

THE HON'BLE SRI JUSTICE N.BALAYOGI

M.A. C.M.A. No.1435 of 2010

JUDGMENT :

The appellant/claimant aggrieved by the Award and Decree dated 24.7.2010 in M.V.O.P. No.711 of 2007 of the Motor Accidents Claims Tribunal (Family Court-cum-Additional District and Sessions Court) Vizianagaram, awarding compensation of Rs.40,000/- with interest at 7.5% per annum from the date of the petition till the date of realization against respondents 1 to 3 jointly and severally, by directing the 3rd respondent to deposit the same in the Court within a month from the date of the order, and after such deposit, permitting the petitioner to withdraw the entire amount, preferred the present appeal, besides other grounds on the grounds that the Tribunal failed to observe that the disability was assessed by the Medical Board at 35% and under the heads, medical bills and pain and sufferance, meagre amounts have been granted and the Tribunal failed to observe about the heads extra-nourishment and transportation to the hospital, which is illegal. Further, the Tribunal failed to grant loss of earnings properly.

2. The claim in brief is that on 20.8.2006 the claimant boarded the auto bearing No.AP 35 T 9328 to go to his village and immediately the driver moved the auto in rash and negligent manner at high speed, as a result, the auto turned turtle near Singubabugari Mango Topes, Kondavelagada at 6 PM.

3. In the accident, he sustained fracture and crush injury on left foot and other injuries all over the body. Immediately, he was taken to Dr.A.Srirama Murthy, Sai Super Speciality Hospital, Vizianagaram for treatment.

4. The petitioner was aged 48 years, quite hale and healthy and used to earn Rs.150/- per day as a mason at the time of the accident. The petitioner is not able to do any work due to injuries and he lost his earnings. He suffered much pain and mental agony at the time of the accident and during the course of the treatment and spent huge amounts towards medicines, transportation to hospital and extra-nourishment.

5. The respondents 1 and 2 were set *ex parte*.

6. The 3rd respondent filed counter disputing the age, income, avocation and accident. It is contended that the driver of the auto was not having subsisting driving licence and the auto was not roadworthy to ply and the policy was not in force at the time of the accident.

It is further contended that the claim of interest is highly excessive, arbitrary and even if the policy is established, the Insurance Company is not liable unless proved that Section 64 VB of Insurance Act, 1938 and Rules 58 and 59 of the Insurance rules, 1958 are complied with.

7. After hearing and consideration of the pleadings, the following issues were settled for trial :

- 1) Whether the accident occurred due to rash and negligent driving of 1st respondent and whether R.1 was having any valid driving licence by the date of accident?
- 2) Whether the petitioner is entitled for compensation? If so, at what quantum of amount he is entitled to?
- 3) Whether the petitioner is bona fide passenger travelled in the vehicle?
- 4) To what relief?

In support of the claim, P.Ws.1 and 2 were examined, Exs.A1 to A7 and Ex.X1 were got marked. For respondents, none were examined, but Ex.B1 was got marked with consent.

8. Now, the point that arises for determination is :

“Whether the order of the Tribunal suffers from legal infirmities warranting interference”

9. The contention of the appellant is that the Tribunal has not considered the disability, medical bills, loss of earnings, pain and sufferance, transport and Exs.A1 to A7 and Ex.X1 properly and only granted meagre amounts, which is illegal.

10. *Per contra*, the 3rd respondent contended that the driver has no subsisting driving licence at the time of the accident and the order of the Tribunal rejecting the disability certificate with reasons is tenable and do not warrant any interference in the appeal.

11. The claimant himself is examined as P.W.1, besides examining Dr.A.Srirama Murthy who treated P.W.1 in Sri Sai Orthopaedic Hospital, Vizianagaram, as P.W.2. The consistent evidence of P.W.1 is that on 20.8.2006 he boarded the auto bearing No.AP 35 T 9328 to go to his village Kondavelagada. Immediately after starting the

auto, the 1st respondent, who is the driver of the auto, drove the same in rash and negligent manner with high speed even without hearing the cries and cautions of himself and other passengers, as a result of such speed, the auto was turned turtle near Singubabugari Mango Topes, Kondavelagada at about 6.00 PM. Ex.A1 is certified copy of the F.I.R. presented on 22.8.2006 at 13.00 hours in respect of the accident occurred on 20.8.2006 at 18.00 hours in Crime No.110 of 2006 wherein the S.H.O. recorded the statement of Kella Appalachari and registered the same as case in crime No.110 of 2006. In the said statement there is clear assertion that along with the complainant P.W.1 - Ramu also boarded the auto bearing No.AP 35 T 9328 and immediately after they boarded, the driver drove the auto in rash and negligent manner with high speed and when it reached near Singubabugari Mango Topes, Kondavelagada, the auto turned turtle. After thorough investigation, the S.H.O., filed charge-sheet against the driver of the auto under Ex.A3 finding that when the auto reached near Singubabugari Mango Topes, Kondavelagada village at about 18.00 hours, the driver of the auto drove the auto in rash and negligent manner with high speed, as a result the front wheel of the auto was broken and the auto fell down on the road.

12. The evidence of P.W.1 read with Ex.A1 – certified copy of F.I.R. and Ex.A3 – certified copy of the charge-sheet goes to suggest that immediately after P.W.1 and others boarded the auto bearing No.AP 35 T 9328, the driver moved the auto with high speed in rash and negligent manner and in spite of request of P.W.1 and other passengers in the auto, he did not slow down, as a result of the speed and rash and

negligent driving, the front wheel of the auto was broken resulting the auto turned turtle on the road. Had the driver drove the auto with care and caution soon after the passengers in the auto requested and stopped it, the accident would have been avoided, which speaks volumes about the rash and negligence. Therefore, I am of the considered view that the evidence of P.W.1 supported by Ex.A1 and A3 well established the rash and negligence on the part of the driver of the auto bearing No.AP 35 T 9328. The Tribunal, having considered the evidence of P.W.1, came to the right conclusion that the accident occurred due to rash and negligent driving of the driver, who is the 1st respondent herein.

13. The 3rd respondent having taken the plea that the petitioner has to prove that at the time of the accident, the driver was having subsisting driving licence, he did not choose to enter into the witness box. Respondents 1 and 2, who are driver and owner of the offending auto, having received notices in the claim petition, they remained *ex parte*. The respondent having taken the plea that there is no subsisting driving licence at the time of the accident, did not choose to enter into the box to speak the same. In such circumstances and in the absence of any rebuttal evidence produced by the 3rd respondent, I am of the considered view that the 3rd respondent failed to establish that the driver does not possess valid and effective driving licence at the time of the accident.

14. With regard to injuries and amounts awarded under different heads, there is the evidence of P.W.1 wherein he deposed that in the accident he sustained crush injury to his left foot and multiple injuries to

all over the body and immediately he was shifted to the Hospital of Dr.A.Srirama Murthy, Sai Super Speciality Hospital, Vizianagaram, where he diagnosed a crush injury to the foot and other injuries to all over the body where he was inpatient for about 45 days and he undergone surgery to his foot. In spite of the best treatment, the fracture is not united. Best piece of evidence with regard to injuries is the evidence of the Doctor who treated P.W.1.

15. According to the evidence of P.W.1 under Dr.A.S.R.Murthy he took treatment and he is examined as P.W.2. The evidence of P.W.2 is that he is practicing as Orthopaedic Surgeon at Sai Super Speciality Hospital, Vizianagaram and while so, on 20.8.2006 P.W.1, inhabitant of Kondavelagada village, was admitted in the said hospital alleged to have been involved in a road traffic accident with crush injury on left foot with exposing bones, tendons and bleeding. Immediately he advised x.ray to the left foot and found multiple fractures and crush injury to the left foot.

16. Ex.X1 is the case sheet of Sai Orthopaedic Hospital. It is the evidence of P.W.2 that the patient was treated conservatively and split skin grafting was done, he was discharged on 30.8.2006 with advice to take further treatment as outpatient, again he examined P.W.1 on the date on which he gave evidence i.e., on 16.6.2010 and advised to take latest x.ray – Ex.A5 to left foot which reveals mal united fractures on his left foot. The movement of his left leg toes are fully restricted and ugly scar was also present on his left foot. The patient - P.W.1 cannot walk freely and cannot walk long distances and limping is present while

walking. He cannot do hard work, as he did prior to the accident. The patient is now suffering with 35% disability, which is partial and permanent in nature. He was also confronted with Ex.A5 – latest x.ray and Ex.A6 – disability certificate issued by him. Ex.A7 is the photograph along with CD showing the present status of the injury. Ex.A4 is the bunch of medical bills purchased by P.W.1. A close reading of Ex.A6 – disability certificate and also Ex.A7 – photograph goes to suggest that skin grafting was done to the left foot and there is no loss of any toe and injury to the left foot toe is visible.

17. The most important crucial fact considered by the Tribunal is that the case sheet under Ex.X1 and Ex.A5 – x.ray are manipulated. P.W.2 in the cross-examination admitted that the same treatment which P.W.2 provided is also available in District Headquarters Hospital, Vizianagaram and there no charges will be collected for treatment and operation. The suggestion to P.W.2 is that if the patient has undergone any surgery, he will not suffer any disability and the same is denied. In the chief itself P.W.2 stated that he treated P.W.1 conservatively and split skin granting was done. But, whereas, P.W.1's evidence is that the Doctors conducted operations also to his foot which is not spoken by P.W.2 or mentioned in Ex.X1 – case sheet. Had he been undergone any surgery, it would have been noted in the Ex.X1 – case sheet.

18. The Tribunal, having considered the evidence of P.W.1 and P.W.2 and the x.ray under Ex.A5, came to the conclusion that as seen from the medical bills – Ex.A4, they were written on the same day with

same pen and the signature of the concerned person, who issued them, does not find place. Further, the bill dated 30.8.2006 said to have been issued by Sai Super Speciality Hospital, Vizianagaram does not contain the signature and seal of the hospital. The said bill is for Rs.6,850/-. A close perusal of Ex.A4 – bunch of medical bills goes to suggest that the prescription of the Sri Sai Super Speciality Hospital, Vizianagaram was enclosed to the each bill issued by Sri Satya Sai Medical and General Stores, near RTC complex, Sri Sai Super Speciality Hospital, Vizianagaram. Bills are issued by the medical store situated in the same Sri Sai Super Speciality Hospital. Every bill contains the signature of the person issued the bills, but I do not know how the Tribunal missed the signatures on those bills. When P.W.1 filed those bills and marked and confronted through P.W.2 - the Doctor who treated him and in the absence of any rebuttal evidence, the finding of the Tribunal with regard to Ex.A4 – bunch of medical bills is erroneous and untenable. The petitioner is entitled to those amounts incurred under Ex.A4 – bunch of bills which comes to Rs.12,348/-.

19. According to the evidence of P.W.1 and Ex.X1, P.W.1 was admitted in the hospital on 20.8.2006 and discharged on 30.8.2006 and he was treated as inpatient conservatively in those days. The Tribunal, having considered the nature of injuries and that he might not have attended to his regular duties for a period of one month and lost his earnings, and taking into consideration the minimum wages in the relevant period, awarded Rs.3,000/- as just and reasonable compensation towards loss of income during the said period. As per the evidence of

P.W.1 he was working as a mason and used to earn Rs.150/- per day, which comes to Rs.4,500/- per month. In the absence of any rebuttal evidence, I consider his income at Rs.4,500/- per month

20. With regard to the disability, there is the evidence of P.Ws.1 and 2. P.W.1's evidence is that he sustained crush injury which is mentioned in Ex.A2 – wound certificate and also in the case sheet – Ex.X1 corroborated by the evidence of P.W.2. Due to crush injury he could not able to attend any duties till today and thereby he lost his daily income and still he cannot walk long distances. P.W.2's evidence is that Ex.A5 – x.ray taken on 16.6.2007 to the left foot shows mal united fracture to the left foot and the movement of his left leg toes are fully restricted and ugly scar was also present on his left foot. P.W.1 cannot walk freely and cannot walk long distances and limping is present while walking and he cannot do hard work as he did prior to the accident and now he is suffering with 35% disability, which is partial and permanent in nature. The Tribunal rejected Ex.A6 holding that P.W.2 is not a Member of the District Medical Board and there is no pleading in the claim petition that the petitioner sustained partial and permanent disability of 35%. The disability certificate – Ex.A6 was not filed along with the petition, whereas Ex.A6 was issued on 16.6.2010 on which date x.ray was taken, hence, held that no reliance can be placed on Ex.A6. Having considered the fact that P.W.2, who treated P.W.1 in Sai Super Speciality Hospital, is the proper person to speak about the disability, it is not the length of time taken for obtaining wound certificate that counts, it is the disability which the injured suffered is actually to consider and

decide the disability. P.W.2 certified the disability in the left foot basing on Ex.X1 and P.W.2 deposed the same in the evidence and mentioned in Ex.A6 – disability certificate, but the Tribunal came to the erroneous conclusion that there is nothing to show that disability was consequence of the injuries sustained by the petitioner and there was no negligence on the part of the P.W.1 in getting himself treated properly. Such finding is untenable, because though the same treatment is available in the Government Hospital, with curiosity to get better treatment P.W.1 admitted in Sri Sai Super Speciality Orthopaedic Hospital and has taken treatment under P.W.2 by incurring heavy expenditure. P.W.2 deposed about the disability and it was clearly mentioned in Ex.A6 – disability certificate that there is crush injury to the left foot, hence there is no substance in the finding of the Tribunal that there is nothing to show disability was a consequence of the injuries sustained by the petitioner in the accident.

21. Under Ex.A6 as well as evidence of P.W.2, P.W.1 was aged 49 years, under Ex.A2 – wound certificate, he was 48 years old, hence the age of the petitioner is considered as 48 years. Income of the petitioner is taken at Rs.4,500/- per month, since as a mason he used to earn Rs.150/- per day i.e., Rs.4,500/- per month.

22. Though P.W.2 deposed and mentioned in Ex.A6 that the disability was 35%, as it appears from Ex.A7 photograph, no doubt there is scar to the left foot and all the five toes to the left foot appear and he can as well attend the duties. Completely he is not incapable of doing

any other work and earn. The earning capacity of the petitioner may affect to the extent of 20% because of the scar mark and skin grafting though not 35% as deposed by P.W.2 and mentioned in ExA2 which was issued on 16.6.2010 the date on which P.W.2 gave evidence. Accordingly, I find that the finding of the Tribunal rejecting the contention of the disability under Ex.A6 is untenable and accordingly I am of the considered view that functional disability and loss of earning capacity can be assessed at 20% for the purpose of determining the compensation, having taken into consideration the nature and gravity of injury and nature of the work which P.W.1 carries and by following the *Sarla Verma v. DTC case* ((2009) 6 SCC 121) since the petitioner is aged 48 years as on the date of the accident and as a mason he used to earn Rs.150/- per day i.e., Rs.4,500/- per month.

23. Having estimated the monthly income of the deceased at Rs.4,500/-, the annual income comes to Rs.54,000/- and by applying the relevant multiplier to the age of the injured i.e., '13', the compensation comes to Rs.7,02,000/-, and 20% of which comes to Rs.1,40,400/-.

24. Besides that the appellant/claimant is entitled to Rs.12,348/- towards medicines and treatment under Ex.A4 bills, Rs.2,500/- towards transportation, Rs.5,000/- towards extra-nourishment and Rs.10,000/- towards pain and sufferance.

25. Thus, in all the claimant is entitled to Rs.1,70,248/- towards compensation.

26. Therefore, the Award is modified and the claimant/appellant is entitled to Rs.1,70,248/- in all.

27. Accordingly, the appeal filed by the claimant in M.A.C.M.A. No.1435 of 2010 is partly allowed, while setting aside and modifying the order and decree dated 24.7.2010 in M.V.O.P.No.711 of 2007 on the file of the Motor Accidents Claims Tribunal(Family Court-cum-Additional District and Sessions Court) Vizianagaram and passed the modified award for Rs.1,70,248/- against the respondents 1 to 3 in O.P. jointly and severally with proportionate costs and interest @ 7.5% per annum from the date of petition i.e., 10.9.2007 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.

28. On such deposit, the claimant is permitted to withdraw the same.

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

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

JUSTICE N.BALAYOGI

June, 2018

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