THE HON'BLE SRI JUSTICE M.SEETHARAMA MURTI

C.M.A.No.3881 of 2004

JUDGMENT:

Having not been satisfied with the quantum of compensation awarded and further being aggrieved of the fact that no liability is on the 3rd respondent/insurance company to even pay the meagre compensation awarded, the unsuccessful claimant/appellant filed this Civil Miscellaneous Appeal, under Section 173 of the Motor Vehicles Act, 1988, assailing the order/award, dated 23.03.1999, in O.P.no.90 of 1998 passed by the learned Chairman, Motor Accidents Claims Tribunal-cum-III Additional District Judge, Karimnagar.

2. I have heard the submissions of *Sri Mahaboob Hussain*, learned counsel representing *Sri K.Jagadishwar Reddy*, learned counsel appearing for the appellant/claimant ('the claimant', for brevity), and of the learned counsel for the 3rd respondent/insurance company ('the insurance company' for brevity). The 1st respondent is the Driver and the 2nd respondent is the owner-cum-insured of the offending lorry. This appeal against the said respondents was dismissed for default. Even though this the appeal is dismissed against the 1st and 2nd respondents, that is, the driver and the owner of the offending vehicle, the statutory liability of the insurance company survives for consideration and there is no need for the presence of the owner of the vehicle to decide the question of statutory liability of the insurance company at the appellate stage in the cases wherever the Tribunal had recorded a finding that the accident had taken place due to the rash and/or negligent driving of the driver of the motor vehicle and if the said finding is not challenged either by the owner of the vehicle or by the insurance company, in view of the judgment of a Division

Bench of this Court in Meka Chakra Rao v. Yelubandi Babu Rao @ Reddemma and others[1].

3. At the outset, it is to be noted that the injured claimant filed the claim petition claiming a compensation of Rs.1,50,000/- for the injuries sustained and the disability suffered on account of his involvement in the subject accident.

3.1 The case of the claimant on the relevant aspect may be stated, in brief, as follows: - 'On the date of the accident, he was 30 years of age and used to work as a labourer on the lorry bearing registration no. ATQ 6786 and earn Rs.1,500/- per month. In the accident, he sustained fracture of bones of right hand and his right hand was amputated. He also sustained fracture of bones of right leg. He was immediately admitted in Government Headquarters Hospital, Karimnagar, and was treated as an inpatient. He spent huge amount on his treatment, medicines and incidental charges. He suffered 100% permanent disability on account of the injuries sustained in the accident.'

3.2 Apart from other contentions, the relevant contentions of the insurance company are as follows: "The compensation claimed is high, excessive and unjust. The case pleaded by the claimant is as follows: 'He got down at 'A' power House Station, Ramagundam, to see his sister. He requested the Driver of the lorry to stop the lorry in the return trip. At about 17.30 hours, the lorry bearing no. ATQ 6786, which was returning from Ramagundam and proceeding towards Godavarikhani, was stopped on seeing the claimant standing at that place. After the claimant just boarded the lorry from the front side, the 1st respondent/driver of the lorry suddenly started the lorry and drove it at a high speed and in a rash and negligent manner. As a result, the claimant fell down on the road and the front tyre of the lorry ran over the right hand and right leg of the claimant. He sustained crush and bleeding injuries on his said limbs.'

[1] 2001(1) ALD 453 (DB)

The above said pleaded version of the claimant makes it apparent that the accident occurred while he was boarding the lorry and not while he was travelling on the lorry as a passenger. In any view of the matter, he stopped the lorry to board the lorry and boarded the lorry in his capacity as a gratuitous passenger. The evidence brought on record does not support the case of the claimant that he was engaged as a labourer on the lorry. The policy in respect of the lorry does not cover the risk of the injured claimant. Hence, and as the claimant travelled as a gratuitous passenger in a goods vehicle, the insurance company is not liable to pay the compensation, if any, that may be payable to the injured claimant."

4. The points that arise for determination in this appeal are:

(i) Whether the compensation awarded is not a just and fair compensation? And if so, what shall be the just and fair compensation to be awarded to the claimant?

(ii) Whether the Tribunal erred in not fastening the liability on the 3rd respondent insurance company to pay the compensation awarded to the injured claimant?

(iii) Whether the alternative contention of the appellant/claimant that the Tribunal ought to have directed the 3rd respondent insurance company to first pay and then recover the compensation paid from the owner-cum-insured merits consideration in the facts & circumstances of the case?

(iv) To what relief?

5. At the hearing, learned counsel for the appellant/claimant contended as follows: 'Admittedly, the claimant sustained two crush injuries on his right upper and lower limbs and sustained fractures of bones of the said limbs. Eventually, his right hand was amputated above wrist. The Tribunal erroneously fixed the percentage of disability at 70% instead of at 100% ignoring the fact that the permanent disability totally impacted his earnings and earning capacity. The Tribunal was in error in observing that the claimant failed to examine one of the doctors of the Medical Board to prove the contents

of the disability certificate. Indeed, there is no necessity to examine a doctor to prove the Disability Certificate issued by a Medical Board. As the disability suffered is visible to the naked eye, there is no need to examine a doctor to prove the disability. The Tribunal erroneously fixed the income of the claimant at Rs.900/- per month ignoring his established case that he was earning Rs.1500/- per month as a Labourer on the Lorry; and, unjustly awarded a meagre compensation of Rs.40,800/- towards loss of future earnings. The Tribunal further failed to award reasonable compensation under various heads including the heads, "'injury', 'pain', and 'suffering'", 'loss of earnings' (past, present and future), 'hospital, medical, transport, attendant, extra nourishment and incidental charges'. Therefore, the meagre compensation amount awarded is unjust and unfair. Indeed the claimant is entitled to more compensation than claimed. In view of the settled legal position, the Tribunal is competent and is empowered to award more compensation than claimed. The facts of the case warrant awarding more compensation than claimed. Hence, the award granting a meagre compensation may be set aside and just, fair and reasonable compensation may be awarded having regard to the facts & evidence.'

6. Per contra, learned counsel for the insurance company while supporting the award of the Tribunal *inter alia* contended as follows: 'The claimant failed to establish his income and also the extent/percentage of disability suffered. Non-examination of a doctor, who treated him and who issued the medical certificate is fatal to the case of the claimant. The Tribunal appreciated the facts correctly and the evidence in proper perspective and awarded just and fair compensation. Hence, the compensation awarded needs no modification. The appeal is devoid of merit in that regard and it is liable to be dismissed. The Tribunal rightly exonerated the insurance company from the liability to pay the compensation having regard to the undisputed facts and the legal position obtaining.'

7. I have carefully gone through the pleadings and the material on record. I have given earnest consideration to the facts & submissions.

8. POINT No. 1:

8.1 Dealing first with the aspect of injuries sustained by the claimant and the allied aspects, it is to be noted that it is not only borne out by record but it is also admitted that the claimant who was aged 30 years sustained a crush injury to the right hand at wrist and that his right hand was amputated above wrist. Exhibit A4 is a medical certificate of the claimant. It was said to have been issued by the Medical officer, Government Civil Hospital, Ramagundam. The claimant also exhibited, exhibit-A7, the disability certificate said to have been issued by AP Vaidya Vidhana Parishad. The said certificates disclosed that the right hand was amputated upto the wrist and the percentage of permanent partial disability was assessed at 70% by the Medical Board of the Vaidya Vidhana Parishad is undisputed. Further, the medical certificate-exhibit A4 and the photograph affixed to disability certificate-exhibit A7, on a plain perusal reflected that the claimant's right hand was amputated upto wrist is also undisputed. It is undisputed that the evidence brought on record disclosed that he was initially treated in Government Hospital, Ramagundam, and was later shifted to Government Hospital, Karimnagar. It is common knowledge that even simple injuries cause painful experience to the victim and take a minimum of two to three weeks time for complete healing. Major injuries like fractures or crush injuries take 4 to 6 weeks or 6 to 8 weeks time for total healing depending upon the nature of fracture/injury and other factors. A further time of one or two months is generally required for physiotherapy and getting normal movements of the limb. The shock, pain and suffering at the time of accident; pain, suffering, discomfort and inconvenience during the period of hospitalization, treatment, bed rest and physiotherapy can be visualized taking into consideration the day to day human experience. Hence, a compensation of Rs.1,00,000/- is awarded under the head "'injury', 'shock', 'pain' and 'suffering'".

8.2 Coming to the compensation to be awarded under the head 'hospital, medical, extra nourishment, attendant's, transport and incidental charges including future medical expenditure', it is to be noted that on account of the injuries, the claimant received treatment as an inpatient and later as an outpatient for a considerable length of time cannot be disputed. He underwent an operation and his right hand was amputated above wrist is also indisputable. It is borne out by record that he exhibited, exhibit A5, bunch of seven medical bills and exhibit A6, bunch of three medical prescriptions, and deposed that he spent Rs.25,000/- on his treatment. As pointed out, the Tribunal awarded Rs.1,000/- towards medicines and Rs.2,000/- towards 'extra nourishment and transportation charges'. Considering the nature of injuries and the consequential disability suffered, it is reasonable to find that one person might have attended on the claimant during the period of his hospitalization and bed rest. Therefore, it is reasonable to accept that the clamant must have incurred some expenditure on the attendant and transportation charges besides expenses on his treatment and medicines. It is common knowledge that even patients receiving treatment in Government Hospital also incur expenditure on attendant, transport, extra nourishment, medicines purchased from outside, besides other incidental charges. In a decision in Managing Director, APSRTC v. Kathavath Gopal and another,[2] this Court held that compensation towards expenditure incurred on extra nourishment and transport cannot be denied even though treatment was given in Government Hospital and one cannot expect positive evidence proving actual expenditure and hence some reasonable hypothesis cannot be ruled out. Hence, it is just and reasonable to award a compensation of Rs.25,000/- under the head 'hospital, medical, extra

[2] 2003(5) ALD 198

nourishment, attendant's, transport and incidental charges including future medical expenditure'. The said sum is accordingly awarded.

8.3 In regard to the compensation under the head 'loss of earnings' (past), what is to be noted is that the evidence brought on record disclosed that the claimant was a labourer and was earning Rs.1500/- per month. Merely because an employer of the claimant was not examined to prove his income, the Tribunal ought not to have fixed his income at a low sum of 900/- per month as the Tribunals and Courts were fixing the notional income of a non earning member at about Rs.1500/- per month at the relevant time. Therefore, and having regard to his future prospects, this Court is inclined to fix the income of the claimant at Rs.1500/- per month. Accepting the contention that the claimant might have been out of work at least for six months on account of the crush injuries a sum of Rs.9,000/- (Rs.1500/- x 6) is awarded under the head 'loss of earnings' (past).

8.4 Coming to the claim under the head 'loss of earnings' (present & future) it is to be re-noted that on account of the injuries sustained in the accident, the right hand of the claimant was amputated above wrist and he suffered permanent disability. His disability was assessed at 70% by a team of competent Doctors of a Medical Board. The claimant being a labourer is permanently incapacitated from attending to his labour work in view of the amputation of his right hand above wrist. Now it is well settled that, except in few cases, the percentage of loss of earning capacity is not the same as the percentage of permanent disability and the percentage of loss of earning capacity depends upon the nature of occupation or job, age, education and other factors and the loss of earning capacity is something that will have to be assessed by the Tribunal with reference to the facts of the case and the evidence in entirety. [See: Raj Kumar v. Ajay Kumar: (2011 ACJ 1)]. Therefore, having regard to the facts of the case, it is reasonable to accept the disability suffered totally impacted his earning capacity and therefore, the functional disability or loss of earning capacity is 100%. The claimant is of 30 years of age at the time of accident. Therefore, the appropriate multiplier as per the ratio in Sarala Verma v. Delhi Transport Corporation[3] is '17' (seventeen). As per the monthly income already determined, the annual income of the claimant works out to Rs.18,000/- If the said multiplicand is multiplied by the multiplier fixed supra, the compensation under the head 'loss of earnings'(present & future) works out to Rs.3,06,000/- (Rs.18,000/- x 17). Since the functional disability or loss of earning capacity is assessed at 100%, no further deduction need be made. The said sum is thus awarded as compensation under the said head.

8.5 Coming to the claim under the group of heads 'loss of prospects of life, loss of amenities of life, loss of enjoyment of life, loss of opportunities of life (economic, political and social), loss of pleasures of life, loss of expectation of life and social disability', having regard to the fact that the claimant suffered the disability at an young age of 30 years and that he has to live with the said disability for the rest of his life a sum of Rs.70,000/- is awarded under this group of heads.

9. Accordingly, this Court finds that the claimant is entitled to the following compensation amounts:

Sl. No.	Head of compensation	Amount (in Rs.)
(1)	Injury, shock, pain and suffering	1,00,000/-
(2)	Hospital, medical, extra nourishment, attendants', transport and incidental charges including future medical expenses	25,000/-
(3)	Loss of earnings (past, present and future) [Rs.9,000/-+Rs.3,06,000/-]	3,15,000/-
(4)	Loss of amenities of life, loss of expectation of life and social disability and other group of heads	70,000/-
Total		5,10,000/-

(Rupees Five Lakhs Ten Thousands only)

[3] 2009 ACJ 1298

10. The claimant claimed Rs.1,50,000/-. The Tribunal awarded a compensation of Rs.66,500/-. The compensation as determined now and to be awarded worked out to Rs.5,10,000/-. It is more than the amount claimed by the claimant. The law is now well settled that if the facts of the case so warrant, more compensation than claimed can be awarded. In the decision in the case of Nagappa v. Gurudayal Singh and others[4] it was held that under the M.V Act there is no restriction that Tribunal cannot award compensation amount exceeding the claimed amount and that the function of the Tribunal is to award just compensation, which is reasonable on the basis of the evidence produced on record.

11. Accordingly, an amount of Rs.5,10,000/-(Rupees Five Lakhs Ten Thousand only) is awarded to the claimant. Under the present law and in the facts and circumstances, the claimant is not entitled to any other compensation amounts. The point is accordingly answered.

12. Coming to the rate of interest on the enhanced portion of the compensation, it is just and fair to award simple interest at the rate of 7.5% per annum from the date of the claim petition as per the ratio in the decision in Mohinder Kaur and others v Hira Nand Sindhi[5].

13. <u>POINTS Nos. 2 & 3:</u>

On the aspect of liability, learned counsel for the claimant contended as follows: 'The claimant is a labourer on the lorry. He got down at 'A' power House Station, Ramagundam, to see his sister. He requested the Driver of the lorry to stop the lorry in the return trip. At about 17.30 hours, the lorry bearing no. ATQ 6786, which was returning from Ramagundam and proceeding towards Godavarikhani, was stopped on seeing the claimant standing at the

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[4] AIR 2003 SC 674
[5] (2015) 4 SCC 434

said place. Then the claimant boarded the said lorry.' Per contra, learned counsel for the insurance company first contended that even as per the pleaded case of the claimant, the accident occurred when he was boarding the Lorry and hence, he cannot be considered as a passenger. He next submitted that even if the claimant is to be considered as a passenger, yet, the insurance company cannot be made liable as the claimant boarded the Lorry as a mid way gratuitous passenger. He finally submitted that the Tribunal having rightly accepted the contention of the insurance company has not fastened any liability on the insurance company and that therefore, the said sustainable finding of the Tribunal needs no interference. Even assuming for a moment that the accident occurred while the claimant was boarding the lorry, nevertheless, he would come under the meaning of the word 'passenger' in view of the settled legal position laid down in the decision in Noorjahan (Tmt) v. Sultan Rajia Tmt alias Thaju and others[6] wherein the Supreme Court held that persons who are in the process of boarding or alighting a vehicle shall be treated as passengers and that such persons would be entitled to coverage. No doubt, the claimant could not adduce any evidence of reliable character to show that he was a labourer on the offending lorry. Learned counsel, therefore, contended that the principle of 'pay and recover' may be applied. Hence, it is apposite to accept that the claimant travelled on the lorry as a mid way gratuitous passenger. Therefore, it follows that the 3rd respondent insurance company cannot be fastened with joint and several/absolute liability. Hence, the question that remains to be considered is as to whether the insurance company can be directed to first pay the compensation awarded to the claimant and then recover the same from the owner/insured by applying the principle of 'pay and recover'. In the considered view of this Court, the answer to this question is no longer *res integra* in view of the recent decision in

[6] (1997) 1 SCC 6

Manuara Khatun v. Rajesh Kr.Singh[7]. In this cited decision, the Supreme Court having considered the legal position held in paragraphs 15, 16 & 17 as follows:

> "15. The aforesaid question, in our opinion, remains no more *res integra.* As we notice, it was subject matter of several decisions of this Court rendered by three Judge Bench and two Judge Bench in past, viz., National Insurance Co. Ltd. v. Baljit Kaur and Ors: [(2004) 2 SCC 1], National Insurance Co. Ltd. v. Challa Upendra Rao and Ors. [(2004) 8 SCC 517], National Insurance Co. Ltd. v. Kaushalaya Devi and Ors. [(2008) 8 SCC 246], National Insurance Co. Ltd. v. Roshan Lal, [Order dated 19.1.2007 in SLP (C) No. 5699 of 2006], and National Insurance Co. Ltd. v. Parvathneni and Anr., [(2009) 8 SCC 785].
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> 16. This question also fell for consideration recently in Manager, National Insurance Co. Limited v. Saju P. Paul and Anr., (supra) wherein this Court took note of entire previous case law on the subject mentioned above and examined the question in the context of Section 147 of the Act. While allowing the appeal filed by the Insurance Company by reversing the judgment of the High Court, it was held on facts that since the victim was travelling in offending vehicle as "gratuitous passenger" and hence, the Insurance Company cannot be held liable to suffer the liability arising out of accident on the strength of the insurance policy. However, this Court keeping in view the benevolent object of the Act and other relevant factors arising in the case, issued the directions against the Insurance Company to pay the awarded sum to the claimants and then to recover the said sum from the insured in the same proceedings by applying the principle of "pay and recover".
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> 17. Justice R.M. Lodha (as His Lordship then was and later became CJI) speaking for the Bench held in paras 20 and 26 as under:
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> > 20. The next question that arises for consideration is whether in the peculiar facts of this case a direction could be issued to the Insurance Company to first satisfy the awarded amount in favour of the claimant and recover the same from the owner of the vehicle (Respondent 2 herein).
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> > 26. The pendency of consideration of the above questions by a larger Bench does not mean that the course that was followed

[7] 2017 ACJ 1031

> in Baljit Kaur, [(2004) 2 SCC 1] and Challa Upendra Rao, [(2004) 8 SCC 517] should not be followed, more so in a peculiar fact situation of this case. In the present case, the accident occurred in 1993. At that time, the claimant was 28 years old. He is now about 48 years. The claimant was a driver on heavy vehicle and due to the accident he has been rendered permanently disabled. He has not been able to get compensation so far due to the stay order passed by this Court. He cannot be compelled to struggle further for recovery of the amount. The Insurance Company has already deposited the entire awarded amount pursuant to the order of this Court passed on 1-8-2011 (National Insurance Co. Ltd. v. Saju P. Paul SLP (C) No. 20127 of 2011 and the said amount has been invested in a fixed deposit account. Having regard to these peculiar facts of the case in hand, we are satisfied that the claimant (Respondent 1) may be allowed to withdraw the amount deposited by the Insurance Company before this Court along with accrued interest. The Insurance Company (the Appellant) thereafter may recover the amount so paid from the owner (Respondent 2 herein). The recovery of the amount by the Insurance Company from the owner shall be made by following the procedure as laid down by this Court in Challa Upendra Rao (supra).

In the considered view of this Court, the facts of the present case are more or less identical to the facts of the cited case as the claimant in the case on hand also travelled as a gratuitous passenger in the offending vehicle. In Manager, National Insurance Co. Limited v. Saju P.Paul[8], the Supreme Court having held that the victim was a "gratuitous passenger", issued directions against the insurer of the offending vehicle to first satisfy the awarded sum and then to recover the same from the insured in the same proceedings. The said view was accepted by the Supreme Court in the above cited latest precedent. In view of the precedential guidance, this Court is of the considered view that the impugned award can be modified insofar as the aspect of the liability of the insurance company and the insurance company can be directed to first satisfy

[8] (2013) 2 SCC 41

the award and then recover the amount paid to the claimant from the owner of the vehicle/2nd respondent herein. The points are accordingly answered.

14. POINT No.4:

In the result, the appeal is allowed accordingly, without costs awarding a total compensation of Rs.5,10,000/- (Rupees Five Lakhs Ten Thousand only). On the compensation already awarded, the Tribunal granted interest at 12%per annum simple. The insurance company is directed to first satisfy the Award and accordingly deposit, within two months from the date of the receipt of a copy of this judgment, to the credit of the OP before the Tribunal, the enhanced portion of compensation, i.e., Rs.4,43,500/- (Rupees Four Lakhs Forty Three Thousands and Five Hundreds only) with interest at 7.5%per annum simple from the date of the original petition till the date of deposit. The already awarded compensation or any portion thereof, if not already paid or deposited as per the award of the Tribunal, the same may also be deposited accordingly. The claimant shall pay, as per the procedure, the deficit court fee on the difference compensation amount i.e., the amount awarded in excess of the amount claimed. After such deposits of the said sums before the Tribunal, the claimant is entitled to withdraw 50% of the deposited amount without furnishing any security. The Tribunal is directed to invest the balance amount in a fixed deposit in the name of the claimant in any Nationalised Bank as per practice and procedure with auto renewal facility until the same is released by the Tribunal to him as per procedure. Since the liability of the insurance company is under the principle of 'pay and recover'; the insurance company on making such deposits is entitled to recover the same from the 2nd respondent/owner-cum-insured, in the same proceeding as per the precedential guidance in the decision of the Supreme Court (8 supra).

Miscellaneous petitions, if any, pending in this appeal shall stand closed.

M. SEETHARAMA MURTI, J

16.02.2018
RAR