THE HON'BLE SRI JUSTICE M.GANGA RAO

M.A.C.M.A.No.523 OF 2011

JUDGMENT:

The appellant-Insurance Company filed this appeal against the award and decree dated 02.09.2010 passed in M.V.O.P.No.103 of 2007 by the Chairman, Motor Accidents Claims Tribunal-cum-Additional District Judge, Family Court, West Godavari at Eluru, granting compensation of Rs.3,01,496/- as against the claim of Rs.5,50,000/- for the injuries sustained by the 1st respondent-claimant in the motor accident occurred on 14/15-08-2006.

The 1st respondent herein filed claim petition originally under Sections 166 and 163-A of the Motor Vehicles Act, 1988 read with Rule 455 of the Andhra Pradesh Motor Vehicles Rules, 1989. Subsequently, during the course of trial, R.1 filed a memo to withdraw the claim under Section 163-A of the M.V.Act and the same was allowed. Now, the claim is only under Section 166 of M.V.Act read with Rule 455 of APMV Rules.

The 1st respondent filed claim petition alleging that on 14.08.2006 while he was driving the car bearing No.AP09 BN TR 2266 on NH5 road in normal speed and reached near Nethakota at about 3.00 a.m. suddenly a dog came across the road, due to which, he applied sudden brakes, as a result of which the car dashed against the divider and turned turtle. The car was totally damaged and he received injuries to his head, right forearm, etc. Immediately, he was shifted to Alert Emergency Hospital, Rajahmundry, where he was treated as an in-patient and spent nearly Rs.2,50,000/- for his treatment. It was further alleged that he require further sum of Rs.50,000/- for his future medical expenses. Due to the accident, he suffered permanent disability. Hence, he claimed compensation from the 2nd respondent and appellant, being the owner and insurer of the offending vehicle respectively, jointly and severally.

The 2nd respondent, owner of the offending vehicle, filed a counter affidavit admitting that the 1st respondent was the driver of the offending vehicle and the occurrence of the accident was true and correct. After the accident, he filed his driver's claim petition against the appellant-Insurance Company and he was paid the total damage of the offending vehicle. Later, he purchased a new car. It is further stated that the offending vehicle was covered by a comprehensive policy under all heads and in addition to that, he paid additional premium covering the risk of the driver of the offending vehicle. The said policy was in force at the time of accident and therefore he is not liable to pay any compensation to the first respondent and the appellant alone was liable to pay compensation.

The appellant also filed a counter denying all the averments of the claim petition, admitting that the offending vehicle was insured with it and the policy was in force as on the date of the accident, however, contending that the liability of the appellant towards third parties was subject to terms and conditions of the policy and the provisions of M.V.Act. As per the terms of the policy, the appellant was liable to pay to the third parties who suffered injuries or damages in the accident. But, in the present case, the 1st respondent himself was the tort-feaser and therefore he was disentitled to file application under Section 166 of the

M.V.Act. Hence, the claim is misconceived and liable to be dismissed.

Based on the above pleadings, the Tribunal framed the following issues for its consideration:

1) Whether the accident occurred due to the rash and negligent driving of the lorry bearing no.AP 09 BN 22 66 driven by its driver/1st respondent?
2) Whether the petitioner is entitled for compensation and if so for how much amount?
3) To what relief:

The subsequent Presiding Officer, on coming to know that issue No.1 was wrongly framed inadvertently, had re-casted the issue No.1 as follows:

> "Whether the accident occurred due to the rash and
> negligent driving of the Car bearing No.AP09 BN-T/R
> 2266 driven by its driver/petitioner?"

During the course of trial, the appellant filed a petition under Section 170 of the M.V. Act and the same was allowed by the Tribunal. In support of his case, the 1st respondent got examined PWs 1 to 5 and marked Exs.A.1 to A.15 besides Exs.X.1 to X.3. On the other hand, the appellant got examined only R.W.1 in support of his case.

The Tribunal, on careful examination of the evidence of P.W.1 and Exs.A.1 to A.3, came to the conclusion that as per Ex.A.3-Final Report, the accident was occurred unexpectedly and no negligence or rashness could be attributed to the driver of the car. It was an unexpected event and when the dog came across the car, in a bit to avert, the driver applied sudden brakes and on account of it, the control over car was lost and the driver sustained injury on his person. According to the evidence of P.W.1, there was no negligence on his part in driving the car, he was driving the car with moderate speed without any rashness or negligence, which shows that the accident was not occurred due to rash and negligent driving on the part of the driver of the offending car i.e. 1st respondent. Accordingly, the Tribunal answered issue No.1 in favour of the 1st respondent-claimant and against the appellant-2nd respondent.

The Tribunal based on the evidence of P.W.1 and Doctors-PWs 2 to 5 coupled with Exs.A.4 to A.15 held that the 1st respondent received one simple injury and three grievous injuries, all the three grievous injuries were operated and fixed with plates and for removal of the above plates, he had to spend about Rs.10,000/- for operation. Hence, the Tribunal granted Rs.10,000/- towards removal of implants as against the claim of Rs.25,000/-. Further, the Tribunal granted Rs.10,000/- each for three grievous injuries and Rs.2,000/- for one simple injury sustained by the 1st respondent.

P.W.3-Dr.M.Srinivasa Rao, Civil Surgeon at Community Hospital, Bhimavaram, who issued Ex.A.13-Disability Certificate, deposed that P.W.1 suffered 50% disability, based on injury Nos.1 and 2 i.e. (1) Interconily low fracture right humerous treated with testitin band wiring and with the construction plates and (2) Fracture both bones of right forearm (upper third) treated with fit with DCP. In the cross-examination, nothing was elicited contrary to Disability Certificate and the only suggestion put was that the Disability assessed was excessive. Hence, the Tribunal based on the evidence of PWs 1 and 3, held that the 1st respondent suffered disability at 25%.

Though the 1st respondent claimed that he was working as a driver of Skoda car, aged about 24 years and earning Rs.4,500/- per month including batta, due to lack of evidence, the Tribunal has taken the income of the 1st respondent as Rs.3,000/- per month i.e. Rs.36,000/- per annum. After applying the multiplier '17', the Tribunal arrived the sum of Rs.1,53,000/- towards compensation for partial and permanent disability. Based on the medical bills marked, the Tribunal granted Rs.1,05,496/- towards medical expenses. In addition, the Tribunal granted Rs.1,000/- towards loss of earnings and in all the Tribunal granted Rs.3,01,496/- (Rs.10,000/- + Rs.32,000/- + Rs.1,53,000/- + Rs.1,05,496/- + Rs.1,000/-) along with costs and interest @ 6% per annum payable by respondent No.2 and appellant herein jointly and severally holding that Ex.B.1 comprehensive policy covers all the risks. Aggrieved by the same, the appellant-Insurance Company is before this Court.

Sri T.Mahender Rao, learned counsel for the appellant-Insurance Company, would contend that the compensation granted is excessive; claimant is not entitled for any compensation; as the claim is under Section 166 of M.V. Act, no rash or negligent driving of the driver of the offending vehicle was proved; the rash and negligent driving of the driver is a *sine qua non* for grant of compensation under Section 166 of the M.V.Act. In the present case as the 1st respondent was the driver and he himself was a tort-feasor for his own fault or negligence, he cannot claim any compensation for the injuries sustained in the accident. As the

1st respondent has already withdrawn his claim under Section 163-A of the M.V. Act by way of amendment petition, now the claim is only under Section 166 of M.V.Act read with Rule 455 of the APMV Rules. When the claim is under Section 166 of the M.V.Act, in the absence of rashness or negligence on the part of the driver and as the driver himself received injuries in the said accident for his own fault, the Insurance Company is not liable to pay the compensation in the absence of policy covering the compensation payable to the driver. The Insurance Company is liable to pay the compensation only in case of rash and negligent driving of the offending vehicle by its driver and for any damage or injuries caused to the third parties alone, otherwise it is not liable to pay compensation.

Learned counsel would further contend that the owner of the offending vehicle paid Rs.25/- under Indian Motor Tariff, hence, claim under Workmen's Compensation Act alone is maintainable as the injured was working as driver under the insured and the insured paid premium of Rs.25/- to cover the risk of the driver. Hence, the claim petition before the Tribunal is not maintainable. According to him, as per Section II (3), (4) & (5) of Ex.B.1-Insurance Policy, the appellant Company agreed to indemnify the insured only for the act of the driver to compensate the third parties and it cannot be construed to mean that the driver himself should be compensated. Thus, he would contend that the liability of the appellant is limited to the extent arising under Workmen's Compensation Act and the owner of the vehicle is liable to satisfy the remaining portion of the award.

Learned counsel would further contend that the Tribunal erred in awarding Rs.1,53,000/- towards 25% partial and permanent disability, which is not specified in Schedule I of the Workmen's Compensation Act. Under the said Act, determination of loss of earning capacity should be with reference to 'all the work' which he was capable of performing at the time of accident and not with reference to the 'work' which he was performing, for which, he placed reliance on ***Shivalinga Shivannagowda Patil and another vs. Erappa Basappa Bhavihala***[1]. He would further contend that the Tribunal erred in granting Rs.1,05,496/- towards medical expenses relying on Ex.X.1-case sheet, Ex.A.11-medical bills and Ex.A.12-prescriptions, as they were not proved by examining the persons who issued them. Mere marking of documents through the claimant does not amount to proof of the documents. Any document produced by any party to the *lis* necessarily requires to be proved in the manner provided under the Evidence Act. Hence, the compensation granted by the Tribunal is excessive and the appellant is not liable to pay the compensation.

Per contra, Sri Naram Nageswara Rao, learned counsel appearing for the first respondent-claimant, would contend the offending vehicle is covered by Ex.B.1 comprehensive policy and it covers all the risks including the compensation payable to the driver of the vehicle, though the accident was occurred during the course of employment. As held by the Tribunal, there is no rash and negligent driving on the part of the driver of the offending vehicle. However, the accident occurred unexpectedly when the dog came across the car suddenly, to avert the dash the driver applied

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sudden brakes, on account of which the driver lost control over the car and the dashed the car to the divider causing the accident resulting in injuries to the driver. Hence, no rashness or negligence could be attributed to the driver of the car and thereby the appellant could not be absolved of its liability to pay compensation for the injuries sustained by the driver. Further, since Ex.B.1 being a Comprehensive Policy, it covers the risk of the paid driver of the offending vehicle, as such, claim under Section 166 of M.V. Act is maintainable and the appellant is liable to indemnify the insured.

Learned counsel had drawn attention of this Court to the evidence of R.W.1 who deposed about passing of OD claims of 2nd respondent herein after verifying and satisfying the record of the vehicle and the driving licence of the claimant which was in force as on the date of accident, and contend that in view of the said admission, the contention of the learned counsel for the appellant that the appellant is liable to pay the compensation only in the event of any damage sustained by the third parties due to rash and negligent driving of the driver of the offending vehicle, could not be sustained. Learned counsel also would contend that though the claimant claimed that he used to earn Rs.4,500/- per month and sustained 50% partial and permanent disability, the Tribunal due to lack of supporting evidence and based on the material available before it, held that the claimant sustained 25% partial and permanent disability and took the earnings of the deceased as Rs.3,000/- per month. Thus, he would submit that the Tribunal granted just and fair compensation and there is no illegality or irregularity in awarding the compensation by the Tribunal and the appeal is liable to be dismissed.

In the facts and circumstances of the case and in considered view of this Court, since Ex.B.1 is a comprehensive policy and covers the risk of the paid driver of the offending vehicle, the appellant-Insurance Company is liable to pay compensation and indemnify the insured. In view of the same, the contentions of the appellant's counsel that there is no provision under the Workmen's Compensation Act to pay compensation to the driver-employee for the injuries sustained for his own negligence and he has not filed any petition under the provisions of Workmen's Compensation Act, are untenable.

The 1st respondent-claimant is at liberty to choose any one of the remedies available to him either under the provisions of the M.V.Act or Workmen's Compensation Act. In this case, he chose to file claim petition under the provisions of the M.V.Act, which cannot be found fault with. Hence, the finding of the Tribunal that the 2nd respondent and the appellant are both jointly and severally liable to pay compensation could not be interfered with.

As regards quantum of compensation, based on the evidence of the Doctor and Disability Certificate, the Tribunal has rightly assessed the partial and permanent disability sustained by the 1st respondent-claimant as 25% instead of 50% as claimed. Further, in the absence of any supporting material, the Tribunal has taken the earnings of the deceased as Rs.3,000/- per month. Further, the Tribunal granted Rs.10,000/- each for three grievous injuries, Rs.2,000/- for one simple injury and Rs.1,05,496/- towards medical expenses. In all, the Tribunal has granted the total compensation of Rs.3,01,496/- along with costs and interest @ 6% per annum, which is in accordance with the evidence available on record, and the same cannot be said to be on higher side or excessive. Thus, viewed from any angle, I see no merits in the appeal and the appeal is liable to be dismissed.

Accordingly, the appeal is dismissed.

Miscellaneous petitions pending in this appeal, if any, shall stand closed. There shall be no order as to costs.

M.GANGA RAO, J

16.11.2018
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