

HONOURABLE SRI JUSTICE N. BALAYOGI

MACMA.No.1585 OF 2010

JUDGMENT:

1. The appellant/claimant aggrieved by the Award and decree dated 10.03.2010 in OP.No.1135 of 2005 on the file of learned Chairman, Motor Vehicle Accident Claims Tribunal-cum-VI Additional District Judge (Fast Track Court), Nizamabad preferred this appeal mainly on the grounds that the Tribunal failed to consider the evidence of PWs.1 and 2 and supported documentary evidence at Exs.A.1 to A.7 while passing the Award and erred in not granting the entire claim of Rs.2,15,000/-.

It is further contended that the Tribunal failed to consider Exs.A.6 disability certificate wherein disability of the appellant/claimant was assessed at 40% and thereby failed to award compensation in proper perspective.

2. No arguments were advanced on behalf of the respondents. However, before the Tribunal, the contention of the second respondent-Insurance Company was that the driver was not having valid and effective driving licence as on the date of accident and that the claim petition was bad for non joinder of driver and owner of the auto bearing No.AP 25 T 5567.

3. The case of the appellant/claimant in brief is that on 20.10.2005 at about 2.30 PM the claimant along with her co-sister Balanarsavva while going to see her daughter in the auto bearing

No.AP 25 T 5567 and when they were on the way after passing of the limits of Sarampally village, the driver of tractor bearing No. AP 15 M 9364 and trolley bearing No. AP 15 M 9365 which was coming from Rajampet village was driven in rash and negligent manner, at high speed and dashed against the appellant/claimant, as a result of which, she suffered crush injury and amputation of great toe and 2nd, 3rd, 4th, and 5th toes of right foot. Immediately after the accident, she was taken to the Government Hospital where at she took treatment and incurred expenditure of Rs.60,000/- towards treatment.

Prior to the accident, she (appellant/claimant) was hale and healthy, contributing her entire income for her family and due to the said accident, she became permanent disabled and lost earning capacity.

4. Based on the rival pleadings, the Tribunal framed the following issues for settlement:

1. Whether the accident occurred on 20.10.2005 at about 2.30 PM due to rash and negligent driving of the auto bearing No. AP 25 T 5567 driven by its driver as per Section 166 of MV Act?
2. Whether the petitioner is entitled to compensation and if so to what amount and from which of the respondent ?
3. To what relief.

5. In order to prove the respective claims, on behalf of the appellant/claimant P.Ws.1 and 2 were examined and Exs.A.1

to A.7 were got marked. On behalf of the respondents, neither oral nor documentary evidence was adduced.

6. The Tribunal on consideration of the oral and documentary evidence found that the accident occurred due to rash and negligent driving of the driver of tractor bearing No. AP 15 M 9364 and trolley bearing No. AP 15 M 9365. On assessing the compensation, the Tribunal directed the respondents to pay compensation of Rs.35,000/- with interest at 7% per annum from the date of petition till the date of realization within three months from the date of decree jointly and severally.

7. POINT:

Now the point that arises for determination is:

Whether the award passed by the Tribunal suffers from any legal infirmities warranting interference.

Learned Counsel for the appellant/claimant submits that the Tribunal failed to consider oral and documentary evidence on record in proper perspective while passing the award and also did not consider disability suffered by the appellant to its stand point.

8. The appellant/claimant herself was examined as P.W.1 besides examining the Doctor as P.W.2. The consistent

evidence of P.W.1 is that on 20.10.2005 at about 2.30 PM while she along with her co-sister Balanarsavva going to see her daughter in auto bearing No. AP 25 T 5567 and when they were on the way after passing the limits of Sarampally village, the driver of tractor bearing No. AP 15 M 9364 and trolley bearing No. AP 15 M 9365 which was coming from Rajampet village and having driven in rash and negligent manner, dashed against the said auto from its right side. During the cross examination, she admitted that her husband filed the complaint to the police.

Ex.A.1 is the copy of FIR and Ex.A.3 is the copy of charge sheet. In Ex.A.3, the Investigating Officer opined that while P.W.1 along with her co sister Balanarsavva travelling in the auto bearing No.AP 25 T 5567 and when the said auto crossed the Sarampally village limits, the tractor and trailer bearing Nos. AP 15M 9364 and AP 15M 9365 respectively having driven in rash and negligent mannter, at high speed by its driver, dashed the said auto, as a result of which, she sustained injuries. The finding of the Investigating Officer in Ex.A.3 are corroborated by Ex.A.1. Though the Insurance Company took plea that there is rash and negligence on the part of the driver of the auto bearing No. AP25 T5567, it did not choose to adduce any oral or documentary evidence. The driver of the offending tractor and trailer involved in the accident is the proper and material witness. For the reasons best known to the first respondent who is the owner of the tractor as also second respondent, insurer of the tractor did not choose to

enter into the witness box. They also did not adduce any independent oral or documentary evidence.

9. In the absence of any such rebuttal evidence produced by the second respondent, I am of the considered view that the findings of the Tribunal are legal and valid in holding that the evidence of P.W.1 supported by Exs. A.1 and A.3 well established that the accident occurred due to rash and negligent driving of the driver of the tractor bearing No.AP 15 M 6364 and trolley No.AP 15M 6365 and that there is no contributory negligence on the part of the drivers of tractor and auto bearing No. AP 25 T 5567 in which the appellant/claimant travelled at the time of accident.

Further, having considered that there is no rebuttal evidence to the evidence of P.W.1 to the effect that the driver of the tractor bearing No.AP 15 M 6364 and trolley No.AP 15M 6365 was not having valid and effective driving licence at the time of accident, following the decisions of this Court, the Tribunal held that such bald pleas that the driver of the vehicle is not having valid and effect driving licence at the time of accident is not tenable under law.

Further the finding of the Tribunal that the accident occurred due to rash and negligent driving of the driver of tractor and trolley bearing Nos. AP 15 M 9364 & AP 15M 9365 respectively, however, driver and insurer of the said vehicle are

not proper and necessary parties and the claim can be adjudicated even in their absence. So also the driver of auto bearing No. AP 25T 5567 is not a necessary party.

Accordingly the finding of the Tribunal that the accident occurred due to rash and negligent driving of the driver of the offending tractor and trolley and that the second respondent failed to establish rash and negligence on the part of the driver of auto bearing No. AP 25T 5567, and that the owner and driver of the said auto are not proper and necessary parties, are legal, valid and do not suffer from any legal infirmities warranting interference.

10. With regard to the claim of compensation, the evidence of P.W.1 is that in the accident she sustained crush injury and amputation of great toe and 2nd, 3rd, 4th, and 5th toes of right foot and other injuries all over the body. Further her evidence is that immediately after the accident, she was shifted to the Government Hospital, Kamareddy and admitted therein as in-patient for one month. She further deposed that she was still taking expert/specialist treatment as an in-patient/out-patient in private hospital for the grievous injuries and incurred heavy expenditure of Rs.60,000/- for medicines and hospital charges and that she was still undergoing treatment. She was cross examined. There was only suggestion that she has not taken treatment in private hospital and therefore not filed any medical prescriptions.

11. The doctor who treated the appellant/claimant is the proper person to speak about the nature of injuries suffered by the appellant/claimant and its impact and gravity. As on the date of accident, P.W.2 was working as Civil Assistant Surgeon in area Hospital, Kamareddy, where at the appellant/claimant was inpatient. The evidence of P.W.2 is that on 20.10.2015 at about 2.30 PM, P.W.1 came to the area Hospital, Kamareddy with crush injury to right foot with loss of great toe and partial loss of skin over the doctum of foot as well as loss of skin over 2nd, 3rd, 4th and 5th toes. The X-ray of right foot shows fracture at middle fingers of 2nd, 3rd, 4th and 5th toes. According to Ex.A.2 Wound certificate issued by the Medical Officer, Area Government Hospital, Kamareddy, injuries spoken by P.W.1 are corroborated with the evidence of doctor-P.W.2 who treated the appellant/claimant in the said Hospital. The prescription of medicines and follow up treatment are confronted by P.W.2. In Ex.A.4 there is specific mention that P.W.1 was admitted in the hospital on 20.10.2005 and discharged on 16.11.2005.

12. The evidence of P.W.1 corroborating the evidence of P.W.2 supported by Exs.A.2, A.4 and A.5 establish that the accident occurred on 20.10.2005, in which, P.W.1 suffered crush injury to left foot with loss of great toe, fracture at middle fingers of 2nd, 3rd, 4th and 5th toes, which are as per X-ray. There is also loss

of skin over the doctum of foot besides loss of skin over 2nd, 3rd, 4th and 5th toes.

13. The finding of the Tribunal is that Ex.A.6 is not proved by examining the person who issued the same and that mere marking of Ex.A.6 will not dispense with its proof. In support of the same, the Tribunal relied on the decision of this Court in ***BATTUROO RAVI VS. SHANKAR RAO AND ANR*** (2007 (3) ALD 449) wherein it was held that in support of disability certificate issued by doctors relating to the disability of the victim, unless the doctor who issued the certificate is examined as a witness that disability certificate cannot be relied on by the tribunals for assessing the disability of the victim. Further it relied on the decision of the Apex Court in ***SAIT TARAJEE KHIMCHAND AND OTHERS Vs. YELAMARTI SATYAM AND OTHERS*** (AIR 1971 SC 1865) wherein it was held that mere marking of the document as an exhibit does not dispense with its proof. By relying on the aforesaid two decisions, the Tribunal came to the conclusion that Ex.A.6 is not proved.

14. As already discussed supra, P.W.2 is the doctor who treated P.W.1 in the Area Government Hospital, Kamareddy. It is the clinching evidence of P.W.1 that immediately after the accident, she was shifted to Area Government Hospital, Kamareddy and admitted therein as inpatient for one month. This

fact is proved by the corroborated evidence of P.W.2 and supported documentary evidence at Exs.A.2 and A.4 and the same is also clearly mentioned in Ex.A.5 that P.W.1 was admitted in the hospital on 20.10.2005 and discharged on 16.11.2005 and that she sustained grievous fracture injury to right foot with loss of great toe and loss of skin over 2nd, 3rd, 4th, and 5th toes, partial loss of skin over the doctum of foot, and fracture at middle fingers of 2nd, 3rd, 4th, and 5th toes. P.W.1 deposed in her evidence that due to the said injuries she became permanent disabled and cannot do any work properly. She lost her earnings and future income also. She was facing lot of untold troubles and subjected to great hardship which cannot be expressed in terms of words. She was suffering with pains and depending on others for doing his regular duties and facing inconvenience with mental agony due to the permanent disability. As already discussed above, the doctor is the proper person to speak about the nature of injuries suffered by the appellant/claimant, its impact and gravity and consequential disability if any, permanent disability in particular.

15. The consistent evidence of P.W.2 is that on 9.4.2008 P.W.1 approached the Medical Board constituted at Kamareddy and that he verified her old records and also examined her clinically and physically and found 40% permanent disability for the amputation of right foot partially. The said disability also conformed in future and the appellant/claimant cannot work

without support of stick and always required medicine and treatment regularly. The appellant/claimant present before P.W.2 on the day of his evidence, i.e. on 7.1.2010 and identified her as to treatment undergone under him and issuance of Ex.A.6 disability certificate by the Medical Board and signed by Chairman and himself as a member of the Medical Board and also as Orthopedic Surgeon. P.W.2 was cross examined at length. There is no mention in Ex.A.2 that the injuries were met in R.T.A. The suggestion is that P.W.2 is not the member of the Medical Board. He admitted that he was not the member of the Medical Board as on the date of Exs.A.2 and A.4 were issued. There was another suggestion which was denied that P.W.2 has issued Ex.A.6 in order to help P.W.1 to get more compensation. The manner in which the cross examination went on goes to suggest that P.W.2 is not the member of the Medical Board at the time of treatment and issuance of Exs.A.2 and A.4. P.W.2 admitted that he was not the member of the Medical Board as on the date of Exs.A.2 and A.4, but he was the member of the Medical Board as on the date of Ex.A.6 and he signed on it (Ex.A.6). A perusal of Ex.A.6 goes to suggest that Ex.A.6 contained the signature of P.W.2 as Member of the Medical Board and also as Orthopedic Surgeon in the Area Government Hospital, Kamareddy. It is P.W.2 who attested on the photo of the appellant/claimant appended to Ex.A.6. The Tribunal without looking into the evidence of P.W.2, the manner in which he was cross examined and verifying Ex.A.6,

came to an erroneous conclusion that the Doctor who issued Ex.A.6 is not examined and therefore Ex.A.6 is not proved as contemplated. The legal decisions relied on by the Tribunal in the cases of *BATTUROO RAVI VS. SHANKAR RAO AND ANR* (2007 (3) ALD 449) wherein it was held that in support of disability certificate issued by doctors relating to the disability of the victim unless the doctor who issued the certificate is examined as a witness that disability certificate cannot be relied on by the tribunals for assessing the disability of the victim, and *SAIT TARAJEE KHIMCHAND AND OTHERS Vs. YELAMARTI SATYAM AND OTHERS* (AIR 1971 SC 1865) wherein it was held mere marking of the document as an exhibit does not dispense with its proof, are the correct propositions of law. But in the instant case, P.W.2 is one of the members of the Medical Board who issued Ex.A.6 and it bears his signature. He deposed and confronted Ex.A.6 that it was issued by the Medical Board to which he was one of the members and it contained his signature. Therefore the finding of the Tribunal that Ex.A.6 is not proved by examining the person who issued it is absolutely erroneous and perverse and the same is liable to be set aside.

16. The evidence of P.W.2 corroborating the evidence of P.W.1 establish that due to the crush injury to left foot with loss of great toe and loss of skin over 2nd, 3rd, 4th and 5th toes, partial loss of skin over the doctum of foot, and fracture at middle fingers of

2nd, 3rd, 4th and 5th toes, she became permanent disabled which is to the extent of 40%.

17. Admittedly the appellant/claimant/P.W.1 did not file any proof of age, occupation and income. Her evidence is that as on the date of accident, she was hale and health and she was contributing her entire income to her family and she was only the earning member in her family. Due to the injuries sustained in the accident, she cannot do any work properly and facing lot of untold troubles and subjected to great hardship which cannot be expressed in terms of words and she became permanent disabled. P.W.2 also confronted that the disability suffered by P.W.1 is conformed in future and she cannot walk without support of the stick and she requires medicine and treatment regularly. There is loss of income to the claimant.

18. During the cross examination P.W.1 stated that she was doing agriculture. In the petition as well as in her evidence, it is stated that as beedi roller, agriculture worker and contract labour, she was earning Rs.6,000/- per month and she was aged 43 years as on the date of accident.

In Ex.A.2 Wound Certificate, age of the appellant/claimant is mentioned as 45 years. In the charge sheet Ex.A.3 and discharge slip of Govt.Hospital Ex.A.4, her age is recorded as 45 years whereas in the disability certificate Ex.A.6,

her age is mentioned as 55 years. The accident occurred on 20.10.2005 whereas disability certificate was issued on 9.4.2008 i.e. three years after the accident and her age as on the date of accident would be 45 years approximately. Having considered the evidence available on record and pleadings, in the absence of rebuttal evidence thereon, I consider the age of the appellant/claimant as 45 years as on the date of accident.

19. In the absence of proof of income, I consider it appropriate to take her wages at Rs.100/- per day or Rs.3000/- per month. This view of mine is supported by the decision of this Court In *P. YESODHAMMA AND ORS Vs. T.BUCHI REDDY AND ORS* {2006 ACJ 414} wherein it was held that when there is no income proof, the daily income of victim person can be taken as Rs.100/- in assessing the loss of earnings. It is on record that she is married and she was contributing her entire earnings to her family. Hence 1/3rd of her earnings have to be deducted towards her personal living expenses had she been alive, then the remaining i.e. Rs.2000/- per month or Rs.24,000/- would be the contribution to her family. As per the decision of the Apex Court in the case of *SARLA VARMS AND ORS Vs. DTC* {2009 ACJ 1298} the appropriate multiplier is '14' as the appellant/claimant was aged 45 years as on the date of accident. Then the normal loss of dependency for 40% of the disability works out to be Rs.24000 x 14 x 40% = Rs.1,34,400/-.

20. P.W.1 deposed that she had incurred Rs.60,000/- towards medicines, transportation, hospital charges and expert treatment in the private hospital after discharge from the Government Hospital whereat treatment is at free of cost. However, she has not filed any medical bills in support of her claim. As per Ex.A.4, medicines are prescribed which she would have to purchase and still she is undergoing treatment. She also suffered pain and suffering which is required to be compensated. Therefore, awarding Rs.20,000/- towards medicines and treatment, Rs.1,000/- towards damages to cloths, Rs.4,000/- towards transportation and Rs.25,000/- towards pain and suffering would be just and reasonable. Thus, in all the appellant/claimant is entitled to be awarded Rs.1,84,400/-.

21. By virtue of the policy Ex.A.7 in force as on the date of accident, the respondents (owner and insurer of the offending tractor and trolley bearing Nos. AP 15 M 9364 & AP 15 M 9365) are jointly and severally liable to pay the said compensation.

22. In view of the foregoing discussion, it is clear that the accident occurred due to the rash and negligent driving of the driver of tractor bearing No.AP 15 M 8364 and trolley bearing No. AP 15M 9365 and in the said accident, the appellant/claimant suffered crush injury to left foot with loss of great toe, loss of skin over 2nd, 3rd, 4th and 5th toes, partial loss of skin over the doctum

of foot, and fracture at middle fingers of 2nd, 3rd, 4th and 5th toes. She suffered permanent disability which is to the extent of 40%. The finding of the Tribunal that the appellant/claimant failed to prove Ex.A.6 on account of non examining the person who issued it is held to be perverse and is liable to be set aside and accordingly set aside in view of the fact that P.W.2 was one of the members of the Medical Board which issued Ex.A.6 and it bears signature of P.W.2 and that Ex.A.6 is confronted through P.W.2 in his evidence. It is further clearly proved that the appellant/claimant was aged 45 years as on the date of the accident and was doing agriculture, working as Beedi roller and contract labourer. In the absence of proof of income, her wages are fixed at Rs.100/- per day relying on the decision of this Court referred supra. Though no proof of medical expenses is filed, in view of the consideration of injuries suffered, treatment undergone for one month and follow up treatment required to be go on regularly and, further, under Ex.A.4 medicines are prescribed by P.W.2 for which she has to incur expenditure for purchasing medicines, the appellant/claimant is entitled to receive compensation as assessed supra.

23. In the result, the appeal is partly allowed, with proportionate costs, setting aside and modifying the Award and decree dated 10.03.2010 in OP.No.1135 of 2005 on the file of learned Chairman, Motor Vehicle Accident Claims Tribunal-cum-VI Additional District Judge (Fast Track Court), Nizamabad to the

extent indicated herein above and awarding total compensation of Rs.1,84,400/- with interest at 7.5% per annum from the date of petition i.e. 24.12.2005 till the date of realization.

24. The respondents are directed to deposit the compensation amount awarded hereinabove, after deducting the amount if any already paid/deposited, within forty five (45) days from the date of receipt of a copy of this judgment.

25. On such deposit being made, the appellant/claimant is permitted to withdraw the same.

26. Advocate fee is fixed at Rs.2,500/-

27. Miscellaneous petitions pending consideration if any in the Criminal Petition shall stand closed in consequence.

JUSTICE N. BALAYOGI

DATED 14TH March, 2018.
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