

THE HONOURABLE SRI JUSTICE N. BALAYOGI

M.A.C.M.A. No.512 of 2011

JUDGMENT:

1. This appeal is preferred by the National Insurance Company Limited, the second respondent in O.P.No.743 of 2008, aggrieved by the order, dated 15.11.2010, passed by the Motor Accidents Claims Tribunal, Anantapur (for short 'the Tribunal') in the said O.P., whereby the Tribunal allowed the O.P. in part awarding compensation of Rs.4,00,000/- along with proportionate costs and interest @ 7.5% per annum from the date of filing of the petition i.e., 23.09.2008 till the date of realization, against the respondents i.e., the appellant herein and the owner of the offending vehicle. The respondents were directed to deposit the said decretal amount within one month from the date of the order. On such deposit, the petitioner, the first respondent herein, was permitted to withdraw an amount of Rs.1,00,000/-. The balance amount was directed to be kept in fixed deposit in any Nationalised Bank for a period of two years and after completion of such period, the said amount was directed to be withdrawn by the first respondent herein.

2. For the sake of convenience, the parties are hereinafter referred to as they were arrayed in the O.P. before the Tribunal.

3. The claim of the petitioner/injured is that on 02.06.2008 at about 6.00 p.m., while he was proceeding in

the jeep on the extreme left side of the road and slowly, a lorry bearing Registration No. TN 57 W 1339 which belongs to the first respondent and insured with the second respondent being driven by its driver in a rash and negligent manner dashed the jeep, as a result of which, the petitioner sustained grievous injuries. Immediately, he was shifted to Government Hospital, Kadiri, and from there to Apollo Hospital, Bangalore, for better treatment. He spent nearly Rs.4,50,000/- towards medial expenses. Due to the injuries sustained in the said accident, the petitioner could not regain normal health and ultimately, he became permanently disabled resulting in loss of earnings. He was on leave for four months and therefore, there was a loss of salary of Rs.1,08,000/-.

4. The appellant/second respondent filed a counter contending that the accident did not take place due to the rash and negligent driving of the offending lorry and its liability is subject to terms and conditions of the policy and that the driver of the offending lorry was not having valid driving licence at the time of the accident.

5. The Tribunal, having considered the pleadings and on hearing both sides, settled the following issues:

- (1) Whether the accident occurred on 02.06.2008 due to rash and negligent driving of the driver of lorry bearing No.TN-57-W-1339 dashed against the Bolero bearing No.AP-04-X-2642 and caused injuries to the petitioner?
- (2) Whether the petitioner is entitled to compensation? If so, to what amount and from which respondent?
- (3) To what relief?

6. In support of his claim, the petitioner examined himself as P.W.1 and also examined two more witnesses as P.Ws.2 and 3 and got marked Exs.A.1 to A.10. Though the second respondent – Insurance Company has not adduced any oral evidence, it got marked Exs.B.1 and B.2.

7. The Tribunal, having considered the entire evidence on record, allowed the O.P. in part and awarded a sum of Rs.37,500/- for the three grievous injuries, Rs.2,00,000/- for the disability, Rs.1,00,000/- for transportation expenses, extra nourishment and other expenses and Rs.62,500/- for pain and suffering. In total, the Tribunal awarded a sum of Rs.4,00,000/- towards compensation along with interest @ 7.5% per annum.

8. Now the point that arises for consideration in this appeal is:

“Whether the award and decree suffered with any legal infirmities warranting interference under appeal.”

9. The contention of the appellant – Insurance Company is that the Tribunal having disbelieved Ex.A.9-disability certificate erroneously awarded Rs.2,00,000/- towards disability and also erred in awarding higher amount for the injuries received by the claimant.

Per contra, the first respondent/claimant contended that the Tribunal forgot that Ex.A.9 - disability certificate was issued by a member of the Medical Board constituted by the Government; that the members of the Medical Board need not

be the doctors, who treated the injured and that the finding of the Tribunal that the claimant failed to establish that he sustained 45% of disability because none of the members of the Medical Board treated him, is illegal and against law.

10. The Tribunal, having considered the oral evidence of P.W.1 and supported by the documentary evidence under Ex.A.1-photostat copy of FIR, Ex.A.3-photostat copy of rough sketch and Ex.A.7-photostat copy of charge sheet, elaborately discussed and came to the right conclusion that Exs.A.1 and A.7 well established the manner in which the accident occurred. Though the appellant cross-examined P.W.1 at length, it could not elicit any information contradicting his evidence. The Tribunal, however, held that since the evidence of P.W.1 supported by Exs.A.1 and A.3 established that the accident was due to the rash and negligent driving of the driver of the offending lorry, the burden is on the appellant, which took the plea that there was no negligence on the part of the driver of the lorry, to rebut the evidence of the petitioner by adducing oral and documentary evidence.

11. The driver of the offending lorry is the proper person to speak about the manner of the accident, but for the best reasons known to the appellant, they have not chosen to examine the driver of the offending lorry. More so, the owner of the lorry, who is the first respondent in the claim petition and second respondent in the appeal, was set *ex parte*.

12. In the facts and circumstances discussed above, the Tribunal, on valid and legal grounds, came to the conclusion that the accident was due to rash and negligent driving of the driver of the offending lorry. Such findings do not warrant any interference by this Court.

13. The main contention of the appellant is that the Tribunal having disbelieved Ex.A.9 disability certificate erred in awarding compensation of Rs.4,00,000/-. No doubt, under the principles of law, the doctor, who treated the injured, is the proper person to speak about the disability and the gravity of the injuries sustained by the injured. In the instant case, the doctor, who treated the petitioner, was examined as P.W.3. The consistent evidence of P.W.3 supported by Ex.A.2-wound certificate and Ex.A.8-Medical bills clinches the issue.

14. P.W.3 is one of the members of the Medical Board who signed on Ex.A.9-disability certificate. The consistent evidence of P.W.3 is that on 26.06.2009, he along with other members of the Medical Board examined P.W.1 and issued Ex.A.9-disability certificate assessing the disability at 45%. According to him and as noted in Ex.A.9 - wound certificate, P.W.1 sustained compound grade III fractures of both bones of right fore arm, lower 1/5th with extensor tendons and muscles in deep in right fore arm with ulnar nerve injury at right wrist, with lacerated wound over dorsum as right hand, treated in Apollo Hospital, Bangalore, resulting into mal union of fracture ulna fracture radius with stiffness of fingers

or right hand and loss of extension with nearly total loss of functions of right hand. He further deposed that P.W.1 is not able to use right hand due to clawing and stiffness of finger joints and that there is decreased range of movements of wrist joint.

15. P.W.2 is the doctor, who treated P.W.1 at Apollo Hospital, Bangalore. He deposed that P.W.1 underwent extensive debridement of wound, tendon repairs and exploration of nerve for injuries and then followed by open deduction with external fixator of right radius and that as the wound got infected and culture showed (MRSA) Methicillin Resistant Staphylococcus Aureus, P.W.1 was treated with appropriate antibiotics and everyday the wound was cleaned and dressed. He further deposed that on 13.06.2008, he found lot of pus and slough and extensor tendons were non-viable; that because of this, all slough tissue and extensor tendons were excised; that he advised P.W.1 to continue I.V. antibiotics at Anantapur; that again P.W.1 was admitted in the hospital on 07.07.2008 and discharged on 09.07.2008 and that during this period, he underwent removal of external fixator and rotation medical graft with skin grafting was done.

16. The evidence of P.W.1 corroborated by the evidence of P.Ws.2 and 3 and supported by Exs.A.8 and A.9 established that P.W.1 sustained three grievous injuries including two fractures over his right fore arm and right hand on account of the accident and that he sustained 45% permanent disability.

17. The doctor, who treated P.W.1 in Apollo Hospital, Bangalore, is the proper person to speak about the disability. There is no rule that the doctor, who treated P.W.1, must be member of the Medical Board constituted by the Government. However, P.W.3, who is a member of the Medical Board, along with other members of the Medical Board examined P.W.1 and issued Ex.A.9 assessing the permanent liability at 45%. P.W.3 has specifically admitted during the course of cross-examination that he did not give any treatment to P.W.1 prior to his examination on 26.06.2009. Further, it is not the evidence of P.W.3 that X-rays of the relevant parts of the body of P.W.1 were taken on 26.06.2009 and such X-rays were taken into consideration at the time of assessing the permanent disability of the petitioner. Neither P.W.1 nor P.W.3 produced and marked any X-rays before the Court below. Though the Tribunal held that the claimant failed to establish that he sustained 45% permanent disability on account of the fracture injuries received by him in the accident that occurred on 02.06.2008, it rightly awarded a sum of Rs.2,00,000/- towards disability.

18. In the facts and circumstances of the case, I am of the considered view that the Tribunal came to the right conclusion that the accident was due to the rash and negligent driving of the offending lorry. As per the evidence of P.Ws.2 and 3, the disability sustained by the claimant-P.W.1 was not established. Further, P.W.3, who issued Ex.A.9, is

not the doctor, who treated P.W.1, and x-rays were also not produced, as such, the finding of the Tribunal that the disability sustained by P.W.1 is not established is erroneous. Hence, the said finding is set aside.

19. Except setting aside the finding of the Tribunal to the extent indicated, the impugned order and decree is confirmed in all respects.

20. In the result, the appeal is dismissed.

21. There shall be no order as to costs.

22. Miscellaneous petitions, if any, pending in this appeal shall also stand dismissed.

Date: 31.07.2018
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JUSTICE N. BALAYOGI

