

(2017) 01 KAR CK 0151
In the Karnataka High Court
Case No : 3246 of 2011 (MV)

SRI.RAGHAVENDRA.M.J S/O M L JAGADISH

APPELLANT

Vs

SRI. R. RAJASHEKHAR S/O RACHAIAH, & ORS.

RESPONDENT

Date of Decision : 02-01-2017

Acts Referred:

Indian Penal Code, 1860, Section 279,
Section 337 - Rash driving or riding on a public way -
Causing hurt by act endangering life or personal safety of others
Motor Vehicle

Citation : (2017) 01 KAR CK 0151

Hon'ble Judges : B.Manohar

Bench : SINGLE BENCH

Advocate : S.S.MAHENDRA, B A RAMAKRISHNA

Final Decision : Allowed

Judgement

1. Appellant is the claimant, being not satisfied with the quantum of compensation awarded in the judgment and award dated 13-07-2010 made in MVC No.4657/2009 passed by the Motor Accident Claims Tribunal, Bengaluru (hereinafter referred to as "the Tribunal" for short) and also fastening the liability on the owner of the offending vehicle to compensate the claimant, has filed this appeal.

2. The appellant filed a claim petition contending that on 22-02-2009 at about 9.45 p.m., he was proceeding in a auto rickshaw bearing Registration No.KA-09/A-2318 as a passenger from Mysuru Railway Station to the Sub-Urban Bus-stop. When the auto reached near JK Ground traffic signal junction, driver of another auto rickshaw bearing Registration No.KL-10/6099 drove the vehicle in a rash and negligent manner on the right side of the road and dashed against the auto rickshaw in which the claimant was traveling. Due to that, the auto rickshaw turned turtle and the claimant sustained grievous injuries. Immediately after the accident he was shifted to Krishnarajendra Hospital at Mysore wherein he had

taken first-aid treatment, thereafter he was shifted to Prestine Hospital at Bangalore wherein he had taken treatment as inpatient from 27-02-2009 to 02-03-2009 for the fracture of both the bones of left forearm. He has undergone surgery on 27-02-2009 and internal fixation has been made by using plates. He claimed that he has spent huge money for his treatment. He was working as a Data Entry Operator and was earning Rs.10,000/- p.m. In view of the injuries sustained and permanent disability he has suffered, he cannot use the left hand. Due to the actionable negligence on the part of driver of the offending auto rickshaw which was insured with the 3rd respondent, the accident had occurred and hence, both the owner as well as the insurer of the offending vehicle are liable to compensate the claimant in a sum of Rs.15,00,000/-.

3. In response to the notice issued by the Tribunal, though the first respondent-owner of the offending auto rickshaw entered appearance through his advocate, he has not filed any written statement and participated in the trial. The 2nd respondent-owner of the auto rickshaw bearing Registration No.KA-09/A-2318 filed written statement denying the entire averments made in the claim petition and contended that due to the rash and negligent driving of the auto rickshaw bearing Registration No.KL-10/6099, the accident occurred, the claimant who was traveling as a passenger in the auto rickshaw sustained injuries and their auto rickshaw has been badly damaged. There is no contributory negligence on the part of the driver of his auto rickshaw. However, due to negligence on the part of driver of the offending vehicle, the accident occurred. Hence sought for dismissal of the claim petition as against him.

4. The 3rd respondent-insurance company filed the written statement admitting that the insurance policy was issued in favour of the offending auto rickshaw. However, the insurance policy is subject to fulfillment of certain conditions. The first respondent has not submitted any documents pertaining to the insured vehicle and also driving license of the auto driver for verification, in spite of the notice issued to him. Further the police have charge sheeted the driver of the offending auto rickshaw for not holding driving license under Section 3 read with Section 181 of the Motor Vehicles Act. The owner of the vehicle entrusted the auto rickshaw to the person not holding valid driving license hence, the insurance company is not liable to compensate the claimant. Further there is head-on collision between two auto rickshaw. Both the drivers of the auto rickshaw have contributed for the accident. Hence, sought for dismissal of the claim petition as against the insurance company.

5. On the basis of pleadings of the parties, the Tribunal framed necessary issues.

6. The claimant, in order to prove his case examined himself as P.W.1 and the doctor who treated him was examined as P.W.2 and got marked the documents as Ex.P1 to Ex.P11. On behalf of the respondent-insurance company, the Deputy Manager of the Insurance Company was examined as R.W.1 and got marked the documents as Ex.R1(1) and Ex.R1(2).

7. The Tribunal, after appreciating the oral and documentary evidence let in by the parties and taking into consideration IMV report, spot mahazar, charge sheet, copy of the complaint held that due to the actionable negligence on the part of driver of the offending auto, the accident occurred. Though the insurance company has taken specific contention with regard to contributory negligence, the same has not been proved by leading evidence. Hence, the contention of the insurance company regarding contributory negligence has been negatived. In the accident, the claimant has sustained fracture of both bones of left forearm. Hence, he is entitled for compensation. With regard to quantum of compensation is concerned, in the complaint lodged before the jurisdictional police, it was clearly mentioned that he was studying 1st Year B.E. course at Bangalore. However in the claim petition he has stated that he was working as a Data Entry Operator and earning Rs.10,000/- p.m., but no document has been produced to substantiate the same. In view of that, the Tribunal has taken notional income of Rs.4,000/- p.m. Initially he had taken treatment in K.R. Hospital at Mysore and thereafter he has taken treatment in Prestine hospital at Bangalore and undergone surgery for the fracture of both the bones of left forearm. Internal fixation has been made. The doctor who treated the claimant has assessed the disability to an extent of 24% to the left forearm and 8% to the whole body. At the time of accident, the claimant was aged about 18 years. The Tribunal taking into consideration income as Rs.48,000/- p.a., taking into consideration the disability to an extent of 8% applying the multiplier 18 awarded a sum of Rs.69,120/- towards future loss of earning. Though during the course of the order, the Tribunal has awarded a sum of Rs.40,000/- towards pain and suffering for the surgery he had undergone for both the bones of left forearm, while computing the compensation, only Rs.30,000/- has been taken towards pain and suffering; Rs.32,000/- towards medical expenses and hospitalization charges; Rs.30,000/- towards loss of amenities and future happiness; Rs.12,000/- towards loss of income during laid up period; Rs.8,000/- towards food, conveyance, attendant and nourishment and Rs.15,000/- towards future medical expenditure. In all, the Tribunal has awarded a sum of Rs.2,06,120/- with interest at the rate of 6% p.a.

8. Insofar as the liability is concerned, the police records clearly disclose that they have charge sheeted the driver of the offending vehicle for the offences punishable under Sections 279, 337 of IPC and also Section 3(1) read with Section 181 of the Motor Vehicles Act, 1988. No document has been produced to show that the said charge sheet has been challenged either by the driver or the owner of the offending vehicle. Though the owner of the offending vehicle entered appearance through his advocate, he has not filed any written statement nor produced any driving license to show that the driver of the offending vehicle was having valid and effective driving license as on the date of accident. Relying upon the judgments of the Hon'ble Supreme Court reported in 1997 ACJ 1065 (UNTIED INDIA INSURANCE COMPANY v/s GIAN CHAND AND OTHERS); 1989 ACJ 1078 (KASHI RAM YADAV v/s ORIENTAL INSURANCE COMPANY LIMITED);

1996 ACJ 1044 (SOHANLAL PASCHI v/s P.SESHAREDDY) and also judgment of this Court reported in 2007(6) AIR KAR 465 (YESHODHARA B SHETTY AND OTHERS v/s UNITED INDIA INSURANCE COMPANY LIMITED) the Tribunal held that owner of the offending vehicle had entrusted the auto rickshaw to a person who was not holding the driving license to drive the auto rickshaw. Hence, the liability was fastened on the owner of the offending vehicle to compensate the claimant. Being aggrieved by the judgment and award passed by the Tribunal, the claimant has filed this appeal.

9. Sri.S.S.Mahendra, learned counsel appearing for the appellant contended that the quantum of compensation awarded by the Tribunal for the fracture of both the bones of left forearm is lower side. In view of the injury sustained, he has become permanently disabled to use the left hand for lifting weight and doing other works. The compensation awarded towards pain and suffering, loss of amenities of life is also lower side. Further the judgment and award passed by the Tribunal fastening the liability on the owner of the offending vehicle to compensate the claimant is contrary to law. The insurance company cannot rely upon the charge sheet filed in the criminal proceedings. It is incumbent upon the insurance company to prove their contention by leading evidence and producing necessary documents regarding not holding of driving license by the driver of the offending vehicle. In the instant case, though the insurance company examined one of the officials in support of their case, the RTO has not been examined to prove that the driver of the offending auto rickshaw was not holding driving license. The judgment and award passed by the Tribunal is contrary to the judgment reported in 2015 ACJ 1018 (THE BRANCH MANAGER, NATIONAL INSURANCE COMPANY LIMITED v/s BASAVARAJ). Learned counsel for the claimant further contended that under Section 149 of the Motor Vehicle Act, the insurer can defend the action on certain extent as enumerated under Section 149(2) (a)(b)(c) of the Act. Hence, the insurance company cannot disown their liability, when the third party is injured in the accident. The judgment and award passed by the Tribunal is contrary to the judgments of the Hon'ble Supreme Court reported in (2004) 3 SCC 297 (NATIONAL INSURANCE COMPANY LIMITED v/s SWARAN SINGH AND OTHERS); and (2013)5 SCC 385 (S.IYYAPAN v/s UNITED INDIA INSURANCE COMPANY LIMITED) and sought for setting aside the judgment and award passed by the Tribunal.

10. On the other hand, Sri.B.A.Ramakrishna, learned counsel appearing for the first respondent and K.Vijayakumar, learned counsel appearing for second respondent argued in support of the judgment and award passed by the Tribunal and contended that as on the date of accident, driver of the offending auto rickshaw was not having the driving license to drive the auto rickshaw. Hence, the question of fastening the liability on the insurance company does not arise. Further, the insurance company also issued notice to the owner of the offending auto to produce the documents and also the driving license of the driver of the said vehicle, but the owner of the said vehicle has failed to produce the same. The owner of the offending auto though entered appearance through his

advocate, he has not filed any written statement; neither produced the driving license nor lead any evidence to show that he has challenged the charge sheet filed against the driver of the offending auto rickshaw. In support of their contention, they relied upon a judgment reported in 2015 ACJ 345 (THE ORIENTAIL INSURANCE COMPANY LIMITED ETC. ETC. v/s ABDUL KALEEL AND M.VISHWANATH ETC. ETC.) Hence sought for dismissal of the appeal.

11. I have carefully considered the arguments addressed by the learned counsel for the parties. Perused the judgment and award, oral and documentary evidence adduced by the parties.

12. The issues that arise for consideration in this appeal are-

(i) Whether the judgment and award passed by the Tribunal fastening liability on the owner of the vehicle require any reconsideration?

(ii) Whether the quantum of compensation awarded by the Tribunal is in accordance with law?

13. Occurrence of the accident; injuries sustained by the claimant due to the actionable negligence on the part of driver of the offending auto rickshaw bearing Registration No. KL-10/6099 and the claimant sustaining fracture of both the bones of left forearm are not in dispute. The dispute is only with regard to quantum of compensation and also liability.

14. In the accident, the claimant has sustained fracture of both the bones of left forearm. He has taken treatment at Prestine Hospital at Bangalore and undergone surgery there. The doctor who treated the claimant has assessed the disability to an extent of 24% to the particular limb and 8% to the whole body. The Doctor who has treated the claimant in his evidence has clearly stated that implants have been removed, the fracture has been united. Though the claimant claims that he was working as a Data Entry Operator, no document has been produced to prove the same. The records disclose that he was a student of 1st year B.E. Course. The notional income of Rs.4,000/- p.m. taken by the Tribunal is on the lower side. Taking into consideration the income as Rs.6,000/- p.m., and the disability to an extent of 8%, applying the multiplier 18 since he was aged about 18 years as on the date of accident, the claimant is entitled for sum of Rs.1,03,680/- as against Rs.69,120/- awarded towards future loss of income. Further, the claimant is entitled to another sum of Rs10,000/- towards pain and suffering. In all, the claimant is entitled to enhanced compensation of Rs.44,560/- which is rounded off to Rs.44,500/- with interest at the rate of 6% p.a.

15. Insofar as the liability is concerned, the specific contention taken by the insurance company is that the driver of the offending auto was not holding driving license to drive the auto rickshaw. The police have charge sheeted the driver of the offending vehicle for not holding the driving license. The owner of the vehicle has not produced any documents to show that the driver of the

offending vehicle was having driving license to drive the auto. Hence, the judgment and award passed by the Tribunal fastening the liability on the owner of the offending auto rickshaw is in accordance with law. More over, the owner of the offending vehicle has not challenged the judgment and award passed by the Tribunal fastening the liability on him to compensate the claimant. Whereas the claimant has challenged the said judgment and award contending that the insurance company has not proved the contention that the driver of the offending auto rickshaw was not holding the driving license by producing necessary documents by leading evidence of the licensing authorities. In the instant case, though the insurance company pleaded the same in the written statement and examined one of their officials, they have not examined the licensing authority i.e. RTO officers. However, the records clearly disclose that the owner of the offending vehicle though represented by the advocate he has not filed any written statement though he was fully aware of the defense taken by the insurance company. The charge sheet filed against the driver of the offending auto has not been challenged either by the owner or the driver of the offending auto rickshaw. No document has been produced before this Court to show that the driver of the offending vehicle has been acquitted from the criminal case. In this appeal also, though the owner of the offending vehicle was served with notice, he remained unrepresented though liability was fastened on him and he has not defended his case. In support of their contention, the insurance company examined the Deputy General Manager as R.W.1 and produced necessary documents. The charge sheet has been marked to show that driver has been charge sheeted under Sections 3(1) read with Section 181 of the Motor Vehicles Act. It is incumbent upon the owner of the vehicle to defend his case by leading evidence. When the driver of the offending vehicle was not holding the driving license at all, the question of examining the licensing authority (RTO) does not arise. It is for the owner of the offending vehicle to produce necessary documents to dispel the contention of the insurance company. The judgments relied upon by the appellant are not applicable to the facts of the case. In the judgment of the Hon"ble Supreme Court referred to above, driver of the offending vehicle having license to drive LMV was driving transport vehicle. In those circumstances, the Hon"ble Supreme Court held that the person having license to drive LMV can also drive the transport vehicle. In the instant case, the driver of the offending auto rickshaw was not holding driving license at all. The owner of the vehicle entrusted the vehicle to the person who was not holding driving license at all. Under these circumstances, the question of fastening liability on the insurance company to compensate the claimant and recover the same from the owner of the offending vehicle does not arise. In a judgment reported in 2015 ACJ 345 referred to above, this Court clearly held that there is no obligation on the part of the insurance company when the driver of the auto rickshaw was not holding driving license at all. Further, in YASHODHARA B SHETTY case, this Court clearly held that the burden to prove entrustment of the vehicle to a duly licensed driver lies on the insured. In the instant case, the insured has failed to discharge his burden. Accordingly, the Tribunal after

considering the oral and documentary evidence relying upon various judgments of the Hon"ble Supreme Court fastened the liability on the owner of the offending vehicle. I find no infirmity or irregularity in the said finding. The appellant has not made out a case to interfere with the judgment and award insofar as fastening the liability on the owner of the offending vehicle.

16. Accordingly, I pass the following:

ORDER

The appeal is allowed in part.

The judgment and award dated 13th July 2010 made in MVC No.4657/2009 is modified. The claimant is entitled for enhanced compensation of Rs.44,500/- in addition to Rs.2,06,120/- with interest at the rate of 6% p.a The appeal is dismissed insofar as challenging the liability fastened on the owner of the offending vehicle is concerned.