THE HON'BLE SRI JUSTICE N.BALAYOGI

M.A. C.M.A. No.2917 of 2009

ORDER :

The appellant herein, who is the 2nd respondent in O.P.No.376 of 2002 aggrieved by the Award and Decree dated 18.10.2006 in O.P.No.376 of 2002 on the file of the Motor Accidents Claims Tribunal (District Judge) Nizamabad, preferred this appeal.

2. The contention of the appellant is that the Tribunal failed to consider the evidence of R.W.1, who deposed that the accident occurred due to negligence of the deceased only and erred in considering the evidence P.W.2, who came to depose for the first time 21 days after the accident and stated in the F.I.R. that the accident occurred due to an unknown vehicle. It is further contended that the Tribunal erroneously awarded Rs.15,000/- towards loss of consortium and loss of love and affection and Rs.5,000/- towards transportation charges against the principles of the second schedule.

3. The claim of respondents 1 to 3 herein, who are claimants in the main O.P., is that they claimed Rs.10,00,000/- compensation under Section 166 of the Motor Vehicles Act.

4. The claim in brief is as follows :

On 18.12.2001 at about 8.30 PM while deceased Shivalingu Rajaram was proceeding on cycle towards Boregaon side slowly by the side of the road and when he reached near Mahalaxmi Nagar colony, Nizamabad, at that time, Tata Sumo Jeep bearing No.AP 25 G 1999 driven by its driver with high speed in rash and negligent manner, came in opposite direction on wrong side and dashed the cycle of the deceased with front portion of the jeep, due to which he fell down and the front wheel of the jeep ran over the deceased and his cycle.

5. In the accident the deceased Rajaram sustained head injury, crush injuries and multiple fractures and he was admitted in the Government Headquarters Hospital, Nizamabad. While undergoing treatment, he succumbed to injuries at 9.45 PM on the same day. The cycle was completely damaged to a tune of Rs.2,000/- and Rs.30,000/- was incurred for treatment.

6. The deceased was hale and healthy and as a beedi packer-cum-maker he used to earn Rs.10,000/- per month and contribute the same for the maintenance of the family. Due to sudden death of deceased, claimants are suffering a lot of mental agony. Petitioners 2 and 3 lost their father's love and affection and 1st petitioner lost her husband.

7. The 2nd respondent filed written statement contending that the driver and the crime vehicle are unknown at the time of the accident and petitioners manipulated the accident with the help of the owner of the vehicle. It is doubtful that the deceased died in any motor accident, much less in the accident involving Tata Sumo Jeep

bearing No.AP 25 G 1999. The driver of the jeep had no valid and effective driving licence at the time of the accident. The claim is excessive and not supported by any facts, law and documents.

8. After hearing and basing on the pleadings of the claimants and the 2nd respondent, the following issues were settled for trial :

1) Whether the accident has taken place due to rash and negligent driving of the vehicle bearing No.AP 25 G 1999 by its driver?
2) Whether the petitioners are entitled for compensation? If so, to what just amount and against whom?
3) To what relief?

9. Subsequently, as per orders in I.A. No.1283 of 2004, dated 21.6.2004 the *ex parte* order against the 1st respondent was set aside and he filed written statement contending that the accident occurred due to negligence of the deceased, who came on cycle in a zig zag manner and he himself dashed against the Tata Sumo and sustained injuries and there is no fault on the part of the 1st respondent. The Tata Sumo is having valid permit and was road worthy and he is holding valid and effective driving licence at the time of the accident and that Tata Sumo was insured with the 2nd respondent with the Policy No.050700/31/01/04964 which is valid up to 23.7.2002, as such the liability of the 1st respondent has to indemnify by the 2nd respondent.

10. The 2nd respondent also filed additional written statement contending that claimants and the 1st respondent with the help of police got filed a false case against the 1st respondent for getting compensation and that the criminal case is an outcome of collusion between petitioners and respondent No.1. In the F.I.R. it was not stated what kind of vehicle was involved and the owner, who claims to be the driver of the vehicle at the time of the accident, did not inform to the Police and nobody gave the name of the owner and the number of the crime vehicle to the police. The Police did not arrest the accused till 5.1.2002 and the 1st respondent did not inform that he was the driver of the vehicle at the time of the accident. If it is correct and the 1st respondent, the owner-cum-driver, drove the vehicle, the Insurance Company is not liable to pay the compensation and the 1st respondent alone is liable to pay compensation.

11. Basing on the written statement of 1st respondent and additional written statement of the 2nd respondent and on hearing both sides, the following additional issues have been settled for trial :

> "<u>Additional Issues :</u>
>
> 1) Whether the vehicle of respondent No.1 was involved in the accident?
>
> 2) Whether the petition is filed in collusion with the respondent No.1?
>
> 3) Whether the insurance company is not liable for the claim as the vehicle was driven by the respondent No.1 at the time of accident?"

12. In support of the claimants, P.Ws.1 to 3 were examined and Exs.A1 to A3 were got marked. On behalf of respondents, R.Ws.1 and 2 were examined and Exs.B1 to B9 were got marked.

13. The Tribunal, having considered both oral and documentary evidence before it, came to the conclusion that the corroborative evidence of P.Ws.1 and 2 supported by Exs.A1 to A3 and B5 established that the accident was occurred due to rash and negligence of the driver of the jeep bearing No.AP 25 G 1999 to which the 1st respondent is the owner-cum-driver at the time of the accident. By virtue of Ex.B1 – Policy respondents 1 and 2 are jointly and severally liable to pay the compensation of Rs.3,32,000/- with subsequent interest at 7.5% per annum from the date of petition till the date of realization which shall be deposited by respondents 1 and 2 within one month from the date of the Award.

14. The 1st claimant herself is examined as P.W.1. Her evidence is that petitioners 2 and 3 are son and daughter and the deceased Rajaram is her husband and her in-laws are no more. There is no cross-examination of P.W.1 with regard to the relationship between the deceased and claimants. Since in view of non-disputing relationship, I hold that the 1st petitioner – P.W.1 is the wife and petitioners 2 and 3 are son and daughter of P.W.1 and deceased Rajaram.

15. Though P.W.1 in her evidence deposed that while her husband was proceeding on cycle from Phulong towards Boregaon, one Tata Sumo dashed the cycle of her husband at Laxminagar Colony, Nizamabad, due to which her husband fell down and received head injury and other severe bleeding injuries, during cross-examination, she admits that at the time of accident, she was not present, but her son was present. After came to know about the accident, she rushed to the accident spot. According to her own evidence, P.W.1 is not a direct eyewitness to the accident, therefore, necessarily I have to rely on the evidence of P.W.2 who alleged to be eyewitness.

16. The evidence of P.W.2 is that he knows Rajaram and witnessed the accident took place on 18.12.2001 near petrol pump of Nizamabad to Dichpally road at about 8.30 PM. He witnessed while the deceased was going on his cycle from Phulong to Dichpally side on the side of the road and when reached near petrol pump, Mahalaxminagar colony, one Tata Sumo came in opposite direction from Dichpally side at high speed and in rash and negligent manner and dashed the cyclist, due to which he fell down and the front wheel of Tata Sumo ran over the deceased. P.W.2 was cross-examined at length and got it clarified his presence at the accident wherein he stated that at that time he went to the petrol pump to fill his scooter and he informed the accident to the traffic police, besides informing to his friend Srinu. After traffic constable came, he explained about the

accident to him. The Police recorded his statement on 19th evening between 5 to 6 PM. On the date of accident itself, he furnished his address to the Constable and the said Constable came to his house on 19th and asked him to come to Police Station.

17. Ex.B5 is the copy of the F.I.R. which is presented by Shivalingu Mahesh who is none other than the son of the deceased Rajaram, wherein he stated that on 18.12.2001at about 8.30 PM when he reached near Vasavi High School, one unknown vehicle came in high speed driven in a rash and negligent manner and dashed his father's cycle. During cross-examination P.W.1 specifically stated that her son is aware of the particulars of the accident.

18. The Investigating Officer, after thorough investigation, filed Ex.A1 charge-sheet against Bandari Gangadhar - R.W.1, driver of Tata Sumo bearing No.AP 25 G 1999. P.W.2 herein is cited as 6th witness in Ex.A1 – charge-sheet, who clearly stated that he immediately informed about the accident to traffic constable and after arrival of traffic constable, he intimated the particulars and accordingly on 19.12.2001, the same traffic constable came to his house and asked him to come to the police station. Nothing suggested to P.W.2 to speak against the insurance company.

19. The accused in Ex.A1 charge sheet examined himself as R.W.1. His evidence is that he is the owner-cum-driver of jeep bearing No.AP 25 G 1999 and about three years back, while he was driving the Tata Sumo from Hyderabad to Nizamabad at Mahalaxmi

colony, the deceased was pedalling the cycle and suddenly crossed the road and dashed the Sumo at 8.30 PM. The deceased fell down from the cycle and then he stopped the jeep for few seconds and thereafter proceeded. During the cross-examination of R.W.1 by the claimants, he denied the suggestion that at the time of accident, he drove the vehicle with high speed and in rash and negligent manner. When cross-examined by the 2nd respondent, he stated that he obtained loan from finance company for Rs.1,50,000/-. He purchased the said Tata Sumo. By the date of accident, Rs.1,00,000/- loan was outstanding and subsequently he discharged the same. On the date of accident, he went to Hyderabad on personal work and while returning, the accident occurred. He clearly admits that one hour after the accident, the Police arrested him at the accident spot itself and produced him before the Court and further he deposed that he obtained bail. The criminal case is still pending. The Motor Vehicle Inspector visited the vehicle on 24.1.2002 and issued Ex.B3 - MVI Report wherein the Motor Vehicles Inspector certified that accident did not occur due to any mechanical defects of the vehicle. The evidence of R.W.1 read with Ex.B4 goes to suggest that R.W.1 was enlarged on bail by the Police itself on 5.1.2002. In the charge-sheet under Ex.A1 it is mentioned that on 5.1.2002 the crime vehicle Tata Sumo bearing No.AP 25 G 1999 has been traced and on examination of the driver, he disclosed his name as Bandari Gangadhar – R.W.1 and he was arrested and on production of surety, he was released on bail on the same day.

20. During the cross-examination, R.W.1 admitted that he submitted proposal to R2 company and admitted that police filed case against him and denied the suggestion that he drove the vehicle with high speed and in a rash and negligent manner and dashed the cyclist. In the cross-examination by R2, he stated what already discussed above, besides that he stated that he attended the Court about 7 or 8 adjournments. The A.O. of the 2nd respondent is examined as R.W.2 who speaks that the accident is not proved and the identity of the vehicle and driver are not proved. F.I.R. is registered against unknown vehicle. Police did not arrest the driver and none of the witnesses stated the number of the vehicle or name of the driver. In the scene of offence panchanama - Ex.B6 and rough sketch - Ex.B7 the name of the driver is mentioned as not known and in the inquest report – Ex.B9 the name of the driver is mentioned as not known. Accordingly, the driver's name is not mentioned. But, during the course of examination, R.W.2 stated that the police filed wrong charge sheet against a wrong person as if he is the owner-cum-driver of the vehicle and the same is insured with the 2nd respondent. As per record, R1 is the driver of the vehicle who is having valid driving licence and further stated that P.W.2 gave false evidence though he was not eyewitness and it is false because he was cited as 6th witness in Ex.A1 – charge-sheet.

21. The Tribunal, having considered all these facts discussed above, came to the right conclusion that R.W.1 is the owner-cum-

driver of the offending jeep which came to light during course of investigation. Though the charge-sheet under Ex.A1 is not conclusive proof, in the absence of any rebuttal evidence to the evidence of P.Ws.1 and 2 corroborated by Ex.A1 – charge-sheet, A3 – Insurance Policy and Ex.B3 – MVI report and Ex.B4 – bail bond of R.W.1 established that R.W.1 is the owner-cum-driver of the offending vehicle bearing No.AP 25 G 1999 on the date of accident and on that day he was returning from Hyderabad and involved in the accident. Though in Ex.B4 driver's name is not noted, Ex.B4 shows that the 1st respondent was released on bail granted by the Police on 5.1.2002 itself. Ex.B7 – rough sketch in the panchanama established that the accident occurred due to rash and negligent driving of the driver of the offending vehicle bearing No.AP 25 G 1999 i.e., R.W.1.

22. Section 161 Cr.P.C. statements of witnesses marked as Ex.B8 are inadmissible in evidence, because they can be used only to contradict or corroborate to the witnesses who are making statements. The Investigating Officer, who recorded the statements, is not examined to support Section 161 Cr.P.C. statements. In view of the above findings and discussion therein, I find that the Tribunal came to the right conclusion that the accident was due to rash and negligent driving of R.W.1, who is the owner–cum-driver of the Tata Sumo bearing No.AP 25 G 1999 and the evidence of P.W.2 - eyewitness to the accident is supported by Ex.A1 – charge-sheet. More over, the appellant is not disputing the finding of rash and negligent, but only

disputing that the vehicle was not involved, which is proved by the consistent and corroborative evidence on record.

23. Though the 1st respondent took the plea that the accident was due to negligence of the cyclist-deceased himself, he did not choose to adduce any oral or documentary evidence to rebut the evidence of P.W.2. In the absence of any such rebuttal evidence, the evidence of P.W.2 and charge sheet under Ex.A1 established that the Tata Sumo bearing No.AP 25 G 1999 is involved in the accident occurred on 18.12.2001 at 8.30 PM and the findings of the Tribunal are legal and valid.

24. The further contention is that the 1st respondent – R.W.1 did not possess valid and effective driving licence at the time of the accident. R.W.1's clear evidence is that he is the owner-cum-driver of the offending Tata Sumo bearing No.AP 25 G 1999 and at the time of accident he was driving the Tata Sumo, while he was returning from Hyderabad at that time. He was also arrested on 5.1.2002 and enlarged on police bail as per Ex.B4 bail bond and also the contents of the charge sheet under Ex.A1. R.W.1 in the evidence stated that since the owner drove the offending vehicle at the time of accident, as no premium is paid, Ex.B1 policy do not cover the risk. Further, Ex.B2 is the driving licence of R.W.1. A reading of Ex.B2, evidence of R.W.1 and admission of R.W.2 during cross-examination that the 1st respondent/R.W.1 was the driver of the vehicle and he was having valid driving licence at the time of the accident goes to suggest that

R.W.1 – R1 was issued driving licence bearing No.6059/NZB/96 on 25.11.1996 and he was authorized to drive motorcycle, car and light motor vehicle and the licence was valid from 25.11.1996 to 30.6.2005 and therefore by the date of accident on 18.12.2001 at 8.30 PM Ex.B2 driving licence was valid. The 2nd respondent has not disputed Ex.B2 driving licence. R.W.1 holds an effective driving licence at the time of accident and he is not disqualified from holding or obtaining a heavy transport driving licence. Though in Ex.B1 policy there is a clause that the owner of the vehicle is not entitled to drive the vehicle. The 2nd respondent, having taken a plea that no premium has been paid under the policy covering the risk of the owner, did not choose to file the entire policy copy and also did not choose to file the conditions of the policy or adduce any satisfactory evidence showing that the 1st respondent - R.W.1 has not paid any premium covering the risk and the 2nd respondent is not liable to pay any compensation for negligence of the owner

25. The Tribunal, having considered the evidence of R.W.1 and the admissions made by R.W.2 during cross-examination and also considering Ex.B2 - driving licence, came to the right conclusion that in the absence of any such document that the 1st respondent has not paid premium covering the risk and 2nd respondent is not liable to pay any compensation for negligence of the owner, an adverse inference can be drawn against the 2nd respondent that Ex.B1 policy covers the

risk of the owner by virtue of Ex.B1 policy and more so the deceased concerned is third party to the vehicle concerned.

26. With regard to proof of age and income admittedly the petitioner did not file any document. P.W.1 in the evidence stated that the deceased was 45 years by the date of accident and he was cultivating 5 acres of land and earning Rs.10,000/- per month. He also doing packing works in Mazdoor Chap Beedi factory and earning Rs.10,000/- per month. During cross-examination the suggestion given to P.W.1 is that her husband was about 55 or 60 years old and the same was denied, but to substantiate that the deceased was 55 or 60 years old, the respondent did not adduce any rebuttal oral or documentary evidence.

27. There is the independent evidence of P.W.3, which corroborate P.W.1, wherein he deposed that the deceased was aged about 45 years and he was doing beedi packing in Mazdoor Chap Beedi company, Shivajinagar, Nizamabad and earning Rs.400/- per day. During cross-examination, P.W.3 stated that he is also working in the same Mazdoor Beedi Company since 5 years and he is not having any identity card of the company. He also denied the suggestion that he is not working in the Mazdoor Beedi company and deceased was more than 55-60 years old.

28. Absolutely there is no evidence that the deceased was cultivating any lands and earning Rs.10,000/- per month and also working as Beedi packer in Mazdoor Beedi factory. As per Ex.B9

inquest report the occupation of the deceased was recorded as Beedi packer in Mazdoor Chap Beedi Factory. To corroborate and substantiate that the deceased was working in Beedi factory and earning Rs.10,000/- per month, no oral or documentary evidence was adduced by claimants.

29. The tribunal, having considered the facts and circumstances and also relying on the decision in ***National Insurance Company Limited Vs. Krishnappa and another*** [1] assessed the income of the deceased at Rs.100/- per day and Rs.3,000/- per month. After deducting 1/3rd towards personal expenses of the deceased, monthly dependency of the family is calculated at Rs.2,000/- per month and per annum at Rs.24,000/-.

30. Ex.A2 is the PME report wherein the age of the deceased was shown as 50 years. As already discussed above, the suggestion to P.W.1 and P.W.3 is that the deceased was more than 55-60 years, but no rebuttal oral or documentary evidence was produced by the 2nd respondent. Therefore, the Tribunal relying on recital in Ex.A2 PME report considered the age of the deceased at 50 years by the date of the accident.

31. As per the decision in ***Sarla Verma v. DTC*** [2] the multiplier to the age group of 46 to 50 is '13', accordingly the Tribunal applied the multiplier '13' and arrived at the compensation

[1] I (2001) ACC 686 (DB)
[2] (2009) 6 SCC 121

of Rs.3,12,000/-. Besides that, it also awarded Rs.15,000/- towards loss of consortium and loss of affection and Rs.5,000/- towards transportation. The awarding of compensation at such rates is quite reasonable and as per the law applicable as on the said date. There is no error or irregularity in awarding compensation of Rs.3,12,000/- and also Rs.15,000/- towards loss of consortium and loss of affection and Rs.5,000/- towards transportation and those are minimum amounts for which the claimants are entitled to. The multiplier '13' applied is based on ***Sarla Verma's case*** taking age of the deceased at 50 years at the time of the accident.

32. In the facts and circumstances discussed above, I am of the considered view that findings of the Tribunal that on 18.12.2001 at about 8.30 PM the accident occurred due to rash and negligent driving of R.W.1, who drove the Tata Sumo in a rash and negligent manner and dashed the cyclist and the deceased succumbed to injuries. R.W.1 is the owner-cum-driver of the said jeep. In the absence of any evidence showing that no premium is paid covering the risk of the owner and more so as the deceased is a third party to the vehicle, Ex.B1 policy which was in force as on the date of accident covers the risk and accordingly the appellant and the 4th respondent are jointly and severally liable to pay the compensation. The amount of compensation awarded i.e., Rs.3,32,000/- is legal, valid and do not suffer from any legal infirmities warranting interference.

33. The appeal fails and is accordingly dismissed with costs confirming the Award and Decree dated 18.10.2006 in O.P.No.376 of 2002 on the file of the Motor Accidents Claims Tribunal (District Judge) Nizamabad. The appellant and the 4th respondent who are insurer and insured are directed to deposit the compensation amount and interest after deducting the amount, if any, already paid or deposited within 30 days from the date of receipt of a copy of the order. On such deposit, claimants are permitted to withdraw their apportioned amounts as ordered in M.V.O.P.

34. Advocate fee is fixed at Rs.2,000/-.

35. Consequently, miscellaneous petitions pending, if any, shall stand closed.

JUSTICE N.BALAYOGI

22nd January, 2018

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