-1 was contrary to the pleadings mentioned in the counter. Hence, in such circumstances, I am of the considered view that there is no error in the findings of the Tribunal that the version of the appellant was not found in the counter-affidavit filed by him, which is true, correct and legal.

14. In the facts and circumstances discussed above, I find no error in the findings of the Tribunal or any reason to interfere in the present appeal. Thus, the appellant failed to establish that the award passed by the Tribunal suffers with any illegality or infirmity, warranting interference. Hence, the appeal fails and is liable to be dismissed.

15. In the result, the appeal is dismissed with costs by confirming the award and decree dated 18.06.2010 passed in MVOP No. 836 of 2007, on the file of the Motor Accident Claims Tribunal-cum- IV Additional District Judge, Visakhapatnam. Advocate fee is find at Rs.2,000/-.

Consequently, the Miscellaneous Petitions pending, if any, shall stand closed accordingly.

Dt:17.11.2017
Kv

N. BALAYOGI, J

THE HON'BLE SRI JUSTICE N. BALAYOGI



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JUDGMENT

Dt. 17.11.2017

Gs/ Kv