

THE HON'BLE SRI JUSTICE N.BALAYOGI

M.A. C.M.A. No.1443 of 2010

JUDGMENT :

The appellant/respondent aggrieved by the Award and Decree dated 8.11.2006 in O.P. No.1707 of 2004 on the file of the Chairman, Motor Accident Claims Tribunal-cum-Chief Judge, City Civil Courts, Hyderabad, awarding Rs.6,02,584/- together with interest at 6% per annum from the date of the petition till deposit and costs pro-rata against respondents 1 and 2 jointly and severally which shall be deposited within one month from the date of award, preferred this appeal besides other grounds on the grounds that the vehicle was not road worthy and that the owner of the vehicle violated the policy conditions and plied the vehicle on the road, hence Insurance Company is not liable to pay compensation. The Tribunal erred in applying multiplier '17' as per Schedule-II of the Motor Vehicles Act as the yearly income exceeded Rs.40,000/-.

2. It is further contended that the Tribunal erred in awarding Rs.15,000/- towards loss of estate and Rs.20,000/- towards loss of consortium and further erred in awarding compensation under the head pain and suffering in the death case. Claimants are not entitled to compensation under the head pain and suffering. The claim of respondents 1 to 5 herein is that on 5.5.2004 while the deceased Praveen Kumar was proceeding by walk near check post, the offending Toyoto Qualis car bearing No.AP 37 AB 7000 proceeding

from Hyderabad to Hayathnagar driven with high speed and in rash and negligent manner dashed the pedestrian in which the deceased sustained multiple injuries. Immediately, he was shifted to Osmania General Hospital and he died on the same day in the Hospital at 4.00 PM while undergoing treatment.

3. The 1st respondent filed written statement contending that the petition is bad for non-joinder of driver of the offending vehicle. The accident occurred due to negligence of the deceased himself while trying to cross the road in disregard to the road rules. The 2nd respondent filed counter and additional counter contending that the motor vehicle inspector in the report opined that the accident was due to mechanical defect of the vehicle, therefore the 2nd respondent is not liable to pay compensation.

4. The Tribunal, having considered the pleadings and the arguments of both parties, settled the following issues for trial :

- 1) Whether the accident resulting in death of R.Praveen Kumar occurred due to rash and negligent driving of the driver of Qualis car bearing No.AP 37 AB 7000?
- 2) Whether the petitioners are entitled for compensation, if so, to what amount and from whom?
- 3) To what relief?

5. In support of the claim the petitioners, P.Ws.1 to 3 were examined and Exs.A1 to A10 and Ex.X1 and X2 were got marked. On behalf of respondents, R.W.1 was examined and Exs.B1 and B2 were got marked.

6. As seen from the grounds of appeal, the main contention is that the owner - 1st respondent allowed the vehicle to move which breaks are defective, thereby violated the terms and conditions; secondly, the multiplier applied is not correct and thirdly, claimants are not entitled to compensation under the head pain and suffering, so there is no dispute with regard to rash and negligence of the driver of the offending car and also the driving licence possessed by him, however, it is better to consider the issue of rash and negligence.

7. The 1st petitioner is examined as P.W.1 whose evidence is that she is the wife, petitioners 2 and 3 are minor children and petitioner Nos.4 and 5 are parents of the deceased Praveen Kumar. Ex.A10 is the legal heir certificate issued by Deputy Collector and M.R.O., Hayathnagar which support the evidence of P.W.1 that the Annapurna/1st petitioner is the wife, Sai Charan/2nd petitioner is the minor son, Keerthana/3rd petitioner is the daughter of the deceased. There is no cross-examination of P.W.1 with regard to the relationship of the claimants to the deceased Praveen Kumar or disputed Ex.A10. Therefore, the unimpeachable evidence of P.W.1 supported by Ex.A10 well established that the 1st petitioner is the wife, petitioners 2 and 3 are minor children, petitioners 4 and 5 are parents of the deceased Praveen Kumar who are dependents on the deceased.

8. Though P.W.1 reiterated pleadings in the claim petition in the evidence in chief, during cross-examination admitted that she is not an eyewitness to the accident, hence any amount of evidence of

P.W.1 with regard to the nature of the accident and what was stated in the Ex.A2, A4 and A5, she is not concerned. Her evidence is of no use in determining the rash and negligence of the party involved.

9. To substantiate the claim and to prove the rash and negligence on the part of the driver of the offending quails car bearing No.AP 37 AB 7000, the claimants examined P.W.2, whose evidence is that he is an eyewitness to the accident as he is running the Tea Hotel on push cart at Chinthalkunta check post. He witnessed on 5.5.2004 at 1.00 PM a Qualis car accident on NH 9 at Chinthalkunta check post. A Qualis Car bearing No.AP 37 AN 7000 proceeding from Hyderabad towards Vijayawada side, on approaching Chintalkunta check post, the driver of the car drove the car with high speed in rash and negligent manner and could not control the car and dashed a pedestrian while he was crossing the road. During cross-examination, he admits that while the deceased was crossing the road, Qualis car bearing No.AP 37 AB 7000, which number he observed at the accident spot, came in uncontrollable manner and suddenly the driver lost the control, the driver of the vehicle applied breaks to stop the vehicle, but could not stop on the spot. But, he does not know whether the breaks were failed at the time of the accident.

10. The Tribunal, having considered the evidence of P.W.2 in its entirety, came to the conclusion that admittedly P.W.2 was not summoned, but at the instance of claimants he was present. P.W.2 in the evidence clearly stated that he does not know the name of the

deceased by the time of the accident. On the background of the evidence stated above, the Tribunal considered P.W.2 as eyewitness to the accident.

11. Ex.A1 is certified copy of the F.I.R., Ex.A2 is the certified copy of the inquest report and Ex.A5 is certified copy of the charge-sheet. Even though the name of P.W.2 is not referred in those documents, the Tribunal came to the conclusion that even though the name of P.W.2 is not mentioned, his evidence simply cannot be discarded, simply because he is not cited as witness. The fact that the alleged eyewitness figured in the F.I.R./Ex.A1 and the charge-sheet/Ex.A5 fortifies the claim of witnesses mainly because the evidence of P.W.2 supported the contents of Ex.A5 that the accident was due to rash and negligent driving of the driver of the offending vehicle.

12. Ex.A4 is the M.V.I. report. Against column-9 it was recorded that the accident was due to mechanical defect of the vehicle which suddenly developed. Against column-10 it was noted that the offending vehicle suffers from the defect of sponge breaks and further the vehicle took more time to stop than the normal distance owing to defect in the breaks. The contention of the 2nd respondent is that as per Ex.B1 policy it is the condition precedent that the vehicle shall be road worthy for the policy to be operative and that since the vehicle is not road worthy as per Ex.A4, the 2nd respondent is not liable to pay.

13. The Tribunal relied on the decision in *Mini B.Mehta Vs. Balkrishna Ramchandra Nayan* (1977 ACJ 118) where the Apex Court held that in order to sustain a plea that the accident was due to mechanical defect of the offending vehicle, it must be shown that the defect was latent and not discoverable by the use of reasonable care. The burden of proving that the accident was due to mechanical defect is upon the owner of the vehicle and it is the duty of the owner to show that the owner has taken all reasonable care and that despite such care, the defect remained hidden. The 1st respondent did not raise any such plea in his written statement and it is the 2nd respondent/insurance company which raised the plea that the accident was due to mechanical defect of the vehicle. As per Ex.B1 policy the 2nd respondent has to indemnify the liability of the insured/1st respondent, but it is not the case of the 2nd respondent that the insurer is not liable to pay the compensation.

14. The 2nd respondent having taken the plea that the accident was due to mechanical defects in the break system, did not choose to adduce any oral or documentary evidence. The Deputy Manager of the 2nd respondent was examined as R.W.1, he is not a direct witness to the accident, but his evidence is that the MVI report established that the crime vehicle bearing No.AP 37 AB 7000 was not maintained by the respondent No.1 insured in a road worthy condition to ply on the road and the 1st respondent failed to maintain the vehicle in efficient condition and in road worthy condition to ply. The driver of the

offending Qualis car is a material witness. For the best reasons known to respondents 1 and 2, the said driver of the offending vehicle was not examined. It is not their case or evidence of R.W.1 that the driver was not available or securing his presence is beyond his control. The 2nd respondent, having taken such plea that the accident was due to mechanical defect, did not choose to produce any oral or documentary evidence. It is the 2nd respondent to adduce evidence and establish that the accident was due mechanical defect of the vehicle. The 2nd respondent who relied on Ex.A4 did not choose to examine the Motor Vehicle Inspector. Therefore, the opinion of the MVI under Ex.A4 is not subjected to test by examining MVI. The owner/1st respondent also not examined, therefore, there is no evidence on record that the owner failed to maintain the vehicle road worthy or he has taken any proper care to rectify the defect in spite of which could not control it. Absolutely there is no evidence to show whether the mechanical defect as envisaged against column 10 of Ex.A4 was such a defect as to render the vehicle not road worthy.

15. In the absence of any such evidence, I am of the considered view that the finding of the Tribunal that the respondents not clearly made out that the mechanical defect of the offending vehicle was the cause and the accident was the effect. There is no nexus between the mechanical defect and the accident. Therefore, the evidence of P.W.2 supported by Ex.A1 and A5 well established that the accident was due to rash and negligent driving of the driver of the

offending Qualis car bearing No.AP 37 AB 7000 and such finding is legal.

16. The further contention of the appellant is that the multiplier applied and the amounts awarded towards loss of estate and loss of consortium and also granting compensation towards pain and suffering are illegal. As already discussed above P.W.1 is none other than the wife of the deceased, her evidence is that in the accident her husband Praveen Kumar sustained multiple grievous injuries, immediately he was admitted in Osmania General Hospital and while undergoing treatment, he succumbed to injuries on the same day. Her husband was aged 32 years and drawing a salary of Rs.4,949/- per month and contributing the same for the family maintenance. The clinching evidence of P.W.1 is that her husband was Attender in a office of the Commissioner of Director for Agriculture and P.W.3 is Junior Accounts Officer in the Commissionerate of Agriculture at L.B.Stadium, Hyderabad. He produced Ex.X1 letter of authorization under which P.W.3 was deputed in response to the summons received to give evidence. Under Ex.X1 authorization, P.W.3 gave evidence on behalf of the Assistant Accounts Officer, Commissionerate of Agriculture, A.P., Hyderabad, his evidence is completely based on records. Ex.X2 is the last pay certificate of late R.Praveen Kumar, Attender, Office of the Commissioner and Director of Agriculture, A.P., Hyderabad, according to which, he was paid up to 5.5.2004, his gross salary was Rs.5,099/- and deductions Rs.955/-. Except

professional tax of Rs.20/-, no other amount was deducted towards income tax under Ex.X2. Therefore, the gross salary is Rs.5,099/- - Rs.20/- = Rs.5,079/-, which is the amount required to be taken into consideration for assessing the loss of dependency.

17. The further evidence of P.W.3 is that the deceased Praveen Kumar was appointed on 1.8.1994 and his date of superannuation is 13.9.2001 and date of birth is 21.9.1971. As per revised pay scale, it was fixed at Rs.4,825/- + Rs.60/- PP and other allowances. Ex.A8 is the salary particulars of the deceased, but whereas Ex.X2 is salary up to 5.5.2004, the date of accident and death. Ex.A7 is the SSC marks list wherein the date of birth of the deceased was noted as 21.9.1971. The evidence of P.W.1 corroborated with P.W.3, supported by Ex.A7 established that the deceased Praveen Kumar born on 21.9.1971. As per Ex.A1/F.I.R., Ex.A2/Inquest Report, Ex.A3/PME report, Ex.A5/charge-sheet, Ex.A6/death certificate and the evidence of P.Ws.1 and 2, the accident occurred on 5.5.2004 and the inquestdars under Ex.A2 opined that the death is due to injuries sustained in the accident involving offending Qualis car bearing No.AP 37 AB 7000. The Doctors who conducted autopsy over the dead body under Ex.A3 opined that the death is due to multiple injuries, therefore, there is direct nexus between the accident and the death.

18. Having considered the date of birth of the deceased as 21.9.1971 and the accident was on 5.5.2004 as on the date of accident,

the deceased was 33 years. As per *Sarla Verma v. DTC* ((2009) 6 SCC 121) the relevant multiplier is '16', therefore the application of multiplier '17' by the Tribunal relying on Schedule-II under Section 163-A of the M.V. Act is erroneous.

19. The claimants in the case are five in number. As per the said case the deduction towards personal and living expenses is $1/4^{\text{th}}$, but whereas the Tribunal deducted $1/3^{\text{rd}}$ which is also erroneous and require modification.

20. The further contention of the appellant is that the Tribunal erred in awarding Rs.15,000/- towards loss of estate and Rs.20,000/- towards loss of consortium. According to the latest constitutional bench judgment of the Apex court in *National Insurance Company Limited v. Pranay Sethi and Others*¹ the claimants are entitled for loss of estate, loss of consortium and funeral expenses at Rs.15,000/-, Rs.40,000/- and Rs.15,000/- respectively, but whereas the Tribunal awarded only Rs.20,000/- towards loss of consortium and Rs.2,000/- towards funeral expenses which are less than the amount which claimants are entitled legally.

21. The gross salary, after deducting the professional tax, is taken at Rs.5,079/- per month, which comes to Rs.60,948/- per annum and after deducting $1/4^{\text{th}}$ towards personal expenses of the deceased, it comes to Rs.45,711/- per annum and by applying multiplier '16', the loss of dependency comes to Rs.7,31,376/-.

¹2017 (ACJ) 2700

22. Besides that, petitioners/claimants, as per *Pranay Sethi's case* are entitled for Rs.15,000/- towards loss of estate, Rs.40,000/- towards loss of consortium and Rs.15,000/- towards funeral expenses. They are also entitled to Rs.1,000/- towards transportation as awarded by the Tribunal. Thus, in total, petitioners/claimants are entitled to an amount of Rs.8,02,376/-.

23. But, however, the Tribunal awarded Rs.20,000/- towards loss of consortium and Rs.2,000/- towards funeral expenses, which are less than the amounts which petitioners/claimants are entitled as per *Pranay Sethi's case*. Admittedly, petitioners/claimants are not entitled for Rs.1,000/- towards pain and suffering.

24. Pertinent to see, it is the appeal preferred by the Insurance Company against the award and decree of the Tribunal and no Cross Objections or Cross Appeal is preferred by the claimants/respondents. Though it is the appeal preferred by the Insurance Company, as per the settled principles of law in the decision referred to above, the respondents/claimants are entitled to receive the amount of Rs.8,02,376/- instead of the amount awarded by the Tribunal.

25. In the facts and circumstances discussed above and findings therein, I do not find any illegality or irregularity in the award and decree and finding of the Tribunal in respect of appellants.

26. Accordingly, appeal is dismissed with costs while confirming the Award and Decree dated 8.11.2006 in O.P. No.1707 of 2004 on the file of the Chairman, Motor Accident Claims Tribunal-cum-Chief Judge, City Civil Courts, Hyderabad.

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

JUSTICE N.BALAYOGI

19.02.2018.

SKMR

