

(2017) 02 KAR CK 0004
In the Karnataka High Court
Case No : MFA No. 3732 of 2014

B.Y. Mohan

APPELLANT

Vs

Allahbaksh K. Sanaulla

RESPONDENT

Date of Decision : 03-02-2017

Acts Referred:

Motor Vehicles Act, 1988 — Section 166, Section 168, Section 173

Citation : (2017) AAC 1093 : (2017) 2 AirKarR 1

Hon'ble Judges : Mr. S. Abdul Nazeer and Mr. K.S. Mudagal, JJ.

Bench : Division Bench

Advocate : Sri Jayaprakash R.V., Advocate, for the Appellant in MFA No. 3732 of 2014; Sri. S.N. Aswathanarayana, Advocate, for the Respondent No. 3 in MFA No. 3732 of 2014; Notice to R 1 and 2 D/w Vide Order Dated 19.11.15, for the Respondent Nos. 1 and 2 in MFA No. 3732 of 2014; Sri. S.N. Aswathanarayana, Advocate, for the Appellant in MFA No. 5363 of 2014; Sri Jayaprakash R.V., Advocate, for the Respondent in MFA No. 5363 of 2014; Served, for the Respondent Nos. 1, 2 and 3 in MFA No. 5363 of 2014

Final Decision : Partly Allowed

Judgement

1. These appeals arise against the judgment and award dated 14.02.2014 passed by the 2nd Addl. District and Sessions Judge and MACT, Mysore in MVC No.1169/2010.

2. MFA No. 3732/2014 is the claimants appeal and MFA No. 5363/2014 is the appeal of the insurance company. In both these appeals, the 2nd respondent is the driver and the 3rd respondent is the owner of the offending vehicle. Before the Tribunal, the driver, the owner and the insurance company were arrayed as respondent nos. 1, 2 and 3 respectively. For the purpose of convenience, the parties will be referred to hereafter with their ranks before the trial Court

3. The claimant filed MVC No. 1169/2010 before the Tribunal alleging that on 20.07.2005 at 3.00 PM when he was returning from Bangalore to Mysore in his Omni KA-09/N-836 after attending his business at Bangalore near Chatrada

Doddi on Bangalore Mysore Road, the 1st respondent drove his sand loaded lorry No.KA-05-A-459 in a rash and negligent manner and hit against the claimant's vehicle and caused the accident. The claimant alleged that in the accident he suffered grievous injuries and his vehicle totally damaged. The claimant further contended that he was shifted to Ramnagara Government Hospital where he got preliminary treatment and then he was shifted to Manipal Hospital. He contended that he was treated as indoor patient for one month and suffered amputation of his right lower limb and other injuries causing 80% disability. He contended that since he lost his consciousness immediately after the accident and due to his long hospitalization he could not file the complaint but, in the meantime another person had filed a complaint against himself and after recovery, he filed PCR No. 76/2005 wherein the 1st respondent was convicted. Thus, he claimed compensation of Rs. 1,35,00,000/- under different heads.

4. Before the Tribunal, respondent nos. 1 and 2 did not contest the matter. The 3rd respondent/ insurance company contested the petition denying the allegation of rashness and negligence on the part of the 1st respondent, injuries suffered by the claimant, treatment taken by him, disability and the claim. The 3rd respondent further denied the policy coverage of the offending lorry and the 1st respondent possessing a valid driving licence at the time of the accident. Respondent no.3 contended that the accident occurred due to the rashness and negligence of the claimant himself and that the petition is bad for non-joinder of the owner and insurance company of the Maruti Omni Van driven by the claimant.

5. The Tribunal framed the issues on all the rival contentions of the parties. Initially, the claim petition was filed before the Addl. Sr. Civil Judge & MACT, Mysore and later it was transferred to the Court of the 2nd Addl. District Judge & MACT, Mysore. After appreciating the evidence recorded by it and hearing the parties, 2nd Addl. Dist Court and MACT by the judgment and award dated 28.08.2010, held that the accident occurred due to the rash and negligent driving of the 1st respondent and negated the contention of the 3rd respondent regarding the breach of conditions of the insurance policy, non-joinder of necessary parties etc. Further, the Tribunal partly allowed the petition granting compensation of Rs.6,57,000/- .

6. Against the said award, the claimant filed MFA No. 9408/2010 for enhancement of the compensation and tire insurance company filed MFA No. 2142/2011 challenging its liability and the quantum. This Court by the order dated 7.8.2013 allowed both the appeals and remanded the matter to the Tribunal reserving liberty to the parties to adduce additional evidence and directing the Tribunal to consider the matter afresh and pass appropriate order affording the reasonable opportunity of hearing to both the parties.

7. After remand, the Tribunal after affording opportunity to both the parties and hearing them, partly allowed the petition under the impugned award granting compensation of Rs. 1,4,90,000/- against the 3rd respondent with interest @ 6% p.a. The claimant challenges the said award on the ground that the assessment

of the disability at 15% is contrary to the medical evidence and the compensation awarded on the heads of pain and suffering, loss of amenities, loss of earning capacity and loss of earnings etc., are all on the lower side.

8. The 3rd respondent/insurance company challenges the award contending that the finding of the Tribunal that the accident occurred due to the culpable rashness and negligence of the 1st respondent is based only on the basis of the conviction of the 1st respondent and acquittal of the petitioner in the Criminal Cases without noticing that such conviction and acquittal are the outcome of the collusion between the petitioner, respondent nos. 1 and 2. The learned counsel for the 3rd respondent contends that the Tribunal overlooking its earlier award has granted exorbitant amount of Rs. 14,90,000/- which is more than the double of what it granted on the earlier occasion.

9. Having regard to the said contention, the question that arises for the consideration of this Court is, "the compensation awarded against the 3rd respondent under the impugned award is just and proper?"

10. Reg coverage of insurance and violation of the policy condition:

- though initially the 3rd respondent denied the coverage of the offending vehicle with its policy and the 1st respondent possessing the valid driving licence, later 3rd respondent itself produced the policy at Ex.R. 1 which shows the coverage of the insurance. The petitioner produced his driving licence at Ex.P.31. The Tribunal in its award both the time held that though the 3rd respondent disputed the fact of 1st respondent holding a valid driving licence, it did not take any steps to substantiate the said contention. As rightly pointed out by the Tribunal, there is no suggestion to PW1-respondent no. 1 possessing a valid driving licence at the time of the accident nor there is any whisper about the same in the evidence of RW1. Therefore, the findings of the Tribunal on those issues do not call for any interference

11. Reg rashness and negligence on the part of the 1st respondent:

The learned counsel for the 3rd respondent relying upon the Judgment of our High Court in Bajaj Alliance General Insurance Company Limited v. B.C. Kumar And Another (ILR 2009 Ear 2921) contended that MACT should not and ought not to place sole reliance on the Judgment of the Criminal Court while considering the issue of the factum of accident and consequent negligence. The reading of the said judgment shows that in that case the insurance company had denied the very factum of the accident. In that case the claimant himself while being admitted into the hospital had given the history that he hit against a road side tree and sustained injuries and that was recorded in the accident register. There the claimant had not denied his signature in the accident register extract and the entries therein are based on the information given by him. The Court in that case further held that the claimant and the driver hail from the same place.

12. In this case, the claimant and respondent nos. 1 and 2 are from different

places. Initially one Basavaraj filed the complaint about accident in Crime No. 92/2012 of Ramnagar Traffic Police Station as at Ex.R.2 against the petitioner. Ex.R.3 is the copy of the mahazar, Ex.R.4 is the copy of the charge sheet form and Ex.P. 10 is the certified copy of the judgment dated 10.01.2008 in C.C. No. 791/2005 passed by the Civil Judge & JMFC, Ramanagar. Ex. P. 11 is the copy of the order sheet and order in C.C. No. 773/2008 on the file of the Civil Judge & JMFC, Ramanagar. The said documents show that though the petitioner was charge sheeted on the basis of the complaint of Basavaraj, later in trial he was acquitted. Ex.P. 11 shows that the petitioner also filed a private complaint on 29.09.2005 i.e., after 2 months of the accident and the Magistrate took cognizance of the offence against the 1st respondent, 1st respondent pleaded guilty and he was convicted for the offences punishable under Sections 279 and 338 IPC.

13. The evidence on record shows that due to the injuries suffered in the accident, the petitioner was hospitalized from 20.07.2005 till 12.08.2005. The medical evidence which will be discussed in detail goes to show that the petitioner had suffered grievous injuries and was immobile. Under such circumstance, there is no reason to disbelieve the evidence of PW1 that due to his medical condition he could not file the complaint immediately.

14. Though the 3rd respondent contends that the proceedings in PCR No. 76/2005, which was registered in C.C. No. 773/2008 and the 1st respondent pleading guilty in that case are the outcome of fraud and collision between the petitioner and respondent nos. 1 and 2, the particulars of the said fraud and collision are not pleaded in the written statement as required under Order 6, Rule 4 of the CPC. The 3rd respondent has not initiated any civil or criminal action against respondents 1 and 2 or the petitioner for such alleged acts of fraud or cheating. Neither the prosecution nor the 3rd respondent questioned the order of the acquittal of the petitioner or the conviction of the 1st respondent by way of any appeal or revision.

15. The grievance of the counsel for the 3rd respondent is that despite the order of this Court in MFA No.9408/2010, the Tribunal did not take into consideration the FIR, Mahazar, IMV Report and Sketch of scene of offence. First of all, even after the remand, the 3rd respondent has not produced the IMV report or the Sketch of Scene of Offence. It has not chosen to examine the 1st respondent or any eye witness.

16. RW1 is not an eye witness. RW1 in his cross examination states that no one from their Company has made any enquiry as to who was traveling with the petitioner in his Maruthi Van. He says he does not know the result of the criminal case registered in pursuance of the charge sheet - Ex.R.2. Therefore, it becomes clear that the 3rd respondent takes up the plea of fraud and collusion only for the sake of the defence without any seriousness of proving the same.

17. In this case, as discussed above, the claimant has given satisfactory

explanation for he not filing the complaint immediately. In the criminal case registered against him, he is acquitted on trial and in the criminal case registered against the 1st respondent, he is convicted on his plea of guilt. Even otherwise, the documents viz., the FIR, Mahazar, Charge Sheet and the sketch of scene of offence have merged with the judgment of acquittal which is a finding recorded after the trial and which has gone unchallenged. Having regard to these facts, the judgment in Bajaj Allianz General Insurance Company Limited relied upon by the learned counsel for the 3rd respondent is not applicable to this case. Though the Tribunal did not discuss these aspects in detail, has reached the right finding ultimately on the issue of rashness and negligence and therefore, does not call for any interference.

18. Reg the quantum

In the petition, averments and the other evidence, show that the petitioner was 38 years old at the time of the accident. The petitioner's evidence that he is an incense stick trader is not impeached. PW2 is the Orthopaedic Surgeon, who conducted surgery on the petitioner along with the team of doctors consisting of Dr. Sharan Patil and team. PW3 is the Plastic Surgeon, who was part of the medical team which conducted the surgery on PW1. Ex.P.3 is the wound certificate issued by Ramanagar Government Hospital, Ex. P.6 is the wound certificate issued by the Manipal Hospital, Ex.P. 5 is the disability assessment certificate issued by Dr. Sharan Patil of Manipal Hospital, Ex.P. 12 and 13 are the out patient and inpatient records respectively, Ex.P. 14 to 25 - the x-ray films, Ex.P.25 - the scanning reports, Ex.P.33 - the follow up sheets. The above records coupled with the evidence of PWs 1 to 3 that petitioner had suffered the following injuries when he was examined by PW3 :

- (1) Bilateral fracture Maxilla with deep lower lip laceration
- (2) Crush injury of right lower limb
- (3) Blunt abdominal injury with gangrenous jejunum & mesenteric tear

The evidence of PW2 and 3 shows that the following surgical procedure was conducted on PW1:

- (1) Guillotine amputation right leg under GA on 21.07.2005.
- (2) Revision Transfemoral amputation under GA 26.7.2005
- (3) Stump Closure 1.8.2005
- (4) Diagnostic Laproscopy, Exploratory Laprotomy, Resection of gangrenous jejunum & anastomosis, Mesenteric repair on 21.7.2005
- (5) Open reduction and internal fixation of bilateral fracture maxilla and soft tissue repair (plastic surgery) on 26.7.2005

19. As per the evidence of PW2, the petitioner suffered 90% disability of the right lower limb due to the amputation of the right lower limb and the disability

for the overall body is 50%.

20. The evidence of PW3 shows that due to the fracture of maxilla bone and soft tissue injury, the petitioner has painful occlusion and sensitive teeth in the upper jaw. According to him, the disability due to the fracture of maxilla is 30% to the face and 10% to the whole body, and the claimant has difficulty in chewing hard substances, frequent head ache, sensitive teeth in upper jaw and generalized weakness. The Tribunal has awarded the compensation as follows:

(1)

Pain and suffering

Rs. 1,00,000/-

(2)

Loss of Amenities

Rs. 1,00,000/-

(3)

Medical expenses and Traveling expenses

Rs. 9,45,000/-

(4)

Loss of earning for six Months

Rs. 60,000/-

(5)

Attendant charges during Hospitalization and rest period

Rs. 15,000/-

(6)

Towards loss of future Earnings

Rs. 2,70,000/-

Total

Rs. 14,90,000/-

21. The facts of this case as far as the injuries are concerned are much similar to the facts of the case in the Judgment in Govind Yadav v. New India Insurance Company Limited, (2011(10) SCC 683). In the said case, there was amputation of the leg of the claimant above knee who was aged 24 years. In that case, the Hon'ble Supreme Court considered the disability of the victim at 70%. In this case, in addition to the amputation of the right lower limb above knee, the

claimant has suffered two mere grievous injuries.

22. Despite PW2 and PW3 assessing the disability at 50% and 10%, the Tribunal has taken the disability at 15% to the whole body. Having regard to the evidence of PWs 1 and 2 and the Judgment of the Apex Court in Govind Yadav's case, the Tribunal is not justified in taking the disability only at 15%. The Tribunal ought to have taken the disability at 60%. The evidence of PW1 coupled with Ex. P.38 show that the claimant has to change the whole prosthesis once in 5-7 years due to normal wear and tear of the components and the physiological variations. The said evidence further shows that the maintenance or change of prosthesis entails him recurring expenses of Rs.35000-40000/-. Therefore, the claimant is entitled for compensation on the head of future medical expenses.

23. As per the income tax register - Ex.P.7, the net annual income of the claimant is Rs.73,449/-. The Tribunal says that the said returns is the one submitted subsequent to the complaint. Therefore, holds that the same cannot be accepted and assessed the income notionally at Rs. 10,000/- per month which is higher than the claimant's own document Ex.P.7 - the I.T. Returns. There is no basis for that. Therefore, the annual income of the claimant has to be taken at Rs.73,449/-. Since the disability is taken at 60%, there will be loss of 60% income. The multiplier of 15 applies. Therefore, the compensation to be awarded towards loss of future income will be $(Rs.73,449 \times 60/100 \times 15)$ Rs.6,61,041/-.

24. Having regard to the Judgment in Govinda Yadav's case and the facts of this case, the compensation awarded to the claimant has to be reassessed as follows:

(1)

Pain and suffering

Rs. 1,50,000/-

(2)

Loss of Amenities

Rs. 1,50,000/-

(3)

Medical expenses and Traveling expenses

Rs. 9,45,000/-

(4)

Food, Nourishment and Attendant's charges

Rs. 50,000/-

(6)

Future medical expenses

Rs. 2,00,000/-

(7)

Loss of six month's income (Rs.73449/2)

Rs. 36,725

(8)

Loss of future earnings (Rs. 73449 x 60/100 x 15)

Rs. 6,61,041/-

Total

Rs. 21,92,766/-

25. Therefore, the just and reasonable compensation payable to the claimant is Rs. 21,92,766/- rounded off to Rs. 21,92,770/-. Out of that, the Tribunal has already awarded Rs. 14,90,000/-. Therefore the claimant is entitled to enhanced compensation of Rs.7,02,770/- payable by the 3rd respondent/insurance company with interest @ 6% p.a. from the date of the petition till its realization.

26. For the aforesaid reasons, MFA No.5363/2014 is dismissed with costs. MFA No. 3732/2014 is partly allowed with costs awarding the enhanced compensation of Rs. 7,02,770/- to the claimant with interest thereon @ 6% p. a. from, the date of the petition till its realization payable by the 3rd respondent within four weeks from the date of this order. The terms of the award of the Tribunal with regard to disbursement and investment of the compensation amount in the bank is maintained.