

THE HON'BLE MR JUSTICE N.BALAYOGI

M.A.C.M.A. No.1688 of 2010

JUDGMENT:

1. The appellant – claimant aggrieved by the Award and Decree dated 16.4.2010 in O.P.No.79 of 2005 on the file of the Court of the Motor Vehicle Accidents Claims Tribunal (VI Additional District Judge),(FTC), Nizamabad at Kamareddy, awarding compensation of Rs.1,10,000/- with proportionate costs and interest at 6% per annum on the said amount from the date of petition i.e., 29.12.2004 till the date of deposit jointly and severally against respondents 1 and 2 which shall be deposited by them within three months from the date of the Award, preferred this appeal.

2. The contention of the appellant is that the Tribunal awarded only meager amount towards medical expenditure and failed to grant compensation towards (i) pain and suffering; (ii) extra nourishment; (iii) attendant charges; (iv) transport; (v) loss of earnings; and (vi) future treatment. It is further contended that the Tribunal failed to grant interest at 18% per annum and award is contrary to law and evidence.

3. The claim of the claimant/appellant herein in brief is as follows :

On 11.9.2003 while the appellant was traveling in auto bearing No.AP 23 U 1661 and while passing through Malthummeda

village limits, at a distance of 3 KMs east from Nagireddipet police station at about 2.00 PM the driver of the auto drove the vehicle in rash and negligent manner and caused the accident.

4. The appellant sustained injuries and immediately he was taken to the Government Hospital, Kamareddy and after taking treatment, he was discharged, even then continuing the treatment through private Doctors. He spent nearly Rs.1,50,000/- towards medical expenses.

5. The 2nd respondent filed counter contending that the driver of the auto bearing No.AP 23 U 1661 never driven the auto in rash and negligent manner, hence the 2nd respondent is not liable to pay the compensation. The accident might have occurred due to overload of auto and negligence of the petitioner himself, as such also the 2nd respondent is not liable to pay compensation.

6. On hearing and consideration of the entire material on record, the Tribunal settled the following issues for trial :

- i) Whether the accident occurred on 11.9.2003 due to the rash and negligent driving of the Auto bearing No.AP 23 U 1661 by its driver as per Section 166(1)(a) of M.V. Act?
- ii) Whether the petitioner is entitled for compensation and if so to what amount and from which of the respondent?
- iii) To what relief?

7. In support of the petitioner's contention P.Ws. 1 and 2 were examined and Exs.A1 to A5 were got marked. On behalf of

respondents, no oral evidence was adduced, but Ex.B1 was got marked with consent.

8. Now the point that arises for determination is :

“Whether the Tribunal erred by not granting compensation towards (i) pain and suffering; (ii) extra nourishment; (iii) attendant charges; (iv) transport; (v) loss of earnings; and (vi) future treatment and by granting meager amount of compensation and whether the order of the Tribunal is suffering from legal infirmities warranting interference.”

The learned counsel for the appellant contended that the Tribunal erred in not granting compensation under different heads having found that the accident was due to rash and negligence of the driver of the auto.

On the other hand, respondent – Insurance Company contended that there is no negligence on the part of the driver of the auto and the Tribunal, having considered the material available on record, rightly awarded just compensation, which do not suffer from any legal infirmities warranting interference.

9. The appellant, being the claimant, is not disputing finding of rash and negligence and it is only contended that no award is awarded under certain heads and the amount granted and interest allowed is very meager in view of the oral and documentary evidence on record, particularly the evidence of P.W.1, who is the appellant – claimant, which is supported with Ex.A1 – copy of F.I.R. and Ex.A3 – certified copy of charge-sheet. The consistent evidence of P.W.1 is

that on 11.9.2003 at about 2.00 PM the driver of the auto bearing No.AP 23 U 1661 drove the auto with high speed in rash and negligent manner, lost control, as a result, the auto went off the road side and turned turtle. In respect of the said accident, Ausali Anjaiah made a complaint to the Police alleging that he was also present in the auto at the time of the accident and the driver of the auto drove the auto with high speed in rash and negligent manner and while crossing the buffalo, the auto turned turtle. The Investigating Officer, after thorough investigation, filed charge-sheet under Ex.A3 against Mohd. Anwar finding that the driver of the auto bearing No.AP 23 U 1661 while proceeding towards Gopalpet and when reached at the agricultural seed form, Malthummeda, drove the auto in rash and negligent manner with high speed and when tried to escape from a buffalo, he could not control his speed and auto turned turtle.

10. P.W.1 was cross-examined by the 2nd respondent at length and could elicit that P.W.1 sat in the auto on the back seat and at the accident spot it was a single straight road. Though in the counter, 2nd respondent took the plea that there is no negligence on the part of the driver of the auto and accident is due to negligence of P.W.1 himself, the respondent failed to suggest the same to P.W.1 and produce any witness to rebut the evidence of P.W.1.

11. It is also the contention of the 2nd respondent that the accident was due to overload of the auto. When the 2nd respondent took such a plea, the burden is on it to produce oral and documentary

evidence. The co-passengers like the complainant, who is cited as first witness in Ex.A3 – charge-sheet or other two lady passengers in the said auto at the time of the accident are the material witnesses to speak about the manner of the accident. For the best reasons known to the 2nd respondent it did not choose to adduce any such rebuttal evidence. As per Ex.A1 – F.I.R. and Ex.A3 – charge-sheet, the auto on 11.9.2003 at about 12.30 noon while proceeding with two lady passengers, the complainant Anjaiah boarded the auto to go to Gopalpet and on the way near Pocharam, P.W.1 boarded the auto. Accordingly, there are four passengers. It is not the evidence or material on record which shows that because of overload only the accident occurred. Exs.A1 and A3 goes to suggest that the driver drove the auto with high speed in rash and negligent manner and while crossing the buffalo, the auto driver lost the control and the auto turned turtle, which clinches the issue that the driver drove the auto with high speed in rash and negligent manner and the accident occurred while crossing the buffalo with high speed.

12. In the absence of any oral or documentary rebuttal evidence produced by the 2nd respondent to the effect that there is no negligence on the part of the driver of the auto and the accident is due to overload or negligence of P.W.1 himself, I am of the considered view that the accident was due to rash and negligent driving of the driver of the auto bearing No.AP 23 U 1661 and such finding is legal, valid and tenable.

13. With regard to injuries on person the evidence of P.W.1 is that in the accident he sustained (i) multiple fractures of both bones of right leg; (ii) fracture of both bones of left leg, (iii) fracture of spinal cord, (iv) fracture of skull, (v) fracture of right jaw; (vi) fracture of ribs and (vii) other grievous and multiple injuries all over the body. Immediately, he was taken to Government Area Hospital, Kamareddy where he treated as inpatient and underwent major operations and spent more than Rs.2,00,000/- till now towards medical expenses. After discharge from the hospital, he is taking treatment under private doctors. The suggestion to P.W.1 is only that he created injuries for the sake of false claim and x-ray films do not belong to him, which he denied.

14. The Doctor – P.W.2, who treated P.W.1, is the proper person to speak about the injuries and documents in support of the said injuries. Ex.A2 is the wound certificate issued by Medical Officer, Government Hospital, Yellareddy. In the evidence, P.W.2 specifically stated that he examined P.W.1 and found the following injuries :

1. Fracture of the both bones of the right lower leg.
2. Communitied fracture of the right fibula.
3. Abrasion on the right elbow about 3x3 cm size.
4. Multiple abrasion on the face and the head about 4 to 5 in number each 2x2 cm size.
5. A supramallidolar fracture of the right fibula.
6. Swelling and tenderness and abnormal mobility of the right foot due to deltoid ligament tear.

Among six injuries, injuries 1, 2, 5 and 6 are grievous in nature and while injuries 3 and 4 are simple in nature. P.W.2 was cross examined by 2nd respondent and the cross-examination is with regard to noting of identity cards in MLC. He admits he did not mention O.P. number in Ex.A2 – wound certificate. His explanation for non-mention of O.P. number in wound certificate is that normally they do not write the O.P. number in injury certificate. The further suggestion is that P.W.1 did not sustain any injury as mentioned in Ex.A2 and Ex.A5 – x.ray and they do not pertain to P.W.1 and that Ex.A2 is issued only to accommodate P.W.1. From the above cross-examination it is very clear that in spite of cross-examining P.W.2 at length, the 2nd respondent could not elicit any favourable material to rebut the corroborative and consistent evidence of P.Ws. 1 and 2 and documentary evidence of Ex.A2.

15. In the absence of any such rebuttal evidence, I am of the considered view that the evidence of P.W.1 corroborated with P.W.2, supported by Ex.A2 well established that in the accident on 11.9.2003 at about 2.00 PM, while the petitioner was traveling in auto bearing No.AP 23 U 1661, P.W.1 sustained the following six injuries :

1. Fracture of the both bones of the right lower leg.
2. Communitated fracture of the right fibula.
3. Abrasion on the right elbow about 3x3 cm size.
4. Multiple abrasion on the face and the head about 4 to 5 in number each 2x2 cm size.
5. A supramallidolar fracture of the right fibula.

6. Swelling and tenderness and abnormal mobility of the right foot due to deltoid ligament tear.

Among six injuries, injuries 1, 2, 5 and 6 are grievous in nature and while injuries 3 and 4 are simple in nature.

16. A perusal of the original claim petition goes to suggest that the appellant – claimant claimed Rs.61,20,000/- towards loss of earnings, Rs.1,50,000/- towards transport to hospital, medical expenses and extra-nourishment and Rs.2,00,000/- towards pain and suffering and further Rs.2,00,000/- towards permanent disability, which comes to Rs.66,70,000/-, however, restricted the claim to Rs.4,00,000/-.

17. The evidence of P.W.1 is that he spent nearly Rs.2,00,000/- towards medical expenses and extra-nourishment and even after discharge from the Hospital, he is continuing treatment under private doctors. He was aged 24 years and doing fish business, besides cultivation and earning a sum of Rs.10,000/- to Rs.12,000/- per month. After the accident, on account of multiple fracture injuries, he became permanently disabled, lost total earning power and not able to do any work. The Doctor, who treated P.W.1, is the proper person to speak about the disability or loss of earning capacity of P.W.1. But, there is no whisper about the disability, loss of earning capacity of P.W.1 in the evidence of P.W.2. More so, the appellant – claimant did not file any piece of paper showing the actual expenditure incurred towards extra-nourishment, attendant charges, transport charges,

medical expenditure and any medical certificate or oral evidence of the Doctor to establish approximate expenditure for the treatment.

18. The Tribunal, having discussed elaborately the evidence of P.Ws.1 and 2 and appreciation of the evidence on record, came to the conclusion that as per the evidence of P.Ws.1 and 2, supported by Ex.A2, the claimant sustained four grievous injuries and two simple injuries due to the accident he received and there is no evidence to show that the appellant will not hamper his earning capacity. Having followed the decision in the case of *Nagiripadu Jayramaiah Vs. Somasila Gopala Krishna and another* ¹ and *Bavirisetty Krishna Babu Vs. Pathaboina Srinivas Rao* ² the Tribunal held that the inconvenience caused to the victim in road accident does not hamper the earning capacity and he did not do any other job. Because there is no proof of hampering the earning capacity of P.W.1, it rejected to award any amount towards loss of earnings.

19. More so, there is also no evidence that the appellant sustained any disability, particularly permanent in nature. P.W.2 – Doctor who is the proper person to speak does not speak about disability. According to the evidence of P.W.1, immediately after the accident he was shifted to Government Area Hospital, Kamareddy, where he was treated as inpatient and undergone major operations. After discharge from the Hospital, he was admitted in private hospital and underwent treatment as inpatient and undergone major operations

¹ 2005 (2) ALD NOC 112

² 2004 (5) ALD 423

and steel rods were fixed to his right and left legs, POP applied for about 6 months, thereafter he is taking treatment under private Doctors and incurred Rs.2,00,000/- expenditure. Ex.A2 is the wound certificate issued by the Medical Officer In-Charge, Government Civil Hospital, Yellareddy. The appellant did not file any certificate showing his admission as inpatient and also treatment and undergoing of any surgeries. P.W.2 also does not speak about surgeries undergone by P.W.1 or Ex.A2 shows any such operations. If really the claimant incurred expenditure towards transportation from his residence to Hospital, he should have produced valid receipts in token of payment of expenditure incurred towards transportation and also for medical and attendant charges.

20. In such circumstances, the Tribunal awarded compensation for four fracture injuries at the rate of Rs.25,000/- for each injury and awarded compensation for two simple injuries at the rate of Rs.3,000/- for each injury and also awarded Rs.4,000/- towards medical expenditure. These amounts awarded are certainly meager and require modification and besides that reasonable amounts should be awarded under different heads to arrive at just compensation. Accordingly, I am of the considered view that P.W.1 sustained fracture of both bones of right lower leg, comminuted fracture of the right fibula, supramallidolar fracture of the right fibula and swelling and tenderness and abnormal mobility of the right foot due to deltoid ligament tear. Besides that he also sustained abrasion on the right

elbow about 3x3 cm size and multiple abrasion on the face and the head about 4 to 5 in number each 2x2 cm size. Accordingly, I find that awarding compensation of Rs.40,000/- each towards fracture of both bones of the right lower leg and comminuted fracture of right fibula (40,000 + 40,000) and Rs.30,000/- each to supramallidolar fracture of right fibula and deltoid ligament tear of right foot (30,000 + 30,000). Besides that, I also award Rs.4,000/- each to abrasion on the right elbow and multiple abrasion on the face and the head (4,000 + 4,000). Thus, in all the claimant is granted Rs.1,48,000/- towards compensation for the injuries sustained. Besides that, taking into consideration grievous fracture injuries and simple injuries sustained by the claimant and treatment he has taken, the claimant is awarded Rs.20,000/- towards medicines and Rs.6,000/- towards extra-nourishment, Rs.5,000/- towards transportation and Rs.15,000/- towards pain and suffering.

21. In the absence of proof of income, considering the evidence of P.W.1 that he was a fisherman and he used to earn Rs.10,000/- per month on fishing business and cultivation, I assess the monthly income of the claimant at Rs.3,000/- per month and basing on injuries he suffered and as he requires treatment, at least he could not have attended his regular works for about 6 months, which is quite reasonable and accordingly I award an amount of Rs.18,000/- (3,000 x 6) towards loss of earnings. Thus, the appellant in all is

entitled for a compensation of Rs.2,12,000/- and which will meet the ends of justice.

22. In the facts and circumstances discussed above and having considered the nature of injuries i.e., four fracture injuries and two simple injuries and nature of treatment and sufferance, the appellant in all is entitled to compensation of Rs.2,12,000/-. By virtue of Ex.A4 policy which is in force by the date of accident, the 2nd respondent being insurer has to indemnify the liability of the 1st respondent. The respondents 1 and 2 are jointly and severally liable to pay the compensation.

23. In the result, the appeal is partly allowed with proportionate costs while setting aside and modifying the award and decree dated 16.4.2010 in O.P.No.79 of 2005 on the file of the Motor Accidents Claims Tribunal-cum-VI Additional District Judge, (Fast Tract Court), Nizamabad at Kamareddy and passed the modified award for Rs.2,12,000/- against the respondents 1 and 2 jointly and severally with proportionate costs and interest at 7.5 % per annum from the date of petition i.e., 29.12.2004 till the date of deposit or realization, which shall be deposited, after adjusting the amount, if any, already deposited or paid, within a period of 30 days from the date of receipt of a copy of the appeal judgment. On such deposit, the appellant is permitted to withdraw the same.

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

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

JUSTICE N.BALAYOGI

24th January, 2018

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