

(2004) 04 AP CK 0030

In the Andhra Pradesh High Court

Case No : Civil Miscellaneous Appeal No. 2092 of 2000

Md. Rasheed

APPELLANT

Vs

Susheela Agarwal and The Regional Manager, National
Insurance Company

RESPONDENT

Date of Decision : 27-04-2004

Acts Referred:

Andhra Pradesh Motor Vehicles Taxation Act, 1963 — Section 149(2), 170

Citation : (2005) 1 ACC 560 : (2006) ACJ 678 : (2004) 4 ALD 597 : (2004) 5
ALT 152

Hon'ble Judges : C.Y. Somayajulu, J

Bench : Single Bench

Advocate : K. Raji Reddy, for the Appellant; R. Venkat Rao, for the Respondent

Final Decision : Dismissed

Judgement

C.Y. Somayajulu, J.—Appellant filed a claim petition alleging that on 19.10.1995 when his auto bearing No.AP-10T-934, being driven by Mohd. Iqbal, reached near Bidar crossroads, vehicle bearing No.AP-11T-8499 belonging to first respondent and insured with the Second respondent, came in the opposite direction in a rash and negligent manner and dashed against his auto resulting in extensive damage thereto. He spent Rs.35,000/- to get his auto repaired, after spending Rs.8,500/- towards towing charges. Since his auto was in the garage for repairs for six months, he lost an income of Rs.15,000/-. So, he is entitled to Rs.58,500/- as damages from the respondents. First respondent chose to remain ex parte, both before the Tribunal and this Court. Second respondent filed a counter contesting the claim of the appellant. In support of his case appellant examined himself as P.W.1 and marked Exs.A.1 to A.5. Second respondent did not adduce any oral evidence but marked Ex.B.1 by consent. The Tribunal held that the accident occurred due to the rash and negligent driving of the driver of the vehicle belonging to first respondent but dismissed the claim of the appellant on the ground that there is no evidence to support his contention regarding the

amount spent for repairs etc. Hence, this appeal.

2. The contention of the learned counsel for appellant is that the evidence of P.W.1 read with Ex.A.5 photographs establishes the extensive damage to the auto of the petitioner and so the Tribunal was in error in dismissing the claim of the appellant. The contention of the learned counsel for second respondent is that since the Tribunal gave cogent reasons for its conclusion that the appellant is not entitled to compensation, there are no grounds to interfere with the finding of the Tribunal. He also questioned the finding of the Tribunal on issue No.1 that the accident occurred due to the negligence of the driver of the first respondent.

3. Since second respondent did not obtain permission u/s 170 of the Motor Vehicles Act, 1988 (the Act), it cannot take the pleas open to the owner and should confine itself to the defences open to it as per section 149(2) of the Act, and so normally I would not have reconsidered the finding of the Tribunal on issue No.1 relating to the negligence of the driver of the vehicle of the first respondent at the time of accident. After perusing the evidence on record, I am satisfied that the Tribunal gave the finding on issue No.1 without any supporting evidence on record. So, I wish to interfere with the said finding by invoking the power vested in this Court by Rule 33 of Order XVI C.P.C.

4. The averments in Ex.A.1, F.I.R. issued in connection with the accident, show that the driver of the auto of the appellant was carrying nine passengers in the auto belonging to the petitioner. The number of persons that can be carried in an auto-rickshaw can be known from the permit and the tax paid for its plying under the A.P. Motor Vehicles Taxation Act, 1963. But, for the reasons best known to him, appellant did not produce the permit of the auto or the receipt showing payment of the tax under the A.P. Motor Vehicles Taxation Act, 1963, to enable the Tribunal to find out the passenger carrying capacity of his auto-rickshaw. Judicial notice can be taken of the fact that by 1995, the year in which the accident took place, autos with carrying capacity of 3 passengers only were plying on the roads in this state. Since nine passengers were travelling in the auto at the time of accident, as per Ex.A.1, it is clear that the driver of the auto of the appellant was carrying more number of persons than permitted and had overloaded the auto.

5. P.W.1 the only witness examined was not an eyewitness to the accident. So, there is no ocular evidence regarding the accident and so this issue has to be decided on the documentary evidence on record. First respondent against whose driver an allegation of negligent driving was made chose to remain ex parte. From Ex.A.4 it is easy to see that the accident took place on the middle portion of road. Even if one of the drivers involved in the accident was careful, he would have averted the accident. Since the accident seems to have occurred in the middle of the road, and since the accident could be avoided even if one of the drivers of the vehicles involved in the accident was careful, it can be taken that the accident occurred due to the negligence of the drivers of both the vehicles involved in the accident and, so, I hold that the accident occurred due to 50%

negligence of the driver of the auto of the appellant and due to 50% negligence of the driver of the vehicle of the first respondent.

6. The year of manufacture of the auto of the appellant involved in the accident, the year in which appellant purchased it and from whom is not known from the evidence on record. It is well known that all vehicles, have wear and tare and so unless the year of manufacture is known, the value of the auto at the time of accident cannot be evaluated.

7. What parts of the auto of the appellant involved in the accident were damaged and what parts were replaced is also not known, because the appellant did not adduce evidence in that regard. When a vehicle is taken for repairs, the mechanic would give an estimate of the amount to be spent and the parts to be purchased. When such parts are purchased, the vendor gives a bill. Not even a single scrap of paper is produced by the appellant to show what parts were purchased and at what price.

8. It is no doubt true that some of the photographs in Ex.A.5 bunch show that the front portion of the auto found therein was damaged. But, Ex.A.5 photographs cannot be taken into consideration because the photographer who took those photographs is not examined. In *Laxman Ganpati Khot and Others Vs. Anusyabai and Another*, it is held

"It is only when the person who takes a photograph and develops it into a negative himself comes into the box and deposes to both those facts, that a negative becomes admissible in evidence. As far as the enlarged print is concerned, the position is still worse, for no print or enlargement can be admitted in evidence without its negative being produced and proved in the manner indicated above".

If Ex.A.5 photographs are not taken into consideration there is no evidence with regard to the damage to the auto of the appellant.

9. It is not known if the auto of the appellant was insured to cover the risk of its damage. Had the appellant produced the policy of insurance of his auto, it would have revealed as to whether the policy was an Act Policy or a Comprehensive Policy. If the policy was a Comprehensive Policy, appellant would have received compensation for the damages to the auto from his insurer. Since the appellant failed to produce the bills showing the amount spent for its repairs and failed to allege that he did not claim compensation from his insurer and also failed to produce the policy of insurance of his auto involved in the accident, it can be presumed that he claimed compensation from his insurer by producing those bills. For all the above reasons, appellant is not entitled to any compensation for the damage caused to his auto from the respondents.

10. Appellant also did not adduce any reliable evidence to establish the towing charges paid by him. So, he is not entitled to any towing charges.

11. Even if Ex.A.5 photographs are taken into consideration, they only show that

the auto found therein was tinkered. It would not take six months for tinkering of an auto. The person who undertook the tinkering work is also not examined. So, I find no grounds to award any compensation to the appellant towards loss of earnings and, thus, I find no grounds to interfere with the finding of the Tribunal that the appellant is not entitled to any compensation.

12. Hence, this Appeal is dismissed. No costs.