

IN THE PUNJAB & HARYANA HIGH COURT AT CHANDIGARH

FAO-878-2013 (O&M)

Date of decision: 03.07.2017

Sandeep Kumar

... Appellant

Versus

State of Rajasthan and others

... Respondents

CORAM: HON'BLE MR. JUSTICE AMOL RATTAN SINGH

Present: Mr. Birinder Singh, Advocate, for
Mr. G.S. Attariwala, Advocate,
for the appellant.

Mr. Neeraj Khanna, Advocate,
for respondent No. 4-insurance company.

AMOL RATTAN SINGH, J.

This is an appeal by the claimant before the learned Motor Accidents Claims Tribunal, Chandigarh, impugning the Award of the said Tribunal dated 15.11.2012, dismissing his claim petition.

2. As per the claim petition, filed under Section 166 of the Motor Vehicles Act, 1988, the appellant (hereinafter referred to as the claimant), was travelling on bus no. RJ-05-PA-0145, belonging to the Rajasthan State Transport Corporation (respondent no. 2 herein), going from Chandigarh to Delhi on 11.09.2007.

When the bus was two kilometers short of Ambala Cantt at about 11:30 p.m., it hit a lorry/truck on its side, with the appellant sitting on a window seat.

As a result of the impact, the glass of the window pane broke and hit the appellant, resulting in multiple injuries to him, with the impact also resulting in a fracture of his right arm.

It was contended that the accident occurred due to the negligence

of the bus driver, i.e. respondent no. 3 herein, and therefore all the respondents in the claim petition, i.e. State of Rajasthan, the Rajasthan State Transport Corporation, its driver Devinder Kumar and the company with which the bus was insured, i.e. respondent no. 4, National Insurance Company Ltd., were all jointly and severally liable to pay the compensation to the appellant-claimant, for pain and suffering, mental agony, loss of income and on account of his day to day activities having been affected.

3. It was further contended in the claim petition that the appellant had purchased a ticket from Chandigarh to Delhi and was allotted seat no. 41, and that the accident had taken place due to the fact that respondent no. 3 was driving the bus at a very high speed, rashly and negligently.

The appellant claimed compensation to the tune of Rs. 5,00,000/- from the respondents along with interest thereupon @ 18% per annum, running from the date of the accident till the date of realization of the compensation.

4. Upon notice having been issued by the Tribunal, respondents no. 2, 3 and 4, i.e. owner, driver and insurer of the bus, filed separate written statements with the State of Rajasthan not having filed any reply.

5. In the reply of the Corporation, the entire contents of the claim petition were denied, stating also to the effect that no such accident had taken place on the Chandigarh Ambala Highway involving bus no. RJ-05-PA-0145, driven by Devinder Kumar Sharma (respondent no. 3).

It also having been averred in the claim petition that the claimant had sent a complaint by registered post to the Senior Superintendent of Police, Ambala, against receipt No. S-339 dated 21.10.2007, the said contention was also denied by the Corporation-respondent no. 2.

6. In his reply, the driver of the bus, i.e. respondent no. 3, filed an almost identical written statement, only adding at the end that the claimant was attended to at the General Hospital at Ambala and then referred to the PGI, Chandigarh, further stating that one Ramesh Kumar was the Conductor of the bus at the time of the 'alleged accident'.

The contention of the appellant-claimant that his co-passengers, by the name of 'Mr. Sunny' and 'Mr. Sethi', helped him reached the General Hospital at Ambala, were also denied in the written statements of respondents no. 2 and 3.

7. The insurance company, i.e. respondent no. 4, raised preliminary objections with regard to it taking "all its defences under Sections 147, 149, 157 and 170 of the Act of 1988, further denying the factum of the accident with the bus in question and further stating that respondent no. 3, i.e. the driver of the bus, was not driving the said vehicle at the time of the alleged accident and that he also did not have an 'effective driving licence' to the knowledge of the owner of the bus.

Yet further, it was contended that the owners of the bus, i.e. the State of Rajasthan and Rajasthan State Transport Corporation, did not have a valid fitness certificate, registration certificate, route permit and insurance policy.

On merits, by and large the contents of the claim petition were denied, further stating that no information about the alleged accident had been received from the insured.

The compensation claimed, of Rs. 5,00,000/-, was also stated to be highly exaggerated and abnormal.

8. On the aforesaid pleadings, the following issues were framed by

the learned Tribunal:-

“1. Whether claimant received injuries due to rash and negligent driving of Bus No. RJ-05-PA-0145 by respondent no. 3? OPP.

2. To what amount of compensation the claimant is entitled and from which of the respondent? OPP

3. Whether respondent no. 3 was not holding a valid driving licence at the time of accident? OPR

4. Relief.”

9. In support of his petition, the appellant-claimant testified as PW-1, in terms of the claim raised in his petition, further tendering medical record in evidence as Exs. P-1 to P-3, the complaint made by him to the Senior Superintendent of Police as Ex. P-4, the postal receipt in respect thereof as Ex. P-5, a disability certificate as Ex. P-6 and bills with regard to the expenses incurred by him on his treatment as Exs. P-7 to P-56.

He also examined one Vijay Singh as PW-2.

10. Respondent no. 3, i.e. the bus driver, tendered into evidence the insurance policy, whereas the insurance company tendered into evidence a copy of an FIR, Ex. RX.

As per the Award of the Tribunal, thereafter the respondents did not appear and were proceeded against *ex parte*, vide an order dated 30.04.2012.

11. Upon considering the evidence, the learned Tribunal found that as per the cross-examination of the claimant, he had admitted to making a statement to the police, on the basis of which an FIR was registered, further categorically admitting that the statement was to the effect that “one unknown truck” being driven by an unknown driver came from behind and while trying to overtake the bus, hit the side of the bus in a rash and negligent manner.

The learned Tribunal therefore held that what the claimant had alleged in his pleadings, was different to what had come out in his cross-examination, which was a version not given in the pleadings.

Hence, holding that the claimant was “blowing hot and cold in the same breath”, the injuries received by him were held to have not been received due to the rash and negligent driving of respondent no. 3.

Consequently, the first issue was decided against the claimant.

12. Having held as above, the issue on entitlement of compensation was also decided against the compensation.

The issue on the validity of the driving licence of respondent no. 3 was decided against the respondents (essentially against respondent no. 4, i.e. the insurance company), holding that the company had failed to discharge the onus to prove that the driving licence was not valid.

13. On the aforesaid findings, the claim petition was dismissed vide the impugned Award.

14. In this appeal, after notice was issued on 10.04.2013, service upon respondents No. 1 and 3 was dispensed with eventually on 29.11.2014, holding that if the liability of the insurance company, i.e. respondent no. 4, would not be disputed, the presence of the other respondents was not required.

Thus, with the owner of the bus, i.e. the State Transport Corporation-respondent no. 2, and the insurance company having been served, and having put in appearance through their respective counsel, service was held to be complete upon the respondents.

16. Addressing arguments for the appellant, Mr. Birinder Singh, Advocate, submitted that the appellant not being at fault, being a passenger in the bus in question, it was a case of composite negligence of the bus driver,

i.e. respondent no.3, and the driver of the unknown truck which came and hit the bus and thereafter sped away and as such, even though in the FIR the negligence was attributed entirely to the truck driver, however, in the complaint made to the Senior Superintendent of Police on 17.10.2007, Ex. P-4, the appellant had alleged that the bus had hit the truck and therefore, in view of that complaint, read with the testimony of PW-2 Vijay Singh, a co-passenger, the Tribunal had wholly erred in holding that the bus driver was not negligent at all. Hence, learned counsel submitted that the claim petition had been erroneously dismissed, the appellant not being contributory to the negligence in causing the accident, in any manner.

In support of his argument, to the effect that it was a case of composite negligence in which the claimant in any case could not be held to be responsible, Mr. Birinder Singh relied upon a judgment of the Supreme Court in **A.P.S.R.T.C. and another** vs. **K. Hemalatha and others** 2008 (3) R.C.R. (Civil) 589.

17. Per counter, Mr. Neeraj Khanna, learned counsel appearing for respondent no. 4-insurance company, submitted that since not a word of negligence was attributed by the appellant in the FIR got registered by him on 15.09.2007, any subsequent attribution of negligence, cannot be taken to be the negligence of respondent no.3, and as such the learned Tribunal made no error in dismissing the claim petition.

Mr. Khanna further submitted that the issue of negligence apart, no doctor having been examined to determine the disability of the appellant-claimant, the disability certificate cannot be accepted to be true.

18. Having considered the arguments of learned counsel for the parties as also the impugned Award passed by the learned Tribunal, it first

needs to be stated that in this appeal, the second contention raised by Mr. Khanna, learned counsel for the insurance company need not be gone into by this Court, as regards the disability of the appellant, and in fact, nor even the amount of compensation payable to him, (if any), in view of the fact that the said aspects were not gone into at all by the Tribunal, it having dismissed the claim petition solely on the ground that the negligence in causing the accident and thereby the injuries to the appellant, could not be proved against the driver of the bus, i.e. respondent no. 3 herein.

Consequently, this Court would only go into the issue of whether the first issue framed by the Tribunal, was correctly decided by it or not.

19. On that issue, the reasoning of the Tribunal was that the appellant had first stated in his complaint, leading to the registration of an FIR pertaining to the accident, that it was the driver of an unknown truck which came and struck the bus while overtaking it, thereby, not actually imputing any negligence to respondent no. 3 in causing the accident. On the other hand, in his claim petition, the appellant averred to the effect that due to the negligent driving of the bus driver, the accident was caused by the bus hitting a lorry/truck “by the side”.

In his cross-examination the appellant also admitted that he had given a statement to the police on the basis of which the FIR was registered and that in the said statement he had stated that an unknown truck, being driven by an unknown driver, came from behind and while trying to overtake the bus, hit the side of the bus in a rash and negligent manner.

Thus, in view of the contradiction apparently made by the appellant-claimant, as regards the manner in which the accident took place, the Tribunal held that respondent no. 3 could not be held responsible for negligent

driving, leading to the accident and the injuries to the present appellant.

20. It needs to be noticed here that the FIR (Ex. RX tendered in evidence by the insurance company), is seen to be registered at 2:30 p.m. on 15.09.2007, with the accident shown to have taken place on 12:45 a.m. on 12.09.2007, i.e. on the intervening night of 11/12.09.2007.

The claim petition is seen to be dated 16.01.2009, i.e. about one year and four months after the accident.

However, what this Court can not ignore is the fact that about one month and five days after the accident, i.e. on 17.10.2007, the appellant also made a complaint to the Senior Superintendent of Police, Ambala, vide registered post, the said representation/complaint being Ex. P-4, and the proof of its dispatch being a receipt of the post office Ex. P-5.

In the said complaint to the Senior Superintendent of Police, it is seen that the appellant had stated that the “bus hit a lorry/truck by its side by a rash and negligent driving of bus and as a result of hit the window panes near the seat occupied by the complainant got broken and hit the complainant on his right arm and head and the complainant received injuries on his head and arm with bleeding injuries and fracture of bones of the right arm. The accident took place due to rash and negligent driving of the said bus on very high speed”.

21. Thus, though it would appear that at the first instance the appellant held the unknown truck driver at fault, who had hit the bus while overtaking it on the right side, about one month later he had stated that it was the bus driver who was to blame. Of course he did not deny making the earlier statement to the police, during his cross-examination.

It also needs to be specifically noticed that the other witness

examined by the appellant, PW-2 Vijay Singh, stated to be a co-passenger, in his evidence is also seen to have stated that the “truck and the bus collided side by side” as a result of which the claimant got injured.

In his cross-examination however, PW-2 admitted that the bus was going on its correct side “with a speed” and that an unknown truck while overtaking the bus in a rash and negligent manner, hit the side of the bus.

Thus, as per the testimony of this witness, responsibility in causing the accident was primarily due to the rash and negligent driving of the driver of the truck, though this witness did state that the bus was “at a speed”.

22. Hence, in the opinion of this Court, it would not be possible to state that there was no negligence at all on the part of the 3rd respondent while driving his bus, either at a high speed or due to not being alert to a truck overtaking him on the right, or for both reasons etc.

Definitely the testimony of the witnesses, including the appellant himself, would suggest that the primary responsibility was that of the truck driver, but in the opinion of this Court, to hold that the 3rd respondent was wholly not negligent would be difficult to establish, especially as he (respondent no. 3) did not even care to step into the witness box to depose with regard to his version of the accident.

This Court naturally is not unaware that once a vehicle is insured, drivers and owners of such vehicles often do not bother to step into the witness box, knowing that eventually any compensation awarded would essentially be payable by the insurance company, it being bound to indemnify the insured.

Yet, even the insurance company did not go beyond tendering a copy of the FIR in evidence and was itself also proceeded against *ex parte*

thereafter, by the Tribunal.

23. However, what is more relevant, in the opinion of this Court, is that in any case, very obviously the appellant-claimant cannot be held responsible for having caused the accident, he being only a passenger in the bus owned by the first two respondents and driven by the third respondent. Hence, as per law well settled by now, it was his choice to implead both, or either of the tortfeasors, in his claim petition, without needing to establish as to who was more responsible for causing the accident.

Very obviously, he not knowing as to who the truck driver was, or even the number or identity of the truck, he exercised his option in impleading the owner, driver and insurer of the bus that he was travelling in, which, to repeat, was legally his right.

24. In this context, a recent judgment of the Supreme Court, in **Khenyei vs. New India Assurance Company Limited and others** (2015) 9 SCC 273, can be cited, wherein after discussing the entire law on the subject, their Lordships held as follows:-

“22. What emerges from the aforesaid discussion is as follows:

22.1 In the case of composite negligence, plaintiff/claimant is entitled to sue both or any one of the joint tort feasons and to recover the entire compensation as liability of joint tort feasons is joint and several.

22.2 In the case of composite negligence, apportionment of compensation between two tort feasons vis a vis the plaintiff/claimant is not permissible. He can recover at his option whole damages from any of them.

22.3 In case all the joint tort feasons have been impleaded and evidence is sufficient, it is open to the court/tribunal to determine inter se extent of composite negligence of the drivers. However, determination of the extent of negligence between the joint tort

feasors is only for the purpose of their inter se liability so that one may recover the sum from the other after making whole of payment to the plaintiff/claimant to the extent it has satisfied the liability of the other. In case both of them have been impleaded and the apportionment/ extent of their negligence has been determined by the court/tribunal, in main case one joint tortfeasor can recover the amount from the other in the execution proceedings.

22.4 It would not be appropriate for the court/tribunal to determine the extent of composite negligence of the drivers of two vehicles in the absence of impleadment of other joint tortfeasors. In such a case, impleaded joint tortfeasor should be left, in case he so desires, to sue the other joint tortfeasor in independent proceedings after passing of the decree or award”

25. Consequently, this not being a case of contributory negligence where the claimant is also responsible to some extent in causing the accident, but a case of composite negligence, in the opinion of this Court, the aforesaid judgment would apply on all fours to the present case.

26. Hence, in view of the above, the impugned Award is set aside, with the finding on issue no. 1 reversed and respondent no. 3 held at least partly negligent in causing the accident, without it being necessary, in terms of the ratio of judgment in **Khenyeis'** case (supra), to determine the extent of his negligence as regards the liability to pay compensation to the appellant.

Issue no. 1 framed by the Tribunal, is thus decided in favour of the appellant-claimant.

27. However, since there was no discussion at all by the learned Tribunal on issue no. 2, i.e. as to the extent of compensation payable to the appellant in the light of the evidence led by the parties on that issue, the matter is remitted to the Motor Accidents Claims Tribunal, Chandigarh, for deciding

the said issue as per the evidence led before it and thereafter, determining the extent of compensation payable to the appellant-claimant.

28. Issue no. 3 having held been decided in favour of the appellant-claimant by the learned Tribunal, to the effect that it was not proved that respondent no. 3 was not holding a valid driving licence and there being no challenge to that finding, the said finding of the Tribunal is upheld.

29. Hence, though the impugned Award has been set aside by this Court, however, the learned Tribunal would not go into issues no.1 and 3, they having been decided by this Court hereinabove, and proceed to determine issue no.2 and the consequential relief, i.e. issue no.4.

30. The appellant would also be entitled to costs of Rs. 2000/- in this appeal.

(AMOL RATTAN SINGH)
JUDGE

July 03, 2017
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Whether speaking / reasoned	Yes
Whether reportable	Yes